

(1979) 02 MAD CK 0050

In the Madras High Court

Case No : Criminal Appeal No. 283 of 1975 and Criminal M.P. No. 3658 of 1978

Assistant Collector of Customs Preventive Department

APPELLANT

Vs

M.N. Mohamed Aboobaker, S.E. Mohamed Naina, S.A.
Mustafa and S.M. Abdul Khader Hajjar

RESPONDENT

Date of Decision : 19-02-1979

Acts Referred:

Customs Act, 1962 — Section 111, 112, 126, 135, 135(b)(i)
Foreign Exchange Regulation Act, 1973 — Section 1(1), 8(1)

Citation : (1979) CENCUS 362

Hon'ble Judges : M.S. Sathar Sayeed, J

Bench : Single Bench

Judgement

M.S. Sathar Sayeed, J.—This appeal has been filed against the judgment of the Chief Metropolitan Magistrate, Egraore, Madras, in C.C. No. 7197 of 1973.

The Collector of Customs launched a complaint against the four respondents herein. The first respondent is the son-in-law of the fourth respondent. The third respondent was a cook in the employment of the fourth respondent and the second respondent was a friend of the first respondent.

The Collector of Customs charged the respondents herein u/s 135(b)(i) of the Customs Act read with Section 8(1) of the Foreign Exchange Regulation Act and Section 85(ii) of the Gold Control Act.

2. The case of the appellant is that the fourth respondent who is the father-in-law of the first respondent was in occupation of premises No. 2, Taylors Lane, G.T. Madras. The appellant on receipt of a report that the respondents were in possession of contraband articles conducted a search of the said premises along with other officers of his Department on 13-7-1969. At the time of the search, the third and fourth respondents and some ladies were present in the house. While the search was in progress, the second respondent came to the house. During the search, they recovered 25 bars of gold of foreign origin (M.O. 1 series) each bar weighing 10 tolas. It is the further case of the prosecution that

the gold bars bore the Foreign markings "Compagnie Metaux Precieux-Paris-10 Tolas 999.0", and they were found in a cloth covered packet kept concealed under the firewood in the kitchen. They also recovered from the living room a plastic hand bag containing 2481 grams of semi-precious stones in 19 packets (M.O. 2 series) and 1602 grams of semi - precious stones (M.O. 3 series) from an iron safe in another room. The officers also recovered Indian currency amounting to Rs. 10920/- from the house of the fourth respondent.

3. When the fourth respondent was questioned as to how the contraband articles came into his possession, he could not account for them properly. Hence on a reasonable belief that the goods recovered by the Customs officials were smuggled goods, they were seized under Ex. P-2. P.W. 3 Balakrishnan who was formerly working as Preventive Officer attached to the Customs House, Madras, conducted a search at premises No. 7, Patnool Sandusa street, Periamet which was in the occupation of the second respondent on 15-7-1969. The search resulted in the recovery of a letter Ex. P-9, a postal cover Ex. P-S addressed to the second respondent and a slip Ex. P.10 containing some Bank Addresses. These articles were seized under Ex. P-11.

4. During the search of the III Floor of premises No. 2, Taylor's Lane, G.T. Madras on 16-7-1969, P.W. 3 Balakrishnan found in a narrow lane between Taylors Lane and No. 129, Moore street, three white cloth packets in the rubbish. Each of these three cloth packets, on examination, was found to contain 25 bars of gold: They also bore foreign markings.

5. At about 2 p.m. on 16-7-1969, P.W.4 Thomas Jacob, a Preventive Officer attached to the Customs House conducted a search in the third floor of the premises No. 2, Taylors Lane which was in the occupation of one Yousuff. At the time of the search, one of his colleagues informed him that a Postman had delivered an insured parcel to the fourth respondent. P.W. 4 instructed one of his officers to see that the fourth respondent did not open the parcel till he completed the search. After completing the search, the fourth respondent was questioned about the parcel which the Postman had brought. The fourth respondent could not give any satisfactory answer. Thereafter, P.W. 4 opened the parcel in the presence of witnesses. It was found to contain 76 numbers of yellow semi-precious stones (M.O.8 series) which appeared to be of foreign origin. As the fourth respondent did not produce any bill or other documents entitling his legal possession of the goods, he seized them under a mahazar Ex. P. 15.

