
(1963) 03 P&H CK 0038
In the Punjab And Haryana At Chandigarh

Gaurishankar

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 28-03-1963

Acts Referred:

Sea Customs Act, 1878 — Section 167(8)

Citation : AIR 1964 P&H 222 : (1964) CriLJ 545

Hon'ble Judges : I.D. Dua, J

Bench : Single Bench

Judgement

I.D. Dua, J.—A common question has been raised in these two writ petitions (Civil Writ Nos. 1389 and 1390 of 1961), and indeed the arguments were addressed only in Civil Writ No. 1389 of 1961 with the result that both these petitions would be disposed of by one judgment. The question raised is whether on the finding of the departmental authorities a personal penalty of Rs. 5,000/- imposed by the Collector of Central Excise and Land Customs, New Delhi is legally sustainable u/s 167(8) of the Sea Customs Act. The other points sought to be raised in the writ petition have not been urged at the time of arguments because as conceded by the learned Counsel for the petitioners they are no longer open to be canvassed, the legal position having since been authoritatively settled.

2. The short contention raised in support of the challenge to the penalty is. that the Collector of Central Excise and Land Customs has not found that Messrs Hanuman Sashay and Brothers were concerned in the offence of importation or exportation of goods which is prohibited or restricted by or under Chapter IV of the Sea Customs Act and that, therefore, there was no legal sanction for imposing the penalty within Section 167(8). The counsel has also made a reference to the order of the Central Board of Revenue dated 8-6-1960 on appeal from the order of the Collector dated 14-11-1958 and to the order of the Government of India dated 17/26-7-1961 on revision and it has been emphasised that even these orders do not disclose a finding contemplated by

Section 167(8) which alone can justify personal penalty.

3. In support of the legal position urged, the petitioner's learned Counsel has, to begin with, relied on a Bench decision of this Court in *S. Balbir Singh Vs. Collector of Central Excise and Land Customs, New Delhi and Another*, There, it was held that u/s 167(8) of the Sea Customs Act the penalty can only be imposed if the person subjected to the penalty has been concerned in the offence of importation or exportation of goods which is for the time being prohibited or restricted. In the case before the Bench it was not denied that there was no such finding on the record, with the result that the penalty of Rs. 3,000/- imposed was held unsustainable. The counsel very frankly also drew my attention to a Full Bench decision of this Court in *Union of India and Others Vs. Jagdish Singh Ishwar Singh*, , the ratio of which, as is apparent from the head-note, is-that when dealing with the question of imposition of penalty it is not necessary for the Collector to say in express words that he is satisfied that a particular person has been concerned in the importation of articles which had been confiscated. It may here be mentioned that a learned Single Judge-of this Court construed the decision in *S. Balbir Singh Vs. Collector of Central Excise and Land Customs, New Delhi and Another*, to mean that there must be an express-finding that the person on whom the penalty is to be imposed was concerned with the importation or exportation of the prohibited goods. The Full Bench while construing that Bench decision noticed that it had been conceded there without arguments-that there was no finding by the Collector that the person proceeded against had been concerned in the offence of importation or exportation of prohibited goods. The counsel has in this connection contended that the view of a learned Single Judge-of this Court in *Des Raj v. The Collector etc. Civil Writ No. 1621 of 1960 (Punjab)*, that the Full Bench overruled the decision in *S. Balbir Singh Vs. Collector of Central Excise and Land Customs, New Delhi and Another*, is not quite correct because the Full Bench merely distinguished the earlier Bench decision holding "that there was not even an implied finding about the person, on whom the penalty was imposed, to have been concerned in the offence of importation or exportation of prohibited goods. Reliance has also been placed on behalf of the petitioner on a decision by *Bishan Narain, J. in Ishwar Dayal v. Union of India Civil Writ No. 771 of 1960 (Punjab)*, where also in the absence of a finding by the Collector, even by implication, that the person on whom penalty was imposed had imported the gold in question, the order of penalty was quashed. The learned single Judge there is of the view that the proposition was well-settled in this Court that in the absence of a finding that the petitioner had imported the gold in dispute no penalty could be imposed. The counsel has conceded that the finding can be implied and need not be express but he has urged that there is no such implied finding in the case in hand.

