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**(1969) 04 DEL CK 0012**

**In the Delhi High Court**

**Case No : Civil Writ Appeal No. 487D of 1962**

Babulal Amthalal Mehta

APPELLANT

Vs

The Union of India and Others

RESPONDENT

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**Date of Decision : 08-04-1969**

**Acts Referred:**

**Citation : (1969) ILR Delhi 860**

**Hon'ble Judges : S.I. Rangarajan, J**

**Bench : Single Bench**

**Advocate : S.C. Mozamdar, Y. Dayal and B.B. Kishore, for the Appellant;**

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## **Judgement**

Rangarajan, J.

(1) The petitioner seeks, in this writ petition, to quash the order of confiscation of the articles seized from his residence from Calcutta by a search of his premises on 4th May, 1955. The order of confiscation was passed by the Collector of Customs on 12th September, 1955, the appeal against which was dismissed by the Central Board of Revenue on 27th July, 1957, a further revision to the Government of India having been dismissed on 12th March, 1962.

(2) On 4th May, 1955, the Rummaging Inspector (Intelligence), along with some others, searched the premises of the petitioner 32, Sir Hari Ram Goenka Street, Calcutta, on the strength of a search warrant issued by the Chief Presidency Magistrate, Calcutta. The petitioner was asked to produce whatever precious stones were in his possession whereupon he stated that whatever stones he had were kept in the steel almirah. The steel almirah was also searched but no stones were found therein. According to the petitioner his first reaction, on hearing knocks and shouts at the door with great force, was that it was a raid of robbers and he hurriedly kept the pouch in which he used to carry jewels to the market inside the jacket for safety. When after a search 475 diamonds and 11 precious stones, which he had kept and wrapped in the jacket, were taken out of the wall almirah, he was asked to make a statement, which was recorded and signed by

him. He did not then mention about the name of his brother (as one from whom he got stones and diamonds from Bombay) or the name of Panna Lal Chopra of Calcutta (from whom he received the balance of the diamonds). The petitioners' present Explanation is that he did not wish to get them into trouble and, Therefore, made no reference to them; he also gave a reduced value of the diamonds, to minimise any possible offence. He was then produced before the Assistant Collector of Customs, Calcutta, who interrogated him further since the goods were suspected to be smuggled goods; the petitioner was asked to produce further evidence in support of his innocence, namely, that the diamonds were not smuggled goods and if he was not the owner to prove how he acquired those diamonds.

(3) The petitioner complains that inspire of repeated requests he was not supplied with a copy of his statement until 21st November, 1956 when the petitioner consulted his attorneys and made enquiries through them in the Court of the Chief Presidency Magistrate, Calcutta and learnt that the fifth respondent had applied u/s 172 of the Sea Customs Act to the Chief Presidency Magistrate on the ground that he had reason to believe that dutiable and/or prohibited goods were secreted in his premises and had requested for a warrant of search for his premises. It is contended that without applying his judicial mind the learned Magistrate issued the said search warrant on account of the information laid before him concerning illegal importation of the goods and it had become necessary to enquire into the suspected offence. Request made on the 7th May, 1955, and again on 16th May, 1955, for the supply of reasons for the seizure was not complied with. The petitioner wrote to his attorney on 7th May, 1955 that he got 464 diamonds from M/s Ratilal Arnratlal & Co. of 89, Jhavari Bazar, Bombay-2, for sale in the Calcutta market, diamonds which had been brought from Bombay through his brother Jayantilal and that he had received 11 pieces of diamonds from Pannalal Chopra of Calcutta. He stated that the other synthetic stones belonged to him personally.

(4) On 23rd May, 1955 the fifth respondent supplied the reason for such seizure u/s 181 of the Sea Customs Act that the diamonds in question were seized on reasonable suspicion and that the same had been imported into India illegally. By letters dated the 20th and 25th June, 1955 the petitioner protested that particulars regarding the alleged illegal importation had not been furnished and that mere suspicion could never be the foundation for any legal action or decision affecting or confiscating the citizen's liberty or property. The petitioner had also demanded the disclosure of any evidence or material in the possession of the authority so that he may examine, accept or contradict the same.

(5) On 25th June, 1955 a show-cause notice was sent to the petitioner u/s 167(8) of the Act mentioning that there were discrepancies in the statement made by the petitioner at the time of the search and seizure and subsequently through his legal advisers and that on examination the diamonds were not found to be single cut and, Therefore, prima facie the diamonds were of foreign origin.

