
(1981) 08 BOM CK 0010

In the Bombay High Court

Case No : Miscellaneous Petition No. 1685 of 1977

Dhirajlal Amritlal Mehta

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 25-08-1981

Acts Referred:

Customs Act, 1962 — Section 110, 110(1), 110(2), 111, 112

Citation : (1982) 10 ELT 273

Hon'ble Judges : M.L. Pendse, J

Bench : Single Bench

Judgement

1. The petitioner is doing business of selling and buying rough diamonds and polished diamonds on commission basis since the year 1961. The petitioner used to reside in Gandhi Building, 2nd floor, Vile Parle, Bombay, in the year 1966. On June 15, 1966, the Officers of the Enforcement Directorate raided the premises of the petitioner on certain information that the petitioner was dealing in smuggled diamonds. At the time of the raid, the Officers noticed a cupboard under lock and key and that cupboard was duly sealed. The petitioner came back to his residence early next morning and in the presence of the petitioner the seal was opened and a packet containing diamonds was found in the cupboard. The statement of the petitioner was recorded by the Customs Authorities in presence of panchas and the petitioner disclosed that on June 13, 1966 he had purchased diamonds from Arunkumar & Co., merchants dealing in rough diamonds. The petitioner also produced the bill issued by Arunkumar & Co. for 555.67 carats of diamonds. The Officers thereupon weighed the diamonds in the packet and noticed that the weight of the diamonds was 625.57 cts. According to the Department, further statement of the petitioner was recorded and in which the petitioner accepted that he had purchased the diamonds from an unknown Muslim in Zaveri Bazar for a small amount. The Department claims that in the two subsequent statements recorded on June 16, 1966, the petitioner admitted that the bill issued by Arunkumar & Co. was not genuine.

2. The petitioner was put under arrest and produced before the Judicial Magistrate, but was released on bail on June 17, 1966. On the next day, i.e. June 18, 1966, the petitioner wrote to the Customs Authorities complaining that his two subsequent statements recorded on June 16, 1966, were untrue and were secured from him under coercion and threats. The complaint made by the petitioner was denied by the Customs Authorities by their reply dated June 25, 1966, wherein it was claimed that the statements were voluntary and the complaint of the petitioner was an after-thought. In answer to this letter, the petitioner reiterated his grievance by letter dated June 30, 1966 and demanded from the authorities the copies of the statements which the authorities claimed to have recorded. The Customs Authorities by their reply dated July 8, 1966 declined to furnish the copies forthwith and informed that the same would be handed over when adjudication proceedings commence. The petitioner made another attempt on July 14, 1966 to secure the statements by writing letter to the authorities. In answer to this letter, the Customs Authorities issued a summons to the petitioner to produce his books of accounts and the requisition was made on July 2, 1966.

3. On November 20, 1966, the petitioner requested the Customs Authorities through his Attorneys to furnish reasons which led the Officers to the reasonable belief that the diamonds found with the petitioner were smuggled goods. The further statement of the petitioner was recorded on November 30, 1966 and the petitioner disclosed that in addition to the purchase made from Arunkumar & Co. the petitioner has purchased diamonds weighing 240.83 cts. from M/s Shine India Corporation on May 5, 1966. Thereafter on December 17, 1966, the Assistant Collector of Customs informed the petitioner that the time provided under Sub-section (2) of Section 110 of the Customs Act, 1962, was extended. On December 21, 1966, the Assistant Collector furnished the grounds which led him to the reasonable belief that the diamonds found with the petitioner were smuggled articles. The two grounds set out in the letter are the prior information obtained by the Customs Authorities and the failure of the petitioner to lead satisfactory evidence of the legal acquisition of the diamonds in dispute. In answer to this letter, the petitioner wrote to the authorities on December 28, 1966 claiming that the grounds which have led the authorities to the reasonable belief were totally vague and insufficient. The petitioner also demanded that the Officer who seized the diamonds should be tendered for cross-examination to enable the petitioner to establish that there was no ground to arrive at a reasonable belief that the diamonds were smuggled articles.