6. It is the further case of the prosecution that respondents 1 to 3 wrote out statements and gave them before one Balasub ramaniam, a Preventive Officer, who is now no more. The appellant, therefore, on the basis of the recoveries made and also on the basis of the statements voluntarily furnished by respondents 1 to 3, issued show cause notices Exs. P-16 and P. 17 to respondents 1 to 4 both under the Customs. Act and Gold Control Act respectively. The first respondent gave the reply Ex. P. 18. The second

respondent gave the replies Ex. P. 19 series. The third respondent did not give a reply. Ex. P. 20 is the reply given by the fourth respondent. The Additional Collector of Customs thereafter on the basis of the replies and also on the basis of the materials available and also taking the voluntary statements given by the respondents into consideration, adjudicated the matter both under the Gold Control Act and the Customs Act. Such adjudication orders are marked as Exs. P-21 and P. 22. The result of the adjudication was that the Additional Collector of Customs confiscated the goods and imposed a penalty of Rs. 5,000/- each on respondents 1, 2 and 4 and Rs. 1,000/- on the third respondent. Thereafter, sanction was obtained and the complaint was laid against the respondents, as stated above, for offences u/s 135(b)(i) of the Customs Act read with Section 1(1) of the Foreign Exchange Regulation Act and Section 85(ii) of the Gold Control Act.

7. When the respondents were questioned, the first respondent admitted that he is the son-in-law of the fourth respondent and that he stayed with him. He stated that the statement Ex. P-4 was obtained from him by the Customs Officers by beating, threat and coercion and he did not give any statement voluntarily. He denied about the search and seizure of goods at the premises No. 2, Taylors Lane.

8. The second respondent stated that he went to the house of the fourth respondent after the search was over, that the Customs Officers took him to the Customs House and obtained the statement Ex. P-5 from him by threat and coercion, that he was beaten for three days and he was forced to sign in the statement Ex. P. 5 and that he has obtained a certificate from the jail doctor for the injuries sustained by him at the hands of the customs officers.

9. The third respondent stated that he entered the house when the search was in progress and nothing incriminating was received from him and that he was beaten and his signature was obtained in a paper and he does not know the contents of the paper.

10. The forth respondent admitted that he was present at the time of the search but stated that 25 gold bars (M.O. 1 series) were not seized in his presence. As far as the seizure and recovery of semi-precious stones are concerned, his contention was that they were of Indian origin. He stated that he had with him the bills relating to M.Os 1 to 4 series and the articles were seized by the Customs Officers before he could show the bills. He denied about the seizure of 75gold bars (M.O. 6 series) and stated that they were not recovered from his house. He admitted the seizure of 75 numbers of semi-precious stones (M.O. 8 series) from the insured parcel received by him that day but stated that they were not of foreign origin.

11. To substantiate their case, the respondents also examined two defence witnesses, namely, the doctors.

12. The learned Chief Metropolitan Magistrate after going through the evidence adduced by the prosecution and also considering the statement of the