The importation of cut diamonds from foreign countries has been either totally banned or highly restricted for the last several years. The" petitioner was, Therefore, asked to explain why the diamonds should not be confiscated and penal action taken against him.

(6) The petitioner stated in reply, supported by certificates from merchants of standing and repute, that diamonds( not only single cut diamonds) are produced and manufactured in this country to a considerable extent and that the discrepancies in his initial statement were due to the same being extorted from him and not even being correctly recorded. It was also stated that section 178A, which was placed on the Statute Book by an amendment coming into force on 7th May, 1955, had no application.

(7) It is further stated that the hearing before the Collector without giving copies, which had been repeatedly asked for, and disclosing the material or evidence against the petitioner behind his back was really no hearing at all. In his order, dated the 12th September, 1955. the Collector confiscated 475 pieces of diamonds and one piece of synthetic stone, the valuation being given as Rs. 40,000.00. The discrepancies between the petitioner's statement of 4th May, 1955 and his later statements and the petitioner's conduct in not pointing out the almirah at once and keeping the articles concealed within folds of clothes were referred to. Out of the total 475 pieces of diamonds (weighing 29 -65 carats) which were stated to have been sent from Bombay, the petitioner had failed to discharge the burden of proof which lay on him u/s 178A to prove that the diamonds were not smuggled.

(8) It is needless to refer to the matters stated by the petitioner in pages 14 to 19 of this application, dealing with the evidence and materials which the Customs authorities at Bombay had gathered in the course of their investigation.

(9) Continuing the narrative of events the petitioner successfully challenged by means of a writ petition before the Supreme Court vide Babulal Anithalal Mehta v. The Collector of Customs, Calcutta the validity of section 178A of the Sea Customs Act of 1878 on the ground that it offended Article 14 of the Constitution. The decision in that case (dated the 8th July, 1957) went against the petitioner. Thereupon he preferred an appeal (with alternative," prayer to treat it as a revision) u/s 90A of the Act to the Board of Revenue which dismissed the appeal as out of time and declined to treat the application as a revision. The petitioner was not given any opportunity of hearing inspire of his pressing for the same. Thereupon the petitioner filed a further revision petition to the Government of India which was allowed in part returning only five pieces for the diamonds on the ground that they had been identified by Shri Pannalal Chopra and dismissed the revision petition concerning the balance. This order was also passed without giving any opportunity to be heard.

(10) Section 178A of the Sea Customs Act admittedly came into effect on 7th May, 1955, whereas the search in this case took place on 4th May, 1955. Section

178A reads as follows :-

(1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be on the person from whose possession the goods were seized; (2) This section shall apply to gold, gold manufacturers, diamonds and other precious stones, cigarettes and cosmetics and any other goods which the Central Government may, by notification in the Official Gazette, specify in this behalf;

(11) His Lordship Mr. Justice Subbarao (as he then was) observed as follows :-

"SECTION 178 of the Sea Customs Act does not govern the present case, for the section was inserted in that Act by Act 21 of 1955, whereas the order of confiscation of the goods in question was made on January 18, 1952. The section is prospective in operation and cannot govern the said order *Aruba Lal v. Union of India*.

(12) His Lordship Mr. Justice Subbarao also referred to section 5 of the Land Customs as well as section 106 of the Evidence Act and observed that while the former was inapplicable the latter could not be used to undermine the well established rule of law that save in a very exceptional case the burden is on the prosecution and never shifts. In this view his Lordship held that it was for the Customs authorities to prove that the articles confiscated were smuggled goods and since they had failed to do so set aside the confiscation relating to them. Those items, in respect of which the Supreme Court set aside the order of confiscation, were items I to 5 in that case; regarding items 6 to 9 the order was different because they were admitted to be smuggled goods in that case.

(13) Shri Brij Bans Kishore, learned counsel for the Union of India, placed before me the decision of his Lordship Mr. Justice P. B. Mukharji in *Kshefra Nath Basak v. Collector of Land Customs*. (3) It was held that section 178A was retrospective in operation since it could be invoked by the Court in a case arising for determination after the same was placed on the Statute Book even though the seizure might have been prior to its being so placed; at the same time Shri Brij bans Kishore drew my attention to the fact that this was earlier than the decision of the Supreme Court in *Ambala! v. The Union of India and others*") and had also been specifically overruled by a Division Bench of the Calcutta High Court in *Shanilal Sen Private Limited and others v. Additional Collector of Customs*"). His Lordship the Chief Justice Sinha discussed this question in paragraph 10 (pages 245-246) and referred to the following extract in Halsbury Laws of England :-