4. The Assistant Collector of Customs, Preventive Department, served a show cause notice dated December 21, 1966, a copy of which is annexed as Exh. H to the petition, on the petitioner to show cause as to why the diamonds seized from the petitioner should not be confiscated and a personal penalty should be imposed as per the provisions of the Customs Act. In answer to this show cause notice the petitioner filed his reply, but the Collector of Customs, Preventive, Bombay, did not accept the defence of the petitioner and passed the order dated

September 7, 1970 confiscating the diamonds, in exercise of the powers u/s 111(d) of the Customs Act. The Collector also imposed a penalty of Rs. 5,000 on the petitioners in pursuance of the powers u/s 112 of the Customs Act. The order passed by the Collector was confirmed in appeal by the Central Board of Excise and Customs on May 23, 1974. The revision application preferred by the petitioner to the Government of India ended in dismissal by an order dated August 16, 1977. The petitioner thereafter filed the present petition under Article 226 of the Constitution of India to challenge the legality of the order of confiscation and imposition of personal penalty.

5. Shri Mehta, the learned counsel appearing in support of the petition, has raised three or four contentions to challenge the legality of the order of confiscation and the penalty imposed by the authorities below. The learned counsel submitted that the proceedings adopted by the authorities below commenced after a period of six months from the date of seizure and therefore the entire action of the Department was without jurisdiction and totally illegal. The learned counsel also submitted that the Collector has violated the principles of natural justice inasmuch as the officer who seized the diamonds was not produced for cross-examination though specifically demanded. It was also urged that there was no material produced on record to establish that the subsequent statements of the petitioner recorded on June 16, 1966 were voluntary in nature. The learned counsel also claimed that the material produced by the petitioner on record was more than sufficient to warrant a conclusion that the acquisition of the diamonds was perfectly legal and did not contravene any of the provisions of the Customs Act. A faint attempt was made to urge that it could not be held that the diamonds were seized from the petitioner because prior to the petitioner opening the cupboard it was sealed by the officers. Shri Sethna, the learned counsel appearing on behalf of the Department, submitted that the statements recorded by the Customs authorities on June 16, 1966 were perfectly voluntary in nature and the statements leave no manner of doubt that the petitioner had acquired the diamonds contrary to the provisions of law. The learned counsel also argued that though the proceedings for confiscation were not adopted within six months that would not exhaust the right of the Department to exercise powers u/s 124 of the Act.

6. In view of these rival submissions, the first question which requires determination is as to whether the Department was entitled to pass an order of confiscation of the diamonds seized when the show cause notice was served after expiry of period of six months from the date of the seizure. Shri Mehta relied upon the provisions of Section 110 of the Act and urged that Sub-section (1) enables the officer to seize goods which he has reason to believe are liable to confiscation. Sub-section (2) of Section 110 reads as under :

"Where any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession

they were seized."

This Sub-section clearly provides that the goods seized under Sub-section (1) must be returned to the person from whom possession was taken in case notice as contemplated under clause (a) of Section 124 is not served within a period of six months. Section 124(a) reads as under :

"No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person -

(a) is given a notice in writing informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;"

Shri Mehta submits that the diamonds were seized from the petitioner on June 16, 1966, while the show cause notice contemplated u/s 124(a) of the Act was served only on January 12, 1967. It is not in dispute that the show-cause notice was served after the expiry of six months from the date of seizure. Shri Sethna urges that though the notice was served after the expiry of six months, the proviso to Sub-section (2) of Section 110 enables the Collector of Customs to extend the time on sufficient cause being shown. The learned counsel argued that in the present case the Collector had informed the petitioner about the extension of time on December 17, 1966 and as the petitioner has not objected to such extension, it is not open for the petitioner to claim that the proceedings were barred by rule of limitation contemplated u/s 110 of the Act. The same reasoning appealed to the Central Board of Excise and Customs in appeal and that is evident from the contents of paragraph 6 of the appellate order.

