

(1981) 09 MAD CK 0034

In the Madras High Court

Case No : Writ Petition No. 2943 of 1978

B. Lakshmichand

APPELLANT

Vs

Government of India

RESPONDENT

Date of Decision : 18-09-1981

Acts Referred:

Customs Act, 1962 — Section 111, 112, 119

Citation : (1983) 12 ELT 322

Hon'ble Judges : Nainar Sundaram, J

Bench : Single Bench

Advocate : K.C. Rajappa, for the Appellant; K.N. Balasubramaniam, for the Respondent

Judgement

1. The proceedings impugned in the present writ petition are those under S. 112 of the Customs Act 52 of 1962, hereinafter referred to as the Act.

The facts leading to the action against the petitioner are as follows :

1. On 20th October, 1973, the Central Excise Officers, Coimbatore, intercepted one Chand Mohamed after he got out of Madras-Cochin Kerala

Express and on search of his person and his baggage, found 235 wrist watches of foreign origin concealed and they also found a slip of paper on

which the address and telephone number of the petitioner were written. The said Chand Mohamed gave a statement that the watches recovered

from him were intended for delivery to the petitioner and that he had brought them from Bombay where he had received them from a person

known as Radhakrishnan. The officers went to the premises of the petitioner on the same day and found him with another person by name

Verghese. The said Verghese was subjected to search and seven wrist watches of foreign origin were recovered from him. The said Verghese

gave a statement that the watches recovered from him were purchased from the petitioner. Two rose coloured hoses were recovered from the premises of the petitioner and were found to be similar to hoses found on the person of Chand Mohamed and in which some of the wrist watches of foreign origin were concealed. On the basis of the statement of these persons and the recovery of the wrist watches and the rose coloured hoses, proceedings were initiated by the Collector of Central Excise, Madras, against the petitioner and as well as the other two persons under the Act. Ultimately, the Collector of Central Excise passed orders on 9th September, 1974, confiscating the 235 wrist watches as well as the seven wrist watches of foreign origin under S. 111(d) of the Act. The Collector of Central of Excise also ordered confiscation of the articles used for concealing the wrist watches under S. 112 of the Act. He also imposed a penalty of Rs. 10,000, on the petitioner quoting S. 112 of the Act. There were imposition of penalties on the other two persons about which we are not concerned. The petitioner appealed to the Central Board of Excise and Customs and it did not prove fruitful and the appeal was dismissed by an order dated 17th September, 1975. The petitioner preferred a revision to the respondent and that revision was also dismissed on 19th October, 1977. The petitioner challenges the order passed by the respondent in the present writ petition.

2. Mr. K. C. Rajappa, learned counsel for the petitioner made an attempt to canvass the merits of the case; but ultimately and rightly was content to make a legal submission in that there is no indication in the proceedings initiated and the orders ultimately passed by the authorities under the Act as to whether the penalty is being imposed either under clause (a) or (b) of S. 112 of the Act and this would vitiate the orders passed. On an appraisal of the submission made by the learned counsel along with the provisions of the Act and the relevant judicial pronouncements I am inclined to sustain the plea put forth on behalf of the petitioner. Clauses (a) and (b) of S. 112 of the Act read as follows :-

112. Penalty for improper importation of goods etc. - Any person - (a) who, in relation to any goods does or omits to do any act which act or omission would render such goods liable to confiscation under S. 111, or abets the doing or omission of such an act, or

(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or

purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under S. 111;.....

