
(1980) 09 KAR CK 0026
In the Karnataka High Court
Case No : Writ Petition No. 2517 of 1978

Gundu Govind Dhumale

APPELLANT

Vs

Collector of Customs and Central Excise

RESPONDENT

Date of Decision : 10-09-1980

Acts Referred:

Customs Act, 1962 — Section 115, 124

Citation : (1980) CENCUS 577 : (1993) 63 ELT 419

Hon'ble Judges : K.S. Puttaswamy, J

Bench : Single Bench

Advocate : J. Jeshtamal and R.U. Goulay, for the Appellant; U. L. Narayana Rao, SCGC, for the Respondent

Judgement

K.S. Puttaswamy, J.—In this petition under Article 226 of the Constitution the Petitioners have challenged the Order No. C. VIII/10/39/74 Cus. (OR 34/74) (S. No. 21/77) dated 31-12-1977 of Collector of Central Excise, Bangalore (hereinafter referred to as the Collector) (Annexure-A) in so far as it relates to confiscation of motor vehicle No. MEL 4681 under the provisions of the Customs Act of 1962 (Central Act No. 52 of 1962) (hereinafter referred to as the Act).

2. Few days before 8-10-1973, the petitioners purchased a new motor vehicle from M/s. Gotadki and Patil Company, automobile dealers, Belgaum. Under a hire purchase agreement entered into between them, petitioner No. 2, a co-operative Bank, inter alia engaged in the business of financing purchase, of vehicles, paid the price of the said vehicle to the dealer and allowed petitioner No. 1 to use the same as its registered owner on the terms and conditions stipulated in the hire purchase agreement. In the certificate of registration issued by the Regional Transport Officer, Belgaum (hereinafter referred to as the R.T.O.), functioning under the provisions of the Motor Vehicles Act of 1939 (Central Act No. 4 of 1939) (hereinafter referred to as the 1939 Act) the fact that petitioner No. 1 is the registered owner of the said vehicle and the same is subject to a hire purchase agreement with petitioner No. 2 are recognised by the said authority.

From 8-10-1973, petitioner No. 1 was using the said vehicle as its registered owner.

3. Petitioner No. 1 has alleged that he had permitted the use of the said vehicle by respondent No. 3 under an agreement and a general power of attorney dated 23-8-1974 (Annexures B and C) and from that day onwards he was using the said vehicle, though he continued to be the registered owner of the same.

4. On 19-12-1974 the aforesaid vehicle which was proceeding from Kumta to Sirsi, was intercepted by the officers of the customs department and was seized for the alleged violations of the Act. In the adjudication proceedings initiated, the Collector notified petitioner No. 1, respondent No. 3 and certain others, but not petitioner No. 2. On a consideration of the material placed before him, the Collector by his order dated 31-12-1977 found the vehicle was carrying foreign goods of the value of about Rupees fourteen lakhs and ordered the confiscation of goods and the vehicle, however permitting the release of the vehicle on payment of a sum of Rupees seventy thousand as fine in lieu of confiscation. The order of the Collector relating to the confiscation of the vehicle and its release with which we are concerned in this Writ petition, reads thus :

"All the foreign goods found in the Truck have not been claimed by any one. The goods themselves bear foreign markings on them. They were in large numbers and quantities, the total value of which is estimated at Rupees fourteen lakhs. Truck No. MEL 4681 was used for carrying the said goods. There is ample evidence that Jeep MYC 2311 was earlier used for carrying a part of the same goods. Accordingly, therefore, I find that the foreign goods found in the truck MEL 4681 were smuggled goods and order their absolute confiscation. The vehicle No. MEL 4681 used in carrying the said goods is also confiscated; but because the said vehicle was used for carriage of goods for hire and the market price thereof at the time of seizure, was about Rs. 75,000/- the owner of the said vehicle is given in option to pay a fine of Rs. 70,000/- (Rupees seventy thousand only) in lieu of its confiscation."

5. The petitioners have assailed the aforesaid order on more than one ground. But, at the hearing of this case, they confined their challenge only to the non-issue of notice, an opportunity of hearing and a consequent opportunity to petitioner No. 2 to claim the release of the said vehicle under the Act.

6. In his statement of objections, respondent No. 1 does not dispute that he had not notified and provided an opportunity of hearing much less an opportunity to claim the release of the vehicle to petitioner No. 2. But, respondent No. 1 claims that petitioner No. 2 who is only a financier is not the owner of the vehicle and was, therefore, not entitled to any notice and opportunity of hearing.

7. Sriyuths J. Jeshtmal and R. U. Goulay, learned counsel for the petitioners have contended that in law the real owner of the vehicle was petitioner No. 2 and the order made by the Collector is violative of Section 124 of the Act and the principles of natural justice. In support of their contention, learned counsel for

the petitioners strongly relied on the ruling of Pradeep and Co. Vs. Collector of Customs and Others,

8. Shri U. L. Narayana Rao, learned counsel for respondent No. 1 urged that petitioner No. 2 was not the owner of the vehicle and, therefore, he was not entitled for a notice either u/s 124 of the Act or the principles of natural justice and that the one and the only remedy available to it was to recover the amounts either from petitioner No. 1 or the other person as was liable to pay the same.