4. On behalf of the respondents reliance has been placed on a decision given by *Gurdev Singh, J. in Hari Bam v. Union of India etc. Civil Writ No. 683-D of 1960 (Punjab)* where it has been observed that it is unnecessary for the Collector to give any specific finding about the petitioner being concerned in importing the gold

bars and that the finding that "he gold had been imported without lawful permit and that the petitioner was concerned with it being in possession of it was sufficient to sustain the order. The respondents" counsel has, in order to support the contention that the finding of the Collector justifies the imposition, also referred me to Annexure "A" which is a notice dated 24-12-1956 to Messrs Hanuman Sahib and Brothers calling upon them to show cause as to why the gold in question be not confiscated Under Sections 5(3) and 7(1) of the Land Customs Act and Section 167(8) of the Sea Customs Act and also as to why further penal action should not be taken for his having contravened the provisions of Section 5 of the Land Customs Act, 1924 and Section 8(1) of the F.E.R.A. read with Section 23-A ibid and Section 19 of the Sea Customs Act. The counsel has also drawn my attention to Annexure "C which is the explanation offered by Shri Gauri Shankar of Messrs Hanuman Sahai and Brothers to the Assistant Collector, Land Customs and again to the grounds of appeal preferred before the Central Board of Revenue in which the point now raised before me was not specifically included and finally to the grounds of revision to the Joint Secretary to the Government Of India in which also this point was not specifically raised. In regard to the penalty in the grounds of revision the only objection raised was that the maximum penalty which could be imposed was Rs. 1000/-.

5. The petitioner's counsel has in reply submitted that the point being one of law can be Taised at any stage and merely because this precise question was not agitated before the Central Board of Revenue or in the explanation offered by Shri Gauri Shanker to the Assistant Collector of Customs is immaterial. He has also contended the the mere fact that in the notice it has been stated that Messrs Hanurnan Sahai and Brothers had not been able to give any satisfactory evidence as to the procurement, through the normal channels, of the gold in question and that the facts gave sufficient reasons to believe that the said gold had been sent by Messrs Hanuman Sahai and Brothers from Amritsar by insured parcel after importing the same from Pakistan without a permit as is required u/s 5 of the Land Customs Act and further as to why further penal action should not be taken for contravention of the provisions of Land Customs Act, Sea Customs Act, and the P.E.R.A., is immaterial, because, according to the counsel, there must be a finding by the Collector about the petitioner being concerned in the offence in order to sustain the penalty imposed.

6. I have given fullest consideration to the arguments addressed at the Bar and have scrutinised the material placed on the record in the light of the submissions urged. It has to be remembered that in cases of illicit import or export of gold it is normally speaking .very difficult to have direct or positive evidence of actual commission or violation of the Customs Laws. By and large one has to depend on circumstantial evidence and it is in a large number of cases a matter of inference drawn from surrounding circumstances and conduct of the parties concerned. It is for this very reason that the legislature has in its wisdom, placed the burden of proof on the person from whom goods are seized in the reasonable belief of their being smuggled goods to establish the contrary. It is true that the belief is of the

goods being smuggled and not that the person from whom the goods have been seized is necessarily concerned in the illicit importation etc. It is, however, clear that the Collector of Customs has jurisdiction to decide both whether the goods are liable to confiscation and also whether the person concerned is liable to further pecuniary penalty provided u/s 167(8) Sea Customs Act.

