

(1981) 11 CAL CK 0034
In the Calcutta High Court
Case No : Criminal Revision No. 2304 of 1979

Dilip Kumar Pyne

APPELLANT

Vs

S.N. Das Gupta, Assistant Collector of Customs for Preventive
(General) Customs House

RESPONDENT

Date of Decision : 18-11-1981

Acts Referred:

Customs Act, 1962 — Section 135, 140
Gold (Control) Act, 1968 — Section 31, 55, 58(2), 85, 93

Citation : (1989) 24 ECR 95 : (1988) 33 ELT 264

Hon'ble Judges : Amitava Dutta, J

Bench : Single Bench

Advocate : Bejoy Bhose and Asoke Roy, for the Appellant; Uma Sanyal, for the Respondent

Judgement

Amitava Dutta, J.—This Revisional application is directed against an order dated 18-10-1979 passed by the learned Judicial Magistrate, Howrah in Case No. 1807-C of 1972 rejecting the petition dated 6-11-1978 filed on behalf of the accused praying for his discharge.

2. On 3-10-1972 the complainant opposite party No. 1 Assistant Collector of Customs (Preventive) filed a petition of complaint against the petitioner before the learned Magistrate on the allegation that the petitioner had committed offences u/s 135 of the Customs Act and u/s 85 of the Gold Control Act read with Sections 31 and 55 of the said Act. The Prosecution case is that on 27-9-1970 some Custom Officers searched the jewellery shop under the name and style of "S.B. Pyne" and Co. of the petitioner and his partner at 342, Netaji Subhas Road, Howrah and recovered four cut pieces of gold weighing 17 tollas and 8.5 annas one of which bore foreign markings indicating that it was smuggled and thereby the petitioner has committed an offence punishable u/s 135 of the Customs Act and that on the said date the petitioner was in possession, custody and control of primary gold in contravention of the provisions of Section 31 and 55 of the Gold Control Act and as no satisfactory account was given of such possession, the

petitioner committed an offence punishable u/s 85 of the Gold Control Act.

3. The learned Magistrate took cognisance of the alleged offence on the said complaint and issued process against the petitioner. Thereafter the Prosecution examined twelve witnesses to prove its case. Before the learned Magistrate considered the question of framing charge the petitioner filed three separate petitions before him praying for discharge on the grounds that search conducted in the aforesaid shop was illegal for want of proper authorisation u/s 58(2) of the Gold Control Act, that proper sanction was not obtained u/s 97(1) of the said Act to file the petition of complaint against the petitioner and that the essential ingredients of the alleged offence u/s 85 of the Gold Control Act have not been made out. The learned Magistrate by his impugned order dated 18-10-1979 rejected the aforesaid three petitions.

4. Before this Court, the learned Advocate for the petitioner has raised several points in support of his contentions that the present prosecution against the petitioner is bad in law. One of the points raised is that as the averments in the petition of complaint as well as the evidence adduced by the Prosecution disclose that the alleged offences were committed by the Partnership firm viz. S.B. Pyne & Co. of which the petitioner and his brother are partners, the proceeding should be quashed because the partnership firm has not been impleaded in the case and there cannot be any prosecution of a partner who is vicariously liable for the alleged offence without the firm which is primarily liable being impleaded in the case. In this connection, reference has been made to the averments in paragraphs 4- and 5 of the petition of complaint wherein it has been alleged that on search of the jewellery shop of the accused under the name and style of Messrs. S.B. Pyne & Co. situated at 342, Netaji Subhash Road, Howrah and from inside the Safe in the shop the key of which was produced by the accused, four cut pieces of gold weighing 17 tollas and 8.5 annas (204.70 grams) were recovered one of which bore foreign markings and that the gold cut pieces so found were not entered into in the books and registers of the accused who is a licensed dealer under the Gold Control Act, 1968 as required by law. The Prosecution has examined P.W. 9 whose evidence is to the effect that the petitioner and Pradip Kumar Pyne, partners of Messrs. S.B. Pyne & Co., 44, Netaji Subhash Road, Howrah had gold dealer's license from 1963 onwards renewable after one year and the said license was renewed upto 1977. So the averments in the petition- of complaint along with such evidence of P.W.9 make out that the alleged offences were committed by the partnership firm of which the petitioner was one of the partners. In this connection reference has been made to Section 93 of the Gold Control Act and Section 140 of the Customs Act which provide that when an offence is committed by a Company which includes a Partnership firm, every person who at the time the offence was committed was in charge of and was responsible to the Company for the conduct of the business of the Company as well as the Company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. The learned Advocate for the petitioner has referred to a decision of the Supreme Court

reported in the case of State of Madras Vs. C.V. Parekh and Another, and the Division Bench decision of this Court in the case of G. Atherton and Company (Pvt.) Ltd. and Ors. v. Corporation of Calcutta (1979 CrL. L. 3 caljournal p. 86) and another decision of this Court in the case of Maya Chandra and Ors. v. The Inspector, Minimum Wages Office and Ors. (1979 CrL. L. Journal . 534 ors) as well as the decision of the Delhi High court in the case of Chander Bhan v. The State, reported in "All India Prevention of Food Adulteration Journal" 1978 at p. 141. The aforesaid decisions support the view that where an offence is shown to have been committed by a partnership firm, one of the partners of the firm cannot be prosecuted for the alleged offence without prosecuting the firm itself which is primarily liable. In my view, this contention raised on behalf of the petitioner is well founded and should prevail. The learned Advocate appearing for the opposite party has raised the point that the petitioner is individually responsible for the alleged offence and therefore the prosecution should be allowed to proceed but the said contention is not warranted by the averments made in the petition of complaint and the evidence already disclosed goes to show that according to the prosecution case the alleged offences were committed by the Partnership firm and the petitioner is but one of the partners. I cannot therefore accept the contention raised on behalf of the opposite party. In view of the finding on the point that the prosecution is bad in law without the partnership firm being impleaded as an accused and cannot proceed, it is not necessary to deal with the other points raised by the learned Advocate for the petitioner.

5. In the result, I find that the application succeeds. The proceeding pending against the petitioner in Case No. 1807-C of 1972 in the Court of the learned Judicial Magistrate, Howrah is quashed and the Rule is made absolute.