

(1972) 07 KL CK 0027

In the High Court Of Kerala

Case No : Writ Appeal No. 436 of 1971

Collector of Customs and Central Excise, Cochin

APPELLANT

Vs

Markose Arnaeutakis, S.T. Speedway, Cochin

RESPONDENT

Date of Decision : 26-07-1972

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 112

Citation : AIR 1973 Ker 7

Hon'ble Judges : P. Govindan Nair, J;K. Sadasivan, J

Bench : Division Bench

Advocate : George Vadakkal, for the Appellant; V.K. Hamsa, for the Respondent

Final Decision : Dismissed

Judgement

Govindan Nair, J.—This is an appeal by the Collector of Customs and Central Excise from the judgment of Nara-yana Pillai, J. in O. P. 4733 of 1969, which is reported in 1972 Ker LT 231 = Markos Aranaoutakis Vs. The Collector of Customs and Central Excise, . By this judgment Narayana Pillai, J. set aside the imposition of personal penalty on the respondent-Markos Arnaeu-takis, Captain, S. T. Speedway-of Rupees 75,000/-; imposed u/s 112(a) of the Customs Act, 1962 (for short the Act) as also the direction to the respondent to pay Rs. 70,000/- in lieu of confiscation of the vessel S. T., Speedway, under the proviso to Section 115(2) of the Act, as well as the direction to the respondent to pay the import duty of Rs. 22,815.00 leviable on 39 cases of whisky, said to have been smuggled from the store of the vessel. The penalty has been imposed and the direction to pay the sum of Rs. 70,000/- in lieu of confiscation and the direction to pay the duty have been given by the Order Ex. P-5 passed by the Collector of Customs and produced along with the O.P. This order also contained the direction to the 2nd Officer of the vessel to pay a penalty of Rupees 50,000/-. There was the further direction in the Order that the U.S.A. currency amounting to Dollars 2418.00 being the sale consideration to 39 cases of whisky, as well as a further

sum of Dollars 930.00 totalling U.S. Dollars 3348.00, be confiscated. These provisions of the Order have not been set aside by the judgment under appeal and we are not concerned, in this appeal, with the imposition of the penalty on the 2nd Officer and regarding the direction to confiscate U.S. Dollars 3348.00.

2. As we understand it, the Order Ex. P-5 proceeds on the assumption if not on the basis of the finding that the vessel S. T. Speedway had been used as the means of transport in the smuggling of the 39 cases of whisky and was, therefore, liable to confiscation u/s 115(2) of the Act; and further that the personal penalty on the respondent had been imposed on the basis that the respondent has abetted the act of smuggling by the 2nd Officer, which rendered the goods smuggled liable to confiscation u/s 112(a) of the Act.

3. We may mention at this stage that no point had been taken in the O. P, specifically challenging the direction in the Order that the respondent should pay the duty of Rs. 22,815.00 leviable on 39 cases of whisky smuggled. u/s 12 of the Act, duty is payable on goods imported into or exported from India. By virtue of Section 86 of the Act, duty is not payable on any stores imported in a vessel, which remained on board such vessel; but when it ceased to remain on board the vessel duty is attracted. This duty can be asked to be paid by the owner of the goods imported, or we conceive, by the agent of the owner of the goods. The master of the vessel will be the agent of the owner of the vessel as well as the agent of the owner of the goods stored in the vessel. There is, therefore, nothing wrong in the order Ext. P-5, in so far as it directs that the duty of Rs. 22,815.00 should be paid by the respondent. As we said already, no specific challenge has been made against this direction to pay the duty by the respondents, and therefore the setting aside of this direction by the judgment under appeal does not seem to us to be justified.

4. The direction for the payment of fine in lieu of confiscation of the vessel has been set aside by the judgment under appeal on the ground that the vessel had not been used as a means of transport in the smuggling of whisky. The learned Judge has entered the finding that the act of smuggling has been done by the 2nd Officer without the knowledge of the respondent, The personal penalty of Rs. 75,000/- imposed on the respondent has been set aside by the learned Judge on the ground that the evidence to connect the respondent with the offence was purely circumstantial and such evidence, which the learned Judge purported to discuss in paragraphs 7, 8, 9 and 10 of the judgment, did not warrant the conclusion that the respondent was connected with the commission of the Act of taking the goods out of the store and of selling them.

