
(1966) 08 MP CK 0002
In the Madhya Pradesh High Court

Benechand Bhomraj Kothari

APPELLANT

Vs

The State of Madhya Pradesh

RESPONDENT

Date of Decision : 26-08-1966

Acts Referred:

Constitution of India, 1950 — Article 20
Penal Code, 1860 (IPC) — Section 120B

Citation : (1968) CriLJ 834 : (1968) ILR (MP) 662 : (1968) 13 MPLJ 193

Hon'ble Judges : Shiv Dayal, J

Bench : Single Bench

Judgement

Shiv Dayal, J.

This petition challenges the competence of the petitioner's trial under Rule 126 of the Gold Control Rules, 1963 for possession of 720-100 grams of primary gold. The accused took a preliminary objection before the trial Magistrate that his prosecution was barred u/s 408, Criminal P.C. The trial Magistrate rejected the contention. The accused filed a revision in the Sessions Court which too has been dismissed.

Shri Pandey, learned Counsel for the petitioner, narrates the following facts. On 6 May 1983, the house of the petitioner was searched u/s 126 (2) of the Gold Control Rules, and according to the prosecution 720-100 grams of primary gold was seized from his possession. The Collector, Central Excise, gave him notice to show cause why he should not be penalized. After hearing him, the Collector, Central Excise, held him guilty u/s 126(1) and imposed ft penalty of Sections 250 u/s 126L(16) of the Gold Control Rules. Further, he directed confiscation of the gold u/s 126-M, but under Clause (8) of the said Rule, he gave option to the petitioner to pay, in lieu of confiscation of the gold, a fine of Rs. 2000. Subsequent to these-proceedings, the petitioner was put up for trial under Rule 126-P of the Gold Control Rules. It is this trial in the criminal Court, which is challenged as illegal and barred by Section 408, Criminal P.C., on the plea of putrefies convict. In this petition the trial is further assailed as being in violation

of the fundamental right under Article 20(2) of the Constitution.

In order to appreciate the contentions raised by the accused, it is necessary to refer to certain provisions of the Gold Control Rules, 1968:

(i) Rule 126-I(1) requires every person (not being a dealer required to apply for licence, or licensed or a refiner) to make a declaration with, in the prescribed period of 30 days to the Administrator in the prescribed form as to the quantity, description and other prescribed particulars of gold (other than ornament) owned by him.

(ii) Rule 126-L(2) empowers a person authorized by the Central Government in writing in that behalf to (a) enter and search any premises; and (b) seize any gold in respect of which he suspects that any provision of this Part has been, or is being or is about to be, contravened.

(iii) It is provided in Rule 126-M that any gold seized under Rule 126-L is liable to confiscation. Clause (2) of that Rule nominates the authorities empowered to adjudicate such confiscation and Clause (8) provides for an appeal. Clause (8)(a) of that Part runs thus:

(8)(a) Whenever confiscation of any gold is authorized by this Part the officer adjudging it may give to the owner of the gold an option to pay in lieu of confiscation such fine as the said officer thinks fit.

(iv) It is further provided in Section 126-L(18) as follows:

Any person who in relation to any gold does or omits to do any act which act or omission would render such gold liable to confiscation u/s 126-M... shall be liable in addition to any liability for any punishment under this Part to a penalty not exceeding five times, the value of the gold or one thousand rupees whichever is more....

(v) Rule 12B-P prescribes punishments for offences under the Rules. It is enacted in Clause (2) of the said Rules:

(2) Whoever,-

(i) refines, processes, melts, converts, deals in or makes, manufactures or prepares any article of gold in contravention of any of the provisions of this Part,

(ii) has in his possession or under his control any quantity of gold in contravention of any provision of this Part.

shall be punishable with imprisonment for a term of not less than six months and not more than two years and also with fine.

The contention for the petitioner is that imposition of a fine under Rule 126-M(8)(a), although in lieu of confiscation, is punishment and the proceeding before the Administrator is prosecution. In my opinion, neither the plea of double jeopardy nor putrefies convict is available to the accused in this case. From the aforesaid

provisions, it is quite clear that under Rule 126-M, gold is liable to be seized and confiscated. At the same time, a provision is made to give the owner of the gold an option to pay a fine to be specified, in case he desires that the gold should not be confiscated. Clause (8)(b) of the Rule reads thus:

For the removal of doubt it is hereby declared that the payment of fine in lieu of confiscation of gold shall not prevent the inflicting of any punishment to which the person affected is liable under the provision of this Part.