7. Shri Mehta relied upon the judgment of the Supreme Court reported in Assistant Collector of Customs Vs. Charan Das Malhotra, in the case of The Assistant Collector of Customs & Superintendent, Preventive Service, Customs, Calcutta & Ors. v. Charan Das Malhotra and urged that the Collector cannot extend the period for giving notice of confiscation u/s 124(a) without giving opportunity of hearing to the person whose articles are seized as contraband. The decision of the Supreme Court entirely supports the claim of the petitioner. It is not in dispute that in the present case the Assistant Collector did not give any hearing to the petitioner before exercising the powers to extend the time. The Supreme Court has held that an opportunity of being heard ought to be given to the person from whom the goods are seized because the Collector while exercising powers of extension is exercising quasi-judicial powers. As the petitioner was not heard before grant of extension, it must be held that the order of extending the period done unilaterally by the Assistant Collector was totally illegal.

8. Shri Sethna submitted that the proceedings were not instituted within six months because the officer felt that the period of limitation will not apply in view of the decision of the Division Bench of this Court reported in 73 BLR 200 in the case of M/s Prakash Cotton Mills Pvt. Ltd. v. B.N. Rangwani. It is not in dispute that the said decision was over-ruled by the Supreme Court by Judgment

reported in Assistant Collector of Customs Vs. Charan Das Malhotra, It is futile for the Department to claim that their action could be justified in face of the Supreme Court judgment because of the erroneous view taken by the High Court. Shri Sethna also submitted that the provisions of Sub-section (2) of Section 110 would not apply and the authorities can confiscate the goods independently u/s 124(a) of the Act and for such confiscation no period of limitation is provided. The submission is totally misconceived. In cases where the goods are seized under Sub-section (1) of Section 110 the power to confiscate must be exercised within a period of six months and no failure the authorities are bound to return the goods. It is futile to claim that the Department could exercise the power of confiscation even in respect of seized goods beyond a period of six months. Shri Sethna's submission that the goods can be confiscated if they are brought in India in contravention of provisions of Section 111 of the Act at any time, cannot be entertained in respect of the goods which were seized under Sub-section (1) of Section 110 of the Act. The power of confiscation cannot remain available for all time to come in respect of goods seized u/s 110 of the Act. The submission of the learned counsel, therefore, deserves to be repelled. The result of this conclusion is that the proceedings adopted by the show-cause notice issued after the expiry of six months are illegal and without jurisdiction. The petitioner is entitled to succeed on this count.

9. The second submission of Shri Mehta that the authorities below violated the principles of natural justice also requires acceptance. The learned counsel submitted that the petitioner was claiming right from June 18, 1966, that is within two days of the search, that his first statement was recorded in presence of the panch witnesses while his subsequent statements were obtained under coercion and threat and they were not voluntary. The petitioner made several attempts to inform the authorities concerned about recording of the statements by coercion and in spite of it at the time of hearing before the collector no officer was examined on behalf of the Department to establish that the subsequent statements of the petitioner were voluntary in nature. The perusal of orders of the three authorities below clearly establishes that the authorities below relied heavily upon the subsequent statements of the petitioner which the Department claims to be voluntary. It is not sufficient for the Department merely to write letters to the petitioner to state that statements were voluntary. It is necessary to examine the officer in confiscation proceedings to establish that the statements were voluntary. Shri Metha is right in his submission that in spite of consistent grievance of the petitioner that the statements were secured under coercion the Department did not bother to examine the officer who had recorded the statement to establish that they were voluntary in nature. The learned counsel also submitted that though the petitioner had sought by his letter dated December 28, 1966 that the officer who seized the diamonds should be tendered for cross-examination, no effort was made by the Department to produce him for cross-examination. The learned counsel submitted that if the officer would have been produced, the petitioner would have established beyond doubt that the

subsequent statements were secured under coercion and not voluntary. In this connection, reliance was also placed upon two or three more circumstances and those are that although the first statement was recorded in the presence of panch witnesses, at the time of recording subsequent statements the panchas were not present. Another circumstance is that the prosecution launched by the Department against the petitioner was withdrawn by a letter dated September 7, 1970 on a statement that there was not enough evidence to prosecute the petitioner and therefore the Collector of Customs had decided not to launch the prosecution. On this statement being made before the Chief Presidency Magistrate, the petitioner was discharged by an order dated September 8, 1970. Shri Mehta is right in his submission that in case the statements were voluntary, then the Collector would have never permitted withdrawal of the prosecution on the ground that the evidence was not sufficient. Can there be any better evidence than the voluntary statement of the accused ? Shri Mehta is right that in case the prosecution would have proceeded, the officer recording the statement would have been required to step into the witness box to sustain the claim that the statements were voluntary and to avoid that the prosecution was not proceeded with. In my judgment, it is obvious that the failure of the Department to tender the officer for cross-examination and the failure to examine the officer in a confiscation proceedings to establish that the subsequent statements of the petitioner were voluntary in nature, is fatal and it was improper on the part of the authorities below to direct confiscation and impose penalty on the basis of such doubtful statements. The proceedings are required to be quashed also on this count.