The only question raised in the present case is that the Collector has done so without the requisite finding. Now in annexure "A" dated 24th December, 1956, the Assistant Collector expressly intimated to Messrs Hanuman Sahai and Brothers in detail that pursuant to secret information, the business premises at Amritsar of the said firm were searched on 18th June, 1956, by the Customs staff, after obtaining search warrants u/s 172, Sea Customs Act from the City Magistrate and as a result of the said search some documents and account book showing their transactions in gold, believed to be smuggled, were taken into possession by the Custom Staff, Acting on the same information, the District Magistrate, Amritsar, was approached by the Custom Staff, Amritsar, to order the detention of one post parcel No. 161 dated 18th June, 1956, despatched from Gum Bazar Post Office, Amritsar, and also to order the delivery of the said parcel to the Collector of Customs or to his representative for further enquiries. The same parcel was accordingly, in pursuance of the District Magistrate's order, taken delivery of from the General Post-office on 22nd June 1956. This parcel was shown to Shri Gauri Shanker proprietor of Messrs Hanuman Sahai and Brothers Jewellers who fully satisfied himself that all the seals on the parcel were intact; and on opening this parcel in the presence of the Supervisor of the General Post-office and Shri Partul Chand it was found to contain six pieces of gold and one letter written by one Laxmi Narain in Hindi on the printed form of Messrs Hanuman Sahai and Brothers addressed to the Madras office of this firm. Since Messrs Hanuman Sahai and Brothers had not been able to give any satisfactory evidence about the procurement, through the normal channels, of these twenty pieces of gold, those facts gave sufficient reason to believe that the above gold had been sent by Messrs Hanuman Sahai and Brothers from Amritsar by insured parcel post after importing the same from Pakistan without a permit as is required u/s 5 of the Land Customs Act and without permission from the Reserve Bank of India. Messrs Hanuman Sahai and Brothers were accordingly required to show cause why in, addition to confiscation further penal action should not be taken for the contravention of the provisions of Section 5 of the Land Customs Act and Section 8(1) read with Section 23-A of the Foreign Exchange Regulation Act and Section 19 of the Sea Customs Act.

Now this notice clearly shows that the department believed the petitioner to have imported the gold in question from Pakistan and the petitioner was accordingly called upon to show cause against this belief as well. Shri Gauri Shanker of Messrs Hanuman Sahai and Brothers through their counsel Shri Madan Mohan Sharma and Shri Hukam Singh on 21st June 1956 submitted an explanation in which it was admitted that the seals on the parcel taken from the General Post-office were intact when it was opened by the Customs authorities in Shri Gauri

Sbanker's presence. The explanation then contained the names of certain persons from whom the gold is stated to have been purchased. Shri Gauri Shanker in para 4 of the explanation stated that the gold recovered from the parcels had been purchased by him in his own account and therefore the joint books of the firm did not contain any corresponding relevant entry. It was denied that the petitioner had imported the gold in question from any foreign country in general and Pakistan in particular at any stage and submitted that the question of holding a permit u/s 5 of the Land Customs Act or permission from the Reserve Bank of India, as required under the relevant notification, did not arise. The gold in question was pleaded not to be liable to confiscation u/s 5(3) of the Land Customs Act; nor was it liable to confiscation u/s 7(1) of the Land Customs Act. A prayer was also made for a hearing through a legal representative of the firm who would argue the legal aspect of the memorandum comprehensively.

7. It appears from the order of the Collector of Central Excise that a personal hearing was actually granted to the counsel in the presence of his client and what was emphasised there was that the party's case had been fully stated in reply to the show-cause memorandum. According to the petitioner's case before the Collector, Shri Gauri Shanker had private dealings which were not disclosed to the partners of the firm and indeed he had kept those dealings secret from them. After considering the entire material before him, the learned Collector did not rely on the explanation offered by Shri Gauri Shanker and as a matter of fact he came to the positive conclusion that the statement made by the parties on 20th June 1956 was contradictory to the explanation tendered in their reply to the show-cause memorandum and also at the time of personal hearing. Holding therefore that Messrs. Hanuman Sahai and Brothers were engaged in the purchase of smuggled gold in their despatch to their Head-office at Madras, burden imposed on them under Section 178-A was found not to have been satisfactorily discharged. The seized gold was thus confiscated u/s 167(8) read with Section 19 of the Sea Customs Act as made applicable by Section 23-A of the Foreign Exchange Regulation Act, 1947. A penalty of Rs. 5,000- was also imposed by the same order.