respondents came to the conclusion that the statements, over which the appellant relies, had been obtained under threat, coercion and fraud by use of force on the respondents. As far as statements recorded by Customs Officer from the respondents are concerned, he came to the conclusion that they are not voluntary statements. He also came to the conclusion that the respondents were beaten by the Customs Officers. He arrived at the conclusion on the basis of the certificates issued by the doctors and also the accident registers Exs. D5 to D.8. D.Ws. 1 and 2 spoke about the injuries on the respondents. The learned Magistrate came to the conclusion that Exs. P-4 to P-6 cannot be relied upon for it was evident that the said statements were not voluntary ones. I agree with the finding of the learned Magistrate for it is proved beyond doubt that the Customs Officials had used force to obtain the statement from the respondents, which is borne out by the testimony of D.Ws. 1 and 2. With regard to the recovery of the gold bars and also the semi-precious stones, the learned Magistrate, on the evidence adduced by the prosecution came to the conclusion that the prosecution has failed to show that the respondents had committed the offences. Therefore, the learned Magistrate has acquitted the respondents. It is as against this acquittal this appeal has been filed by the Customs authorities.

13. The learned Counsel appearing for the appellant contends that from premises No. 2, Taylors Lane the above-said article which are marked as M.Os. 1 to 8 were recovered. It is also clear from the facts of the case that the fourth respondent was a tenant of the said premises. It is also further clear that the first respondent who is the son-in-law of the fourth respondent was residing along with him. These facts are clear for the first respondent has stated in his reply notice Ex. P.18 to the Collector of Customs as follows:

...When I came to my house my neighbours informed me there was a customs raid in my house the previous day and that my father-in-law and my cook have been taken by the Customs authorities the previous day itself and that the Customs Authorities are waiting in my house to arrest me....

So also the fourth respondent in his reply notice Ex. P. 20 to the Collector of Customs has stated as follows:

...I wish to state that premises No. 2, Taylor's lane is not in my exclusive occupation, and it is in the joint occupation of myself and my son-in-law....

It is therefore, clear that both the first and fourth respondents were residing at No. 2 Taylor's Lane. It is also clear that 25 bars of gold of foreign origin were recovered from the kitchen portion of the said premises. When these two persons were in occupation of the said premises, it surpasses one's comprehension as to how 25 bars of gold had come into the kitchen portion of the said premises underneath the firewood. The learned Counsel appearing for the appellant contends that on the basis of the statements given by the first and second respondents and on the basis of the recovery of M.O. 1 series, namely, 25 bars of gold of foreign origin, it has to be presumed that the first and second

respondents were aware of the contraband articles in their premises ; so also about M.Os. 2 and 3 series which were recovered from the house of respondents 1 and 2 and also from the parcel which was delivered by the postal authorities to the fourth respondent. It is made clear from the facts of the case that M.Os. 1 to 3 series were recovered from the premises occupied by respondents 1 and 4. It is under these circumstances the counsel appearing for the appellant contends that respondents 1 and 4 cannot go scot-free and that the finding of the learned Magistrate that they are not liable for the charge, framed against them is contrary to law and has to be set aside. The learned Counsel appearing for the appellant has also taken me through some of the exhibits and also the judgment in detail. As far as respondents 2 and 3 are concerned the third respondent is a cook and the second respondent is a friend of the first respondent. The counsel appearing for the appellant does not press the case as far as these two respondents are concerned. But as far as respondents 1 and 4 are concerned, the contention of the appellants' Counsel is that the learned Magistrate has erred in acquitting them.

14. Mr. K. Ramaswami, the learned Counsel appearing for the respondent contends that the charges support the judgment of the learned Magistrate. His main contentions are that as far as the fourth respondent is concerned, the charge against him has not been framed under the Gold Control Act and that even in the adjudication order of the Collector of Customs which is marked as Ex. P.22 dated 30-9-1972, with reference to the gold seized from No. 2, Taylors Lane, the Collector has observed as follows:

Regarding their involvement in the smuggled gold bars seized from the premises at No. 2 Taylors Lane; Madras-I Abdul Cader Hajiar has disclaimed any connection with gold. Although there is a strong suspicion that Shri Abdul Cader Hajiar is also involved in dealing with the smuggled gold, there is no direct evidence connecting him with the 100 gold bars seized in this case.