9. Respondent No. 3 who has been served by substituted service has remained absent and is unrepresented.

10. The assertion of the petitioners that the vehicle had been permitted to be used by petitioner No. 1 under a hire purchase agreement with petitioner No. 2, that neither petitioner No. 1, nor respondent No. 3 had paid all the instalments due thereto to petitioner No. 2, that petitioner No. 1 had not purchased the vehicle exercising the option to purchase on payment of the price, that the certificate of registration issue under the 1939 Act recognises petitioner No. 1 as only a registered owner and that the note relating to hire purchase with petitioner No. 2 had not been cancelled, which are not disputed by respondent No. 1 are amply borne out by the certificate of registration of the vehicle. Shri Narayana Rao also did not dispute the correctness of these facts.

11. Section 115 of the Act that gives the option to pay a fine in lieu of confiscation and claim for release or Section 124 of the Act that directs an authority not to make an order for confiscation, employs the terms "owner" of the goods or the conveyances. But, the said Act or the General Clauses Act does not define the term "owner" and, therefore, the meaning of that term, has to be ascertained as understood in common or general law.

12. R. M. Goods in his treatise on Hire Purchase defined Hire Purchase at Common Law in these words :

"A hire-purchase agreement as known to common law may be defined as a contract for the delivery of goods on hire under which the hirer is granted an option to purchase the goods. Being a species of bailment hire purchase is applicable only to goods i.e. to chattels personal capable of physical delivery.

Hire-purchase is distinguished from simple hire by the option to purchase which is given to the hirer. The word "option" is used advisedly. A true hire purchase agreement is one under which the hirer may elect to purchase the goods by fulfilling certain conditions but which does not bind him to purchase them. It is in this feature that a hire purchase agreement differs from a conditional contract of sale within the meaning of the Sales of Goods Act, 1893, or a credit sale as defined by the Hire Purchase Act, 1938.

A contract of sale is one under which, in addition to the seller being under a binding obligation to sell, the buyer is under a binding obligation to buy; a hire-purchase agreement is an agreement under which the hirer may purchase but is

not obliged to do so..."

13. The distinction between a "hire purchase agreement and credit sale" has been neatly summarised by the Law Commission of India in its 28th Report presided over by the then Chairman Shri T. L. Venkatarama Aiyer, an eminent retired judge of the Supreme Court in these words :

"There is, in law, a well defined distinction between agreements of hire purchase and credit-sales. A hire purchase agreement is a form of bailment. The hirer is given the right to purchase the goods on certain conditions. That, however, is an option, not an obligation to purchase. The hirer may elect to purchase the goods, and when he does that and fulfils all the conditions prescribed in the agreement the title to the goods will pass to him. But he may elect not to do so, and in that event he is entitled to return the goods and terminate the agreement in the manner provided therein. In an agreement of credit-sale, on the other hand, the purchaser has no right to terminate it as his option. If he did that, he would be in breach of the contract and would be liable, in law, in damages, vide *Lee v. Butler* 1893 (2) Q.B.D. 318; *Helby v. Mathews* 1895 A.C. 471; *Auto Supply Co. v. Raghunath Chetti* ILR 52 Mad. 829. In Halsbury's Laws of England, the distinction between hire purchases and credit sales is stated to be that "under the latter type of contract there is a binding obligation on the hirer to buy and the hirer can therefore pass a good title to a purchaser or pledgee dealing with him in good faith and without notice of the rights of the true owner, whereas in the case of a contract which merely confers an option to purchase there is no binding obligation on the hirer to buy, and a purchaser or pledgee can obtain no better title than the hirer had, except in the case of a sale in market overt."

14. In the 4th Edition of Halsbury's Laws of England, the distinction between Hire purchase agreements and conditional sale agreements is stated thus :

"Nature of an distinction between hire purchase agreements and conditional sales agreements. - The contract of hire purchase is one of the variations of the contract of bailment. But it is a modern development of commercial life, and the rules with regard to bailments, which were laid down before any contract of hire purchase was contemplated, cannot be applied without modification, because such a contract has in it not only the element of bailment but also the element of sale. At common law "Hire Purchase" properly applies only to contracts of hire conferring an option to purchase, but it is often used to describe contracts which are in reality agreements to purchase chattels by instalments, subject to a condition that the property in them is not to pass until all instalments have been paid. However, the distinction between these two types of contracts is a most important one because under the latter type of contract there is a binding obligation on the hirer to buy and the hirer can therefore pass a good title to a purchaser or pledgee dealing with him in good faith and without notice of the rights of the true owner, whereas in the case of a contract which merely confers an option to purchase there is no binding obligation on the hirer to buy, and a purchaser or pledgee can obtain no better title than the hirer had, except in the

