

(1998) 11 MAD CK 0101

In the Madras High Court

Case No : Criminal Revision Petition No. 747 of 1996

Abdul Wahib

APPELLANT

Vs

Asstt. Commr. of Cus. (Prosecutor)

RESPONDENT

Date of Decision : 11-11-1998

Acts Referred:

Customs Act, 1962 — Section 102, 102(1), 135, 135(1)

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 50, 50(1)

Citation : (1999) 113 ELT 801

Hon'ble Judges : M. Karpagavinayagam, J

Bench : Single Bench

Advocate : M. Ajmeer Ali, for the Appellant; P. Rajamanickam, Special Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

M. Karpagavinayagam, J.—Abdul Wahib, the petitioner herein challenging the conviction for the offence u/s 135(1)(a)(i) of the Customs Act and sentence to undergo rigorous imprisonment for three years and to pay a fine of Rs. 5,000/-, in default to undergo R.I. for six months imposed by the trial Court, confirmed by the lower appellate Court, has filed this revision.

2. The short facts for disposal of this revision are these:- The petitioner is a casual labourer working in Air India at the Madras International Airport. P.W. 1 is an Intelligence Officer. On 3-5-1990 at the time of clearance of passengers, P.W. 1 found the petitioner entering into gents" toilet and after some time coming out. He was intercepted by P.W. 1 on suspicion. He was escorted to Air India Intelligence Unit room. In the presence of witnesses he was searched. The petitioner was having one plastic bag kept concealed inside his jatti. When the bag was opened, it was found to contain four 1 kg. gold bars and three 10 tolas gold bars all with foreign markings. The petitioner was not in possession of any valid permit. The gold bars worth about Rs. 15,22,325/- were seized under mahazar. On the same date, the petitioner gave a statement admitting the

possession of the gold bars in his own handwriting. On enquiry, it was found that two other accused were also involved. Therefore, after obtaining sanction, the complaint was filed against the petitioner and two others for the offence referred to above.

3. On conclusion of trial, the petitioner (A1) was found guilty and A2 and A3 were acquitted. As against the conviction, the petitioner filed an appeal which was also dismissed. Hence, the revision.

4. Mr. Ajmeer Ali, the Counsel for the petitioner, while challenging the conviction, would submit the following :-

"The pre-requisite for the complaint u/s 135 of the Customs Act is the valid sanction. The sanction filed in this case does not show that all the documents were produced before the sanctioning authority before granting sanction. As such, the sanction is not valid.

There is a contradiction between the evidence of P.W. 1 and P.W. 8 with reference to the recovery of the gold bars from the accused.

The search of the petitioner by the officers was not conducted by following the provisions of Section 102(1) of the Customs Act, by failing to comply with the requirement under the said section to inform the accused of his right to be searched in the presence of a Gazetted Officer or a Magistrate."

5. In reply to these submissions, Mr. Rajamanickam, the learned Central Government Prosecutor would repel the submissions by pointing out various portions of the impugned judgments.

6. At the threshold, I shall point out that the first two points have been elaborately dealt with by both the courts below and they held that the sanction was valid there was evidence to show that all the materials have been placed before the sanctioning authority before granting sanction and that there is no contradiction between the evidence of P.W. 1 and P.W. 8. Therefore, I need not go deep into the said submissions, as the factual aspects have been correctly decided by both the courts below.

7. Regarding the third point, it is submitted by the Counsel for the petitioner that Section 102 of the Customs Act is an analogous provision to Section 50 of the Narcotic Drugs and Psychotropic Substances Act and that the Apex Court in Saiyad Mohd. Saiyad Umar Saiyad v. State of Gujarat, 1995 SCC 564, while following the decision in State of Punjab Vs. Balbir Singh, has categorically held that u/s 50 of the N.D.P.S. Act, the prosecution must prove that the accused was made aware of his right that he could choose to be searched before a Gazetted Officer or a Magistrate and that failure to do so would vitiate the entire proceedings and that in the present case, there is no evidence to show that the petitioner was made aware of his right. He would also cite the decision in Banka Das, Rambalak Das, Birendra Kumar Behera and Soumitri Behera Vs. State of Orissa, to point out that the provision u/s 102 of the Customs Act is in pari

materia with Sub-section (1) of Section 50 of the N.D.P.S. Act.

8. In the light of the said submission, the learned Counsel pointed out that the conviction imposed upon the petitioner for the offence u/s 135 of the Customs Act without complying with the mandatory provisions of Section 102 of the Customs Act, is illegal and liable to be set aside.

9. The said submission, in my view, has no legal basis. I am not able to conclude that Section 102 of the Customs Act is in pari materia with Section 50 of the N.D.P.S. Act. Even assuming it to be so, as per the judgment of the Supreme Court rendered in State of Punjab Vs. Balbir Singh, , Section 50 of the N.D.P.S. Act would be applicable only when the search was conducted on prior information and otherwise Section 50 would not be attracted and in the case of a search on suspicion, the question of complying with the requirements u/s 50 would not arise.

10. In the similar line, I had also an occasion to consider this aspect in the judgment reported in 1087 M.L.J. 364 (Deepa Ghosh v. State) in which I held that Section 50 of the N.P.D.S. Act will not be applicable to the case where the person accused of an offence was searched only on suspicion.

11. Therefore, the arguments on the strength of the rulings by the Apex Court, while interpreting Section 50 of the N.P.D.S. Act, would not be of any use for the petitioner. In the instant case, there is a clear evidence to show that P.W. 1 entertained suspicion on the petitioner, while he entered into the Gents" Toilet and when he came out of the toilet after some time, he was taken to the Intelligence Unit room where he was searched only on the basis of the said suspicion. During the personal search, it was found that a plastic bag was concealed inside his jatti. When the bag was searched, it was found to contain gold bars worth about Rs. 15 lakhs and odd with foreign marks.

12. In the light of these facts, I do not find any ground to accept the submission made by the learned Counsel for the petitioner that the right of choosing the officer under whose presence the search was conducted u/s 102 of the Customs Act is mandatory as envisaged in Sub-section (1) of Section 50 of the N.D.P.S. Act.

13. In the result, the revision is dismissed as devoid of merits confirming the conviction and sentence imposed on the petitioner by both the courts below.