As is seen from this adjudication order, the Collector of Customs has himself pointed out that there is no direct evidence connecting the fourth respondent with 100 gold bars seized in this case. In view of the specific adjudication, and even under the sanction given by the Collector of Customs u/s 137 of the Customs Act, no sanction was given as regards the fourth respondent with to Section 97 of the Gold control Act as is found from Ex. P.23 and no authorisation has been given by the Collector of Customs for filing the complaint under the Gold Control Act as far as the fourth respondent is concerned for it is made clear from Ex. P.24 that the authorisation was obtained for filing the complaint only against respondents 1 to 3 and not against the fourth respondent, it cannot be held that the fourth respondent will be liable under the Gold Control Act. The learned Counsel Mr. Ramaswami contends that the fourth respondent is not liable to be charged under the Gold Control Act; nor can be held liable u/s 135 of the Customs Act. It is seen from the facts of the case more particularly when the Customs Officers have projected a case before the Magistrate that it is the fourth

respondent who is liable to be charged for having been in possession of gold. But there is no specific charge against the fourth respondent with reference to Section 97 of the Gold Control Act. When the case was proceeding before the Magistrate, a doubt had arisen whether the fourth respondent had also to be charged u/s 85(ii) of the Gold Control Act. The learned Magistrate's Order dated 29-1-75 makes it clear that the fourth respondent Abdul Khader Hajjar has not been charged for possession of gold bars. The prosecution has also not filed a complaint against all the residents of No. 2, Taylors Lane. Hence, the Magistrate after hearing the arguments posted the case to 31-1-1975. Thereafter, it is not known whether the prosecution had pressed the point before the Magistrate that the fourth respondent had also to be charged under the Gold Control Act. From the lower Court's bundle, there is nothing to show that any further argument was made by the prosecution with regard to the charge against the fourth respondent under the Gold Control Act. In the absence of any record and in the absence of any affidavit on behalf of the prosecution either in the trial court or before this court to show that the matter was argued subsequently for framing a charge against the fourth respondent under the Gold Control Act, I have to conclude that a specific charge has not been framed by the appellant against the fourth respondent under the Gold Control Act. Even in the grounds of appeal, there is no specific ground raised by the Department to show that the fourth respondent is liable u/s 85(ii) of the Gold Control Act. Therefore, as far as the fourth respondent is concerned, the learned Magistrate has rightly acquitted him holding that he is not liable to be charged u/s 85(ii) of the Gold Control Act.

15. The learned Counsel appearing for the appellant contends that it is the duty of the court to frame the charge on the basis of the material placed. The learned Counsel also cited an Order of this court made by Natarajan, J., in CrI. M.P. No. 177 of 1976 (S.G. Sohan Raj v. The Assistant Collector of Central Excise, Vellore) dated 14-4-1976. That was a case where the shop of a licensed pawn broker was searched and gold ornaments were seized. Show cause notice was given to the pawn broker and adjudication proceedings were initiated by the Collector of Central Excise on the ground that the pawn broker had contravened Section 6(2) and 55 of the Gold Control Act. Independent of the adjudication proceedings, criminal proceedings were also launched against the pawn broker Sohanraj by the Collector of Central Excise. It was contended in that case that in the absence of a complaint pertaining to a specific offence under the Act, the court is not entitled to frame a charge in respect of that offence. The learned, Magistrate in that case framed the charge on the basis of the complaint made by the Assistant Collector of Central Excise. Aggrieved by the order of the learned Magistrate, the pawn broker Sohanraj preferred the said Criminal Miscellaneous Petition. When the matter came before Natarajan, J., the learned Judge pointed out that Section 97 of the Gold Control Act lays down that no court is entitled to take cognizance of any offence under the Act except on a complaint in writing made by the competent Gold Control Officer that the restriction, however, cannot be taken to mean that the court is bound to take cognizance of only those offences which are