It seems to me quite clear that such a clause with however emphatic its wording, cannot take away the constitutional protection under Article 20(2). If it is held that fine in lieu of confiscation is punishment and the proceeding constitutes prosecution within the meaning of that Article, the law-making body cannot, by incorporating such a provision, abrogate the fundamental right guaranteed in that Article. If it is held that a trial under Rule 126-P is barred by Article 20(2) of the Constitution, Clause (8)(b) of the above Rule will be ultra vires the Constitution.

I shall, therefore, examine whether a proceeding under Rule 126-M(8)(a) is prosecution. "Prosecution" means a proceeding either by way of indictment or information in the criminal Courts in order to put an offender upon his trial. Merely because the competent Authorities are empowered to impose legalities under the Gold Control Rules they are not converted into a Court of Law. So also the penalty imposed by such authorities is not the same thing as punishment by a Criminal Court for a criminal offence. There is no provision in the Rules that there will be a trial nor are the competent authorities invested with magisterial functions in respect of trials under the Code of Criminal Procedure. Every penalty not punishment within the meaning of Article 20(2) of the Constitution: that Article envisages punishments awarded by a Court of Law. Shri Pandey laid a great deal of stress on the provisions contained in Rule 126-I(2) and it was argued that as the provisions of the Code of Criminal Procedure, relating to search and seizure, having been made applicable, the proceeding is prosecution. In my judgment this contention must be rejected. Applicability of the provisions of the Code of Criminal Procedure, relating to search and seizure, is not the test and it does not convert a proceeding into a trial before a criminal Court. Conferral of the power of adjudging confiscation or imposition of fine in lieu of confiscation are penalties, which can be imposed by the authorities under the Gold Control Rules. The object is confiscation of tending gold and to give an option to its owner to pay a fine in lieu of such confiscation. It is more in the nature of a proceeding in rem than a proceeding in personam. A proceeding for adjudging confiscation is not prosecution as the authority dealing with that proceeding is not a criminal Court. The confiscation or fine in lieu of confiscation cannot be said to be punishment.

In *Thomas Dana v. State of Punjab* AIR 1959 SC 875, their Lordships considered the applicability of Article 20(2) of the Constitution to a trial in the criminal Court, where the accused had been dealt with in proceedings before the Sea Customs Authorities u/s 167(8) of the Sea Customs Act. Under that enactment, if

any goods, the import or export of which is from time to time prohibited or restricted by or under Chap. 4 of that Act, is imported into or exported into or exported from India contrary to such prohibition or restriction (vide Sections 18 and 19), such goods are liable to confiscation and any person concerned in any such offence is liable to penalty not exceeding three times the value of the goods or not exceeding Rs. 1000/-. It was held that such confiscation of goods and infliction of penalty does not bring into operation the provisions of Article 20(2) of the Constitution so as to bar his prosecution and imprisonment u/s 176(8) of the Act, read with Sections 23 and 28B of the Foreign Exchange Regulation Act, and u/s 120B, Penal Code. Their Lordships said:

When a criminal prosecution and punishment of the criminal, in the sense of the Penal law, is intended, the section makes a specific reference to a trial by a Magistrate, a conviction by such Magistrate and on such conviction, to imprisonment or to fine or both.... The Legislature was, therefore, aware of the distinction made throughout the Schedule to Section 167, between a proceeding before Revenue authorities by way of enforcing the preventive and penal provisions of the Schedule and a criminal trial before a Magistrate, with a view to punishing offenders under the provisions of the same section. It is, therefore, in the teeth of these provisions to contend that the imposition of a penalty by the Revenue officers in the hierarchy created by the Act is the same thing as a punishment imposed by a criminal Court by way of punishment for a criminal offence.