8. Now as observed earlier the Collector has jurisdiction to impose this penalty and this has been settled on high authority; the only objection raised is that it has been imposed without a finding that the petitioner had been concerned in the illegal importation of gold. Whether there is any such implied finding and whether there is any material on the record justifying the same would appear to be a matter which could and should legitimately and appropriately be raised on appeal provided by the statute. As a matter of fact an appeal was actually preferred before the Central Board of Revenue and about 12 elaborate grounds were raised in the memorandum of appeal. But except for the general ground No. 12, "that the order of the learned Collector confiscating the gold and imposing a penalty of Rs. 5,000/- is wholly erroneous, illegal and unjust", I do not find any specific ground to the effect that in the absence of a finding, that the appellant there had been concerned in the offence of importation of

prohibited or restricted goods, the penalty could not in law be imposed. From the order of the Central Board of Revenue also it appears that this ground was not pressed. According to the appellate order the appellant there had failed to discharge the onus of proving u/s 178-A, Sea Customs Act, in" regard to the lawful importation into India of the gold under confiscation.

9. Again, in the grounds of revision preferred to the Joint Secretary to the Government of India, Ministry of Finance, also, I do not find any specific ground to the effect that there being no finding of the petitioner having been concerned in the offence of importation, the penalty could not lawfully be imposed, but, stress, as appears from ground No. 4 in the memorandum of revision, was laid on the argument that the penalty could not exceed Rs. 1,000/-. To quote the actual words it was averred "the penalty of Rs. 1,000/- provided by Section 167(8), Sea Customs Act, is the maximum penalty which could have been imposed by law." Presumably this ground was based on the view taken by G. D. Khosla, C. J. and Bedi, J. in *Gian Chand v. State*, Cr. R. No. 1566 of 1958 (Pigmy), a view which was doubted by another Bench of this Court and has since been held by the Supreme Court to be wrong.

9a. The respondent's learned Counsel has contended that the Collector's order having not been questioned on appeal and revision on the ground now canvassed, which involves a question of fact, should not be permitted to be raised on the writ side for first time. Had the point been raised on appeal and on revision, the tribunals would have determined the question on considering the evidence, but this having not been done the petitioner should not be allowed to challenge on this ground the Collector's order which has merged in the final order on revision,

10. There is certainly something to be said for -the respondents" contention, but at the same time it must be pointed out that my attention has not been drawn to any material from which it "is possible to infer or to raise an implied finding that the petitioner was concerned in the illicit importation of gold, for, unless he can be held to have been so concerned the penalty cannot in law be imposed. I am not unmindful of the presumption which may be permissible from the possession of smuggled gold, keeping in view the common course of human conduct etc., but such a presumption need not necessarily be that the possessor was concerned in the actual unauthorised importation of the smuggled gold: it may be consistent only with the receipt of such gold with the knowledge of its illicit character. But then that is not enough to attract the liability of personal penalty.

11. It is stressed that gold smuggling is a national menace and seriously affects the State's capacity to take measures for the security of the Republic and therefore deserves to be eliminated and suppressed with a strong hand. I agree that at the present juncture our national security is linked up with the elimination of this evil and no one can look at it with indifference, and also that persons who indulge in these prejudicial activities are, wittingly or unwittingly, doing irreparable injury to the cause of defence of the whole country. But, however anti-

national and distasteful to this Court the activities of these unpatriotic persons who callously indulge in illegally smuggling gold or who trade in smuggled gold, for reasons of personal greed so as to gain pecuniary benefit therefrom, so long as their activities do not clearly fall within the mischief of the law imposing personal penalty 5 they must be held entitled to the protection guaranteed by our Constitution. The basic principles of our jurisprudence enshrined in our Constitution, which we value so much, and for the preservation of which we are even today struggling hard, enjoin this Court to afford equal protection of the laws to every citizen and also to ensure that no citizen is subjected to any penalty except under the authority of law. Had the Customs Department come to an implied finding or had the respondents even pointed out to me material on the record reasonably sufficient to form the basis of such a finding I would have felt disinclined to interfere with the impugned T on the writ side, but in the absence of either of these two alternatives I think this Court cannot properly decline to give relief to the petitioner.

12. Before closing I should also like to observe that the remedy truly lies with the Parliament in making suitable amendment in the law and not with this Court which is only concerned with the enforcement declaration of the existing laws as it finds them uninfluenced by personal preferences: Courts cannot under the guise of construction make or supervise legislation.

13. As a result of the foregoing discussion, I am constrained to set aside and quash the imposition of personal penalty. The order of the confiscation, as already pointed out, was not challenged before me. The writ petition is thus allowed to the extent just mentioned. There will be no order as to costs of these proceedings.