5. The first question raised by counsel for the appellant before us is whether this Court is justified in considering the correctness or otherwise of the findings entered by the Collector of Customs in relation to the imposition of the personal penalty as well as the direction to pay compensation in lieu of confiscation. According to counsel for the appellant this is not a case of no evidence whatever or a case of no material. If there was material and the conclusions reached were

conclusions which could be drawn from the materials available before the authority, it is submitted that the sufficiency or adequacy of the material is not a matter for this Court in a proceeding under Article 226 of the Constitution. It is further submitted that the question is not whether this Court would have come to the conclusion on the materials that were available before the Collector of Customs; but whether any reasonable man would have come to the conclusion on the materials that were available. These propositions are now well settled and it is unnecessary to refer to cases other than those decided by the Supreme Court on this point, because, we consider that the matter has been, more than clearly, enunciated by at least five decisions of the Supreme Court starting from the one in Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and Appeals, Assam and Others, . This decision was referred to in Kaushalya Devi and Others Vs. Bachittar Singh and Others, , Wherein the Supreme Court observed:--

"It was also pointed out that the High Court had exercised its supervisory jurisdiction in that case in respect of errors which could not be said to be errors of law apparent on the face of the record; if at all they were errors, they were errors in appreciation of documentary evidence or affidavits, error in drawing inference or omission to draw inferences. In other words, it was further observed, these were errors which a Court sitting as a Court of appeal only, could have examined and, if necessary corrected. In the present case also we feel, With respect, that what the High Court has done is to correct what may be errors in appreciations of documentary evidence or errors in drawing inferences."

6. Similar are the observations of the Supreme Court in Major U.R. Bhatt Vs. Union of India (UOI), , wherein it was held:--

"The order of discharge from service passed against him by order of the Governor-General is not liable to be questioned on the ground that the materials may not have justified the passing of that order. It is not within the competence of a civil Court to sit in judgment over the decision of the authority who is competent by law to dismiss a public servant provided he has been afforded an opportunity to defend himself consistently with the substance of the Constitutional guarantee."

7. In State of Orissa v. Muralidhar AIR 1963 SC 404 there is the following passage:--

"Whether or not the evidence on which the Tribunal relied was satisfactory and sufficient for justifying its conclusion would not fall to be considered in a writ petition. That in effect is the approach initially adopted by the High Court at the beginning of its judgment However, in subsequent part of the judgment the High Court appears to have been persuaded to appreciate the evidence for itself, and that, in our opinion, is not reasonable or legitimate."

8. We may also extract certain passages from the decision in The State of Madras Vs. G. Sundaram, :--

"It is well settled now that a High Court in the exercise of its jurisdiction under Article 226 of the Constitution, cannot sit in appeal over the findings of fact recorded by a competent Tribunal in a properly conducted departmental enquiry except when, it be shown that the impugned findings were not supported by any evidence."

9. A similar view was expressed in *State of Andhra Pradesh Vs. Sree Rama Rao*, at p. 1726:--

"The High Court is not constituted in a proceeding under Article 226 of the Constitution a Court of appeal over the decision of the authorities holding a departmental enquiry against a public servant; it is concerned to determine whether the enquiry is held by an authority competent in that behalf, and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Where there is some evidence, which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court in a petition for a writ under Article 226 to review the evidence and to arrive at an independent finding on the evidence.

But the departmental authorities are, if the enquiry is otherwise properly held the sole Judges of facts and if there be some legal evidence on which their findings can be based, the adequacy or reliability of that evidence is not a matter which can be permitted to be canvassed before the High Court in a proceeding for a writ under Article 226 of the Constitution.

It could have considered only the fact whether there was an evidence at all which, if believed by the Tribunal, would establish the charge against the respondent. Adequacy of that evidence to sustain the charge is not a question before the High Court when exercising its jurisdiction under Article 226 of the Constitution. This view was reiterated in *Union of India (UOI) Vs. H.C. Goel*, ."

It is unnecessary to multiply judicial pronouncements on the subject, because the proposition seems to us to be well settled.

10. Counsel for the appellant submitted before us that this Court exceeded its jurisdiction, because it has analysed the evidence on its own and has come to independent conclusions on matters of fact which have been found by the Collector of Customs on the materials that were available before the Collector of Customs and those conclusions were arrived at by the Collector of Customs without infringing any rule of natural justice and without breaching any well-known principles of law. It has, therefore, to be examined whether there has been a reappraisal of the evidence by this Court and whether there was any material before the Collector of Customs on which the conclusions arrived at by him could have been reasonably reached. It is necessary for this purpose to state a few facts which are established or are undisputed.