In *The State of Mysore Vs. H.L. Chablani*, , the Supreme Court had another occasion to consider the question as to the constitutionality of a subsequent prosecution launched against a person whose goods had been confiscated u/s 167 of the Sea Customs Act. It was held as follows:

The Sea Customs Authorities are not a judicial tribunal and the adjudging of confiscation, increased rate of duty or penalty under the provisions of the Sea Customs Act do not constitute a judgment or order of a Court or judicial tribunal necessary for the purpose of supporting a plea of double jeopardy.

It, therefore, follows that when the Customs Authorities confiscated the gold in question neither the proceedings taken before the Sea Customs Authorities constituted a prosecution of the appellant nor did the order of confiscation constitute a punishment inflicted by a Court or judicial tribunal on the appellant.

The law was recently recapitulated in *Indo-China Steam Navigation Co. Ltd. Vs. Jasjit Singh, Additional Collector of Customs and Others*, . Gajendragadkar, C. J., spoke for the Court thus:

It is settled by decisions of this Court that the Customs Officer who initially u/s 167(12A) is not a Court or Tribunal, though it is also settled that... the Customs Officer has to act in a quasi-judicial manner.... In AIR 1989 SC 375, this Court has observed that the Collector and other officers in the hierarchy mentioned by the Sea Customs Act may have to act judicially in the sense of having to consider

evidence and hear arguments in an informal way; even so, the Act does not contemplate that: in doing so, the said authorities are functioning as a Court.

Referring to *Atherton West and Co. Ltd. Vs. Suti Mill Mazdoor Union and Others*, , their Lordships said:

It was held that the proceeding before the Sea Customs Authorities under the Act was not a prosecution and the order of confiscation was not a punishment inflicted by a Court or judicial Tribunal within the meaning of Article 20(2).

Referring to certain observations in that case that the Customs Officers are not required to act judicially on legal evidence tendered on oath and they are not authorized to administer oath to any witness, their Lordships said that they were obiter. On a review of these decisions, the following law was laid down in *Indo-China Steam Navigation Co. Ltd. Vs. Jasjit Singh, Additional Collector of Customs and Others*, :

The result, therefore, is that it is no longer open to doubt that the Customs Officer is not a Court or Tribunal though in adjudicating upon matters u/s 167 of the Act, he has to act in a judicial manner.

As regards the penalty provided in Rule 126-I(16), it is true that the penalty, which may extend to five times the value of the gold or One thousand rupees, whichever is more, is punishment, and it is also made expressly clear in the same clause that such penalty may be imposed "in addition to any liability for any punishment under this Part". This clearly means that two punishments are provided; (i) Penalty under Rule 126L(16); and (ii) Punishment under Rule 126P. But these two punishments differ in their nature. The former can be imposed by the authorities enumerated in the clause itself, but not by a Court of law, while the latter can be awarded only by a criminal Court after trial. The fundamental right under Article 20(2) of the Constitution is not infringement, unless the accused has already been "prosecuted and punished", which words indicate that there must be not only punishment but also prosecution. And, as already said, a prosecution in this context means initiation or starting of proceeding of a criminal nature before a Court of law or as judicial tribunal in accordance with the procedure prescribed in the statute, which creates the offence and regulates punishment. See *The State of Mysore Vs. H.L. Chablani*, . Proceedings before the competent authorities mentioned in Rule 126L(16), do not constitute prosecution. That being so, such proceedings do not bar a criminal prosecution for the same offence, although punishable under two different provisions.

For the reasons aforesaid, it must be held that a proceeding under Rule 126M(8) of the Gold Control Rules, for imposition of fine in lieu of confiscation, or a proceeding under Rule 126L(16) for imposition of penalty, is not prosecution within the meaning of Article 20(2) of the Constitution. It is not a proceeding either by way of indictment or information in a criminal Court. The officer dealing with the matter is not a criminal Court; the imposition of fine in lieu of confiscation is not punishment. Therefore, the trial of a person accused of the

offence under Rule 126P of the Gold Control Rules is not an infringement of his rights under Article 20(2) of the Constitution on the ground of double jeo pardy, nor can his plea of putrefies convict u/s 403, Criminal Procedure Code, be upheld just because a penalty has been imposed by a competent officer under Rule 126L(16), or because he has been given an option under Rule 126M(8)(a) of the Gold Control Rules.

The petition is dismissed.