10. Shri Mehta then submits that the Collector was not justified in arriving at a reasonable belief that the diamonds secured from the petitioner were smuggled articles and adopting the proceedings for confiscation u/s 124 of the Act. The submission is that the material produced by the petitioner on record unmistakably indicates that the acquisition of the diamonds was legal and no provisions of the Customs Act were contravened. In support of the submission, reliance is placed on the fact that on the date of the raid itself the petitioner gave statement about purchase of diamonds on June 13, 1966 from Arunkumar & Co. and also produced a bill in support of such purchase. It is further claimed that the petitioner disclosed about the purchase of another set of diamonds on May 5, 1966 from Shine India Corporation and bills in support of that purchase was also produced. In this connection it must be remembered that if the petitioner had purchased the diamonds on May 5, 1966, from Shine India Corporation, then there was no occasion for the petitioner not to disclose that fact on the date of the raid itself, nor the petitioner would have waited to disclose that purchase for a period of five months after the date of raid. This circumstance leaves no manner of doubt that the claim of the petitioner about the purchase from Shine India Corporation was clearly an after thought and could not be relied upon. Shri Mehta submits that the petitioner had produced the evidence of Shine India Corporation to substantiate his claim. Shri Sethna on the other hand points out

that the three authorities below have rejected this claim on the ground that it is impossible to believe that the petitioner would wait for a period of more than five months to disclose this purchase. I find considerable merit in the submission of Shri Sethna that it is impossible to accept the claim of the petitioner about the purchase effected from M/s Shine India Corporation. That leaves for consideration only the claim of the petitioner about purchase of diamonds from Arunkumar & Co. The authorities below have declined to accept the claim of the petitioner on a very vague ground. It is not in dispute that immediately after the raid the petitioner disclosed his purchase and produced the bill. The Collector felt some doubt as regards the genuineness of the bill, but it is impossible to conclude on the material on record that the bill produced by the petitioner was bogus. The proceedings adopted by the Department are quasi-criminal in nature and it is not necessary for the petitioner to establish beyond doubt that he has purchased the diamonds under the bill from Arunkumar and Company on June 13, 1966. In case the claim made by the petitioner is probable on the facts and circumstances of the case, then it is not open for the authorities to confiscate the diamonds in question. In my judgment, the authorities below overlooked that the fact that the petitioner made statement immediately and also produced the bill is sufficient to warrant a conclusion that the acquisition of 555.67 cts. of diamonds was legal.

11. Shri Sethna very vehemently urged that the Assistant Collector has taken into account five factors to record the conclusion that the claim of the petitioner could not be accepted and that being the finding of fact should not be disturbed in exercise of the writ jurisdiction. The grounds which appealed to the Collector are (i) that the petitioner did not produce his account books on the date of the raid itself. This ground could not be sustained, because it is not in dispute that on being summoned to produce the account books, the petitioner has produced his Rojmel and Khata Vahi. The second ground which appealed to the collector is that on the date of the seizure the petitioner was not aware of the total quantity of diamonds contained in the packet. It is true that the petitioner only produced the bill issued by Arunkumar & Co. and the bill covered the quantity of 555.67 cts. of diamonds only. That fact itself is not sufficient to conclude that the entire quantity of diamonds found in the packet was acquired in contravention of law. The Collector then relies heavily upon the contradictory statements alleged to have been made by the petitioner. The Collector proceeds on the basis that the subsequent statements made by the petitioner on June 16, 1966 were voluntary in nature. For the reasons mentioned hereinabove it is impossible to record that finding on the material available on record. One more circumstance which appealed to the Collector was that though the petitioner became aware that the Enforcement Officer had raided his residence late at night on June 15, 1966, he did not come back to his residence till early morning on June 16, 1966 and that circumstance indicates that the petitioner was manoeuvring to secure some bills to substantiate his illegal acquisition of diamonds. In my judgment, the circumstances relied upon by the Collector is totally perverse. There are several