General rule in legal proceedings the general rule is that he who asserts must prove; this proposition is sometimes more technically expressed by saying that the burden of proof rests upon the party who substantially asserts the affirmative of the issue. In applying the rule, however, a distinction is to be observed between the burden of proof as a matter of substantive law or pleading, that is, the burden of proving an issue or issues, sometimes termed the legal burden,

and the burden of proof as a matter of adducing evidence during various stages of the trial. The former burden is fixed at the commencement of the trial by the state of the pleadings or their equivalent and is one that never changes under any circumstances."

(14) His Lordship the Chief Justice made a distinction between the burden of proof of facts which are asserted as a matter of substantive law and of facts which are asserted as a matter of procedural law; if a person was charged with having committed an offence u/s 167(8) of the Sea Customs Act read with the appropriate sections of the Foreign Exchange Regulation Act. It was in the nature of criminal proceedings and the burden of proof was entirely on the prosecution. Since section 178A of the Sea Customs Act completely altered this burden and laid it on the accused to show that the goods were not smuggled it was, without doubt, an alteration in the substantive law and not merely of a procedure. Even apart from this reasoning it is sufficient to note that Shri Brij Bans Kishore can derive no assistance from the decision of Mr. Justice P. B. Mukharji rendered in the year 1959 prior to the decision of the Supreme Court in *Ambu Lal v. The Union of India and others*(2) in 1961. If section 178A of the Act, as amended, does not govern the goods seized in this case there is very little positive evidence to show that the goods were imported in the country in violation of any regulation banning such importation.

(15) The learned counsel for the petitioner, on the other hand, sought to argue before me that despite the petitioner's pre-varicating statements there was sufficient proof which has been adduced in this case to show that the goods were not smuggled goods. But the difficulty is obviously great in the way of the petitioner when he seeks to prove that these goods are not smuggled goods, even as the Customs Department has not been able to prove, despite the pre-varicating statements of the petitioner, that the goods in question were smuggled goods. In the very nature of this case, Therefore, this case has to be decided on the burden of proof. If the burden of proof is on the petitioner he would fail: if it is on the Customs Department, the order of confiscation has. to be set aside.

(16) The only material question which arises for decision in this. writ application, Therefore, is whether section 178A is prospective or retrospective. The clear holding of the Supreme Court in *Amba Lal* being that it is only prospective and not retrospective the order of confiscation has to be set aside for this reason alone.

(17) In this view of the matter it is needless to go into the other questions, both of fact and of law, which were debated by both sides before me.

(18) I may, however, refer to only one aspect. The Supreme Court observed in *Amba La!* that the only pre-requisite for the application of section 178A was the subjectivity of the Customs Officer in having a reasonable belief that the goods were smuggled. It was on this ground that the Madras High Court held in *Natfhella Sampafhu Chetty and another v. Collector of Customs*") that Article

178A(1) of the Sea Customs Act was an unconstitutional infringement of the fundamental right of the petitioners secured by Articles 19 and 19 His Lordship Mr. Justice Rajagopalan had observed (page 147) that since according to Amba Lal the reasonableness of the belief was not subject to investigation by a Court by the application of any objective criteria and for the other reasons mentioned by him section 178A was unconstitutional. In the appeal before the Supreme Court as against the said decision, reported in *The Collector of Customs v. Sampathu Chetty* and another the learned Solicitor General, on behalf of the Union of India, pointed out that the above said observation of the Supreme Court in *Amba Lal* was not really part of the decision and that he would not support it. In the result (vide page 820) the belief entertained by the official concerned before he proceeded to seizure was really justiceable. It was also contended for the petitioner that no search was made in this case with the requisite belief, hence it was not a search made under the Act, and that the further presumption under 178A could not be invoked, even if the said section applied to the present case. But these aspects of the matter need not detain us because section 178A does not apply to the instant case.

(19) I have been requested by Shri Majumdar to record that he was impugning the order of confiscation passed in this case on another ground, viz., the officer making the search also violated principles of natural justice. There is clearly no need to go into this aspect also because section 178A has been held to be only prospective and not retrospective. It does not, Therefore, apply to the goods seized in this case on 4th May, 1955, section 178A having come into force only on 7th May, 1955.

(20) In the result, the order of confiscation passed is set aside. The petition is allowed accordingly with costs.