made mention of in the complaint and that once a valid complaint regarding contravention of the provisions of the Gold Control Act has been taken on file by a Magistrate, he has to proceed in accordance with the provisions of of Part B of Chapter XIX of the Code of Criminal Procedure. It is on the basis of the observations of Natarajan, in the said case, the learned Counsel for the appellant contends that when once a complaint is lodged by the Collector of Customs, and Section 85 of the Gold Control Act is also mentioned in the complaint, it was the bounden duty of the Magistrate to take cognizance of the offence under the Gold Control Act and he should have framed a charge against the fourth respondent in respect of the said offence. I am afraid, such an argument cannot be advanced in this case. The facts of this case are quite different. In this case though a complaint has been made against the fourth respondent u/s 85(ii) of the Gold Control Act, an opportunity was given by the Magistrate to advance arguments and the case was posted to 31-1-1975. Nothing was brought to my notice as to what has happened with regard to the finality of that order. Both the counsel appearing for the appellant and the respondent are not able to place before this court any material to show that there was any final order passed with regard to the charge with respect to the offence under the Gold Control Act by the Magistrate. In the absence of any final order, it has to be presumed that the prosecution has given up the charge u/s 85(ii) of the Gold Control Act. In any event, nothing has been brought to my notice by the learned Counsel appearing for the appellant that any final order was passed subsequent to the order passed by the Magistrate on 29-1-1975. Under the circumstances, I have to conclude from the records available and also the arguments advanced by the counsel on behalf of the appellant and the respondents, that a specific charge has not been made under the Gold Control Act against the fourth respondent and the fourth respondent is not liable to be charged under the Gold Control Act. The learned Chief Metropolitan Magistrate has rightly acquitted the fourth respondent under the Gold Control Act holding that he is not liable under the Gold Control Act or u/s 135 of the Customs Act. Therefore, the appeal preferred by the appellant as far as the fourth respondent is concerned is unsustainable.

16. As far as the first respondent is concerned, it is seen that he has been charged u/s 135(b)(i) of the Customs Act and also 85(ii) of the Gold Control Act. We cannot rely, as pointed out already, on the confessional statements given by the respondents. The contention of the prosecution is that they recovered M.O. 1 series from the kitchen of the premises in occupation of the fourth respondent on 15-7-1969 and on 16-7-1969, they recovered M.O. 6 series from the lane adjoining the premises of the fourth respondent. If 75 bars of gold (M. 0.6 series) were recovered from the lane adjoining the premises of the fourth respondent, it cannot be said that it is only the respondents who were responsible for the same. As pointed out by the learned Magistrate, if the respondents had thrown 75 bags of gold from their house, it is not known how a vigilance Department like the Customs Department were keeping quiet without noticing it. It is also clear from the evidence of P.W. 1 Pandarinathan that he did

not check whether there was any windows or ventilator in the kitchen. He frankly admitted as is found from the evidence and also from the judgment of the Magistrate that there are ventilators on each of the floor of No. 2, Taylors Lane opening into Moore Street. No distance or location has been clearly mentioned in the mahazar Ex. P. 7 with regard to the actual place from where the gold was seized and the window at No. 2, Taylors Lane. Under the circumstances, it cannot be said that 75 bars of gold which were alleged to have been recovered were in the possession of the first respondent.