reasons why the citizens of this city return back to the residence late at night and the mere fact that the petitioner returned to his residence early in the morning on June 16, 1966 is not sufficient to lead to the sole conclusion that the petitioner deliberately delayed his return to secure bill from Arunkumar & Co. In my judgment, it is impossible to hold that the available material could have led the Collector to a reasonable belief that the diamonds found with the petitioner were smuggled goods. In my judgment, the petitioner has given a reasonable and plausible explanation about the diamonds weighing 555.67 cts. and the Collector was not justified in confiscating diamonds of that weight. In case the Collector would have confiscated the balance of the diamonds then no fault could have been found with the order of the Collector. As I am holding against the Department on the first two grounds, the entire order of confiscation and personal penalty is required to be set aside.

12. It is necessary to make a reference to the submission made by Shri Sethna in regard to the nature of the statements of the petitioner. Shri Sethna argued that the subsequent statements of the petitioner were voluntary in nature and the principles of natural justice are not violated. The learned counsel urged that though the petitioner had demanded that the officer who seized the diamonds should be tendered for cross-examination, that request was not pressed before the Collector or in appeal before the Board. The learned counsel also submitted that the point about the failure to examine the witness to establish the voluntary nature of statements was also not raised before any of the lower Tribunals. It was also claimed that the panchas were present at the time of recording the first statement but they were not called for the purpose of recording the statement but for the purpose of seizure. The learned counsel desired that I should peruse the voluntary in nature. I declined to do so because it is not proper to enter into that arena when the Department has failed to examine the officer who recorded the statements to establish that the statements were voluntary in nature. The grievance of the petitioner that the officer who seized the goods was not tendered for cross-examination cannot be brushed aside by claiming that the claim was not pressed before the Collector. The petitioner had made the demand by writing letters and it is difficult to appreciate what the petitioner was required to do thereafter.

13. Shri Sethna relied upon two decisions, one of the Supreme Court reported in Pukhraj Vs. D.R. Kohli, in the case of Pukhraj v. D.R. Kohli, Collector of Central Excise, Madhya Pradesh & Vidarbha & Anr. and the other of Mysore High Court reported in AIR 1968 Mys 89 in the case of Ganeshmul Channilal Gandhi and another v. Collector of Central Excise & Asstt. Collector in support of his submission that the burden lies on the petitioner to establish that the goods seized from him were not smuggled goods. It is not necessary to consider the authorities in detail because the question is not whether the burden lies upon the petitioner, but whether the Customs Authorities had material to have a reasonable belief that the goods were smuggled.

14. Shri Mehta argued that it could not be claimed that the diamonds were secured from the petitioner, because before the petitioner arrived at his residence the cupboard in which the packet of diamonds was kept was sealed by the authorities. The submission is only required to be stated to be rejected. The packet was kept in a cupboard under lock and key and it is not in dispute that the key was in possession of the petitioner all throughout.

15. In the result, the order of confiscation and the personal penalty imposed by the Department is wholly illegal and deserves to be quashed. Accordingly, the petition succeeds and the rule is made absolute, and the orders passed by the Collector on September 7, 1970 and by the Central Board of Excise and Customs on May 23, 1974 and by the Government of India on August 16, 1977 are quashed. The respondents are bound to return the diamonds seized from the petitioner, but Shri Sethna informs me that prior to the filing of the present petition, the Department has sold the diamonds and the sale proceeds amounting to Rs. 1,05,868.05 are lying with the Department. The Department is bound to refund the amount to the petitioner within a period of three weeks from to-day. As the petitioner has paid the amount of penalty of Rs. 5,000/-, in pursuance of the order, the Department shall refund that amount also to the petitioner.

In the circumstances of the case, there will be no order as to costs.