Clauses (i) to (v) which then follow deal with the classes of penalties, depending on the categories of goods. A plain reading of the above clauses

makes it clear that they are distinct and separate. There is a possibility that the act complained of could fall within both the categories; but if the

penal action is proposed to be taken and proceedings are prosecuted and if they should culminate ultimately in the imposition of penalty, then the

authorities must be clear in their mind as to whether either of the above clauses would apply or both would apply. The Supreme Court with

reference to S. 167(8.a), of the Sea Customs Act, 1878, held in *Gian Chand and Others Vs. The State Of Punjab*, that in the absence of any valid

statutory provision in that behalf the onus of establishing the essential ingredients under that provision, necessary to bring home the offence to an

accused is on the prosecution. Obviously the stress was on the essential ingredients which go to make up the offence. There cannot be a

misconception or ambiguity with reference to the offence complained of because that would cast a cloud of doubt as to the essential ingredients

and naturally the discharge of the burden of proof would be stifled. Proceedings should not be allowed to be prosecuted on vague basis and

camouflaged hypothesis and prejudice must be presumed to have been caused to the accused in these circumstances. Clause (a) of S. 112 of the

Act contemplates the doing of an act or omitting to do an act in relation to any goods, which act or omission would render such goods liable to

confiscation under S. 111, or abetting the doing or omission of such an act. Clause (b) of S. 112 of the Act lays down that any person who

acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping or concealing, selling or purchasing, or is

any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation u/s 111, shall be liable to penalty as

per the clauses set out. S. 112(b) of the Act would be attracted only if the person has been concerned in the offence of importation or exportation

of goods which are, for the time being, prohibited or restricted. If that clause is attracted, there should be specific reference to it in the proceedings

initiated and the finding rendered, and if there is a failure to do so, the order of penalty cannot be sustained. When the penal provisions are invoked and proceedings are prosecuted for the purpose of imposition of penalty, the matter should not be dealt with in the sphere of ambiguity. There should be precision in the application of the provisions of the Act and it cannot be done in a camouflaged manner. There should be specific allegations even in the show cause notice and as well as in the subsequent proceedings and the ultimate orders to be passed by the authorities under the Act as to which of the clauses are attracted and as stated above, there is a possibility that on the facts of a particular case, both the clauses could also be attracted. In the absence of such specific allegations and specific findings, it is not possible to sustain the proceedings and the ultimate orders passed thereon. If the Customs authorities take recourse to any of the clauses dealing with the penalty, their order must further indicate the amount of duty payable in respect of the goods in question which was not paid.

3. I have been taken through the show cause notice and as well as the orders passed by the authorities under the Act in the present case. There is only the bare quoting of S. 112 of the Act and there is no reference to either to clause (a) or (b) or both of S. 112 of the Act. The essential ingredients have not been specifically set out with reference to either of the clauses. Hence, it has got to be held that there was no making up of mind either at the earlier stage or at the subsequent stage of the prosecution of the proceedings and the passing of the orders thereon as to which of the clauses would be attracted in the instant case. The whole matter has been dealt with in a sphere of ambiguity. The present case is not a case where a wrong provision has been quoted, so that it can be stated that it was due to a bona fide error, which did not vitiate the jurisdiction of the Authority. As stated above, this is a case where there had been a failure to apply the mind as to which of the clauses is relevant and would be attracted. The power and the discretion given to the Authority functioning under S. 112 of the Act are judicial in character and are open to judicial review, and if they are found to have been exercised on irrational and ambiguous basis, the court will strike down the orders.

4. A similar infirmity in a show cause notice under S. 112 of the Act came up for scrutiny before a Division Bench of the Calcutta High Court in

Charandas Malhotra Vs. Assistant Collector of Customs and Superintendent Preventive Service and Others, , and there, it has been countenanced

that the notice should contain the relevant allegations that the person concerned did or omitted to do anything which he was required to do under

the law or he had any knowledge that the contraband seized has been smuggled into the country. On the facts of the case, the Bench held that the

person concerned had been asked to show cause why he should not be penalised in accordance with the provisions of S. 112 of the Act, without

charging him with the ingredients of the offence which would expose him to a penalty, and therefore, he can neither give a proper answer nor

adequately defend himself. If the above propositions are kept in view, I find that the orders passed by the authorities under the Act in the instant

case cannot be sustained. There is lack of clarity and the whole matter has been dealt with in a sphere of ambiguity. Definitely, the petitioner must

be deemed to have been put to prejudice by such proceedings and the orders passed thereon. This obliges me to interfere in writ proceedings.

Accordingly the writ petition is allowed. There will be no order as to costs.