17. The question for consideration is whether the first respondent was in possession of M.O. 1 series to his knowledge or whether they were in his legal position. It is admitted by the prosecution that M.O. 1 series were found in the kitchen. It is also admitted that it was the third respondent (cook) who was frequenting the kitchen and not respondents 1 and 4. Under the circumstances, it cannot particularly be pinned upon that it is only the first respondent who is liable in respect of the recovery of M.O. 1 series from the kitchen. But it cannot be doubted that it was only the first respondent who was residing along with the fourth respondent. From any recovery that was made from the kitchen which is part of the premises No. 2 Taylors Land, it can be presumed that the first respondent would have had knowledge of M.O. 1 series. In any event Mr. Ramaswami the learned counsel does not seriously dispute that it is likely that the first respondent would have had no knowledge of M.O. 1 series. In view of the fact that Mr. Ramaswami does not seriously dispute as to the recovery of 25 bars of gold (M.O. 1 series), I am of the view that the first respondent is liable u/s 135(b)(i) of the Customs Act and Section 85(ii) of the Gold Control Act. Therefore, the order of acquittal in regard to the first respondent is erroneous. The first respondent has not satisfactorily explained as to how M.O. 1 series could come into the kitchen in spite of the fact that the cook, namely, the third respondent was frequenting that place. In any event, as stated above the counsel appearing for the first respondent does not seriously dispute the possession of M.O. 1 series. Under these circumstances, I am of the view that the first respondent has to be convicted and sentenced. Since the proceedings had started from the year 1969 and the matter has now been heard in the year 1979, I am of the view, in the interests of justice, instead of sentencing the first respondent to undergo imprisonment, it is just and sufficient if he is sentenced to pay fine and accordingly, I convict the first respondent u/s 135(b)(i) of the Customs Act and 85(ii) of the Gold Control Act, and impose on him a fine of Rs. 500/- on each count. In addition, I sentence the 1st respondent to undergo imprisonment till the rising of this court u/s 85(ii) of the Gold Control Act. Time for payment of fine is two months from the date of the receipt of this order; in default of payment of fine, the first respondent will undergo R.I. for six months.

18. This case was posted, for being mentioned (on this day 19-2-79) though judgment was not completely delivered. On 16-2-1979 the matter was heard. The counsel appearing for the appellant Mr. Badsha contended that there should be a direction from this Court with regard to the last paragraph viz. paragraph 20

of the judgment of the trial court wherein (he learned Magistrate has observed that M. Os. 2,3 and 8 series will be returned to the fourth accused. It is for this purpose the learned Counsel appearing for the appellant cited a decision reported in Assistant Collector of Customs, Madras v. Misrimal 1977 CrL. J. 1551 wherein a Division Bench of this Court has observed that the criminal court, on acquittal under Sections 111, 112, 126 and 135 of the Customs Act, cannot order return of the goods to the accused u/s 517 Cr. P.C. because after confiscation the goods vested in the Central Government. It was also observed that u/s 126 of Customs Act, the accused is not entitled to claim possession of the goods u/s 517, because the Criminal Court could not make any order regarding the goods which have already vested in the Central Government u/s 126 of the Customs Act. In short, the observation of the Bench of our High Court is to the effect that when once goods were seized by the customs, the goods vested in the Central Government and the Criminal Court trying such a case, after acquittal, cannot direct the return of the goods to the accused. In this case, the learned Magistrate, as stated above, has directed the return of the semi-precious stones which are marked as Exs. M.Os. 2, 3 and 8 series to the fourth accused. The learned Counsel Mr. Ramaswami submits that he has already filed an appeal before the Customs Authorities at New Delhi against the confiscation order of the Collector of Customs. Whatever may be result of the appeal preferred by Mr. Ramaswami, it is for the Department to substantiate that the articles seized viz. M. Os. 2,3 and 8 series require licence to import. But as far as this case is concerned, the order of the Chief Metropolitan Magistrate, Madras, directing Customs Authorities to return M.O's 2, 3 and 8 series to the fourth accused is improper and has to be set aside and accordingly set aside.

19. In the result, the appeal is allowed as far as the first respondent is concerned, as indicated above; and the appeal is dismissed as far as respondents 2 to 4 are concerned.

20. The learned Counsel appearing for the department, Mr. Ilyas contends that the gold seized by the Customs Authorities which are marked as M. Os. 1 and 6 series (25 and 75 golds bars) which is in the custody of the Customs Authorities may be directed to be sent to Mint at Bombay. It is for this purpose, he has filed Cr. M.P. No. 3658/78 seeking directions from this court. The Customs Authorities are directed to send back the gold seized in this case to the Mint at Bombay, as prayed for in this petition.