(i) Between 18-6-69 and 6-9-69, 108 cases of whisky had been taken on board the vessel on various dates detailed in para 9 of the order Ext. P-5. The respondent, when he was examined on 9-9-69 stated that the total consumption of whisky per voyage to and back from Kharg Island from Cochin (the vessel was admittedly plying between Cochin and Kharg Island) lasting about 14 days would be about 65 bottles, when he joined the vessel on 25-5-69. It is thus clear that the total quantity of whisky that would have been consumed during 6 voyages that the vessel admittedly undertook would not have been more than 400 bottles. As against this the supply of whisky was 1296 bottles;

(ii) The vessel had, when it arrived in the Cochin Port on the 5th of September, 1969, 456 bottles of whisky on board. On 6th September, 36 bottles of whisky were brought and these were also taken to the stores. It had thus 492 bottles of whisky as against 65 bottles required for one voyage;

(iii) When the customs officers went on board the vessel the respondent conversed with the 2nd officer in Greek (a language unknown to the officer) and it was after that that the 2nd officer confessed that he had sold 39 cases of whisky from the store;

(iv) The Master of the vessel had admitted that he was the custodian of the whisky as well as other goods in the store and that such goods were under his supervision and responsibility;

(v) It was fully admitted that the key of the store was left by the Master of the vessel with the 2nd Officer; and was not kept by the Master himself;

(vi) Dollars 3348 confiscated were found underneath the bed of the Master.

11. On the above facts the Collector of Customs came to the conclusion that the 39 cases of whisky could not have been sold "without the knowledge, connivance and consent of the Master, especially when the sale proceeds of 39 cases of whisky had been recovered from his cabin, from under his bed." In this connection, the statement of the 2nd officer that he had kept the currency in the Master's cabin apprehending seizure by the customs authorities was also considered by the Collector of Customs and he was not prepared to accept this version. After having rejected the second officer's version that he kept the sale consideration of 2418 Dollars underneath the bed of the respondent without the respondent's knowledge and with a view to avoid detection, as well as the case that 930 Dollars belonging to the 2nd Officer had also been kept by the 2nd officer under the bed of the respondent, the Collector of Customs proceeded to state;

"It would not be reasonable to accept that he would have attempted such an unwise sale, unless he had the concurrence of the Master".

12. These findings, though they do not specifically refer to the ingredients necessary to satisfy the requirements of Sections 112(a) and 115(2) of the Act, in substance would do duty for the necessary findings for the sections to be

attracted. We are not prepared to say that there were no materials before the Collector of Customs and that such an inference could not reasonably have been drawn by the Collector of Customs from the materials that were available. We may add that the adequacy or sufficiency of the material is not a matter for consideration by this Court in proceedings under Article 226 of the Constitution. It is not as though the respondent has no other remedy in regard to the details of the examination of the materials and a meticulous analysis of the evidence to find out whether the inference to be drawn from the materials is the same as that had been drawn by the Collector of Customs. Nothing said in the judgment is intended in any manner to prevent complete examination and analysis of the evidence in other appropriate proceedings. All that we say is that we are not prepared to say that there was no evidence in the case from which a reasonable inference could be drawn that the respondent was involved by intentionally aiding by agreeing to sell whisky which would make him an abettor of an illegal act in the doing of a thing which would render the goods, whisky in this case, liable to confiscation u/s 112(a) of the Act. Section 112 is in these terms:

"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 u/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 u/s 111, shall be liable,--

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding five times the value of the goods or one thousand rupees, whichever is the greater;

(ii) in the case of dutiable goods other than prohibited goods, to a penalty not exceeding five times the duty sought to be evaded on such goods or one thousand rupees, whichever is the greater".

13. Counsel for the Master of the vessel urged before us that the charge that has been levelled mentioned Section 112 (a) and (b) of the Act and this section involves many offences and there was no clarification in the charge that any particular offence had been committed by the respondent, and that there has been no examination of the provisions of the section by the Collector of Customs and that there was no clear finding of the act or omission on the part of the respondent, which would render the goods liable to confiscation. No doubt, it is true that the charge did not mention specifically that the act committed by the respondent would fall u/s 112(a) and not u/s 112(b). There was, however, no complaint before the authority that he did not understand the charge or that he was not in a position to reply to the charges that were framed. The representations made by the respondent had been considered by the Collector of

Customs and on the materials that were available before the Collector of Customs the view could be taken that there has been at least abetment of the commission of the act, viz., the sale of whisky by the 2nd officer, which should have been in the store of the vessel, which rendered these goods liable to confiscation and, therefore, attracting Section 112(a).

14. Turning to the direction for confiscating the vessel, counsel for the respondent contended that this is not a case in which the vessel had been used as a means of transport in the smuggling of whisky and, therefore, no direction for the confiscation of the vessel could at all have been passed. His submission is that all that happened was that the vessel arrived in the port legitimately with a certain quantity of whisky, that whisky happened to be sold by the second officer without the knowledge of the Master of the vessel, and therefore the act which caused the removal of the whisky from the store of the vessel constituting an act of smuggling as defined in the Act has no nexus or connection with the transport of the whisky in the vessel by the owner or by the Master, an agent of the owner, and unless this nexus is established there can be no direction for confiscation of the vessel. This contention would have been a good point (though the question does not arise in this case) if there was no material to connect the vessel and the transport with the act of smuggling. If there was no thread of evidence to connect the transport of the goods with the smuggling the section would not have been attracted. The Section is in these terms:

"115. Confiscation of conveyance.-

(2) Any conveyance or animal used as a means of transport in the smuggling of any goods or in the carriage of any smuggled goods shall be liable to confiscation, unless the owner of the conveyance or animal proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the conveyance or animal and that each of them had taken all such precautions against such use as are for the time being specified in the rules:

Provided that where any such conveyance is used for the carriage of goods or passengers for hire, the owner of any conveyance shall be given an option to pay in lieu of the confiscation of the conveyance a fine not exceeding the market price of the goods which are sought to be smuggled or the smuggled goods, as the case may be.

Explanation: In this section "market price" means market price at the date when the goods are seized."

15. The question then is whether there was material to connect the vessel with the act of smuggling. Counsel for the respondent is justified in the submission that there must have been an idea of smuggling in the mind of the Master of the vessel and an act of transporting by using the vessel as a means of transport with that idea, in order that the section may be satisfied. This point seems to us to be well taken; but the finding of the Collector of Customs was that the sale of

whisky by the second officer was with the concurrence of the Master and the further inference was drawn from the other facts that there had been an excess storage of whisky in the vessel with a view, if necessary, to smuggle the whisky. These findings establish that the vessel was used as a means of transport with the idea of smuggling. The findings establish the requisite mens rea, and the findings, we think cannot be assailed in proceedings under Article 226 of the Constitution because they are based on material. The findings cannot be said to be unreasonable or perverse and this court cannot consider the adequacy or sufficiency of the evidence for the findings. We shall guard ourselves by saying that we are not entering any finding on this matter; but merely considering the question as to whether it can be said in proceedings under Article 226 of the Constitution that there was no material at all before the Collector of Customs for the conclusions that he had reached. The whisky in the store of a vessel could have disappeared for any of the reasons mentioned in the judgment under appeal and in such cases we do not think that the vessel would have been liable to confiscation, but the finding entered by the Collector of Customs was that it disappeared as a result of sale which had been effected by the second officer with the full concurrence of the Master. The word "concurrence" has been used as indicating an agreement with the Master and such an agreement will amount to conspiracy coming within the second limb of Section 180-A of the Penal Code; the Master would have thus abetted the sale which would make the vessel liable to confiscation. The Master of the vessel can therefore be directed to pay compensation in lieu of confiscation. However in view of the proviso to Sub-section (2) of Section 115 the fine imposed cannot exceed the market value of the goods which are sought to be smuggled or the market value of the smuggled goods. The fine here is in excess of the market value of the 39 cases of whisky (the market value it given as Rs. 56,160/- in paragraph 15, sub-paragraph (1) of Ext. P-5). Even if the value of 930 dollars is taken into account, the fine imposed is excessive. So the setting aside of the fine by the judgment under appeal will stand. That we make it clear that the setting aside of the fine will not preclude fresh, appropriate and legal orders being passed fixing the quantum of the fine after hearing the respondent

16. Our attention was drawn to the decision of the Supreme Court in *Amba Lal v. Union of India* AIR 1961 SC 264 from Which a passage has been quoted in the judgment under appeal, wherein it has been laid down that the fundamental principles of criminal jurisprudence and natural justice must apply and the burden of proof will be on the Customs authorities to bring home the guilt to the person alleged to have committed a particular offence under the Act by adducing satisfactory evidence.

17. The question of the evidence being satisfactory is a matter for the Collector or the authority functioning under the Act to consider. This Court in a proceeding under Article 226 of the Constitution cannot weigh the evidence and then say that the evidence is unsatisfactory or is inadequate or is insufficient to bring home the guilt to the person charged under the Act. This is a matter for the

Appellate Authority, and this Court cannot function as an Appellate Authority under Article 226 of the Constitution as it deals only with such cases as patent errors, perverse or arbitrary orders and so forth. Counsel relied on the same decision and contended that if burden of proof has been wrongly cast this court would interfere. But we do not think that there has been any such wrong casting of burden by the Collector of Customs.

18. We are aware that severe penalties have been imposed on the respondent, and that perhaps a different view was possible on the evidence before the Collector of Customs; this according to us is insufficient to justify interference by this Court.

19. We are, therefore, constrained to get aside the judgment under appeal and dismiss the writ petition except in regard to what is stated in paragraph above. We do so. We, however, consider that this is a case in which the parties should be directed to bear their respective costs throughout. We direct accordingly.

20. Before closing, we wish to state that the notice that was issued to the respondent, (The Master of the Vessel), C/o. South India Corporation (Agencies) (P) Ltd., was returned unserved with the endorsement "not known". Mr. V. K. Hamza, who appeared for the respondent (Master of the Vessel) in the O. P. was then contacted by the Court and he readily took notice and represented the respondent and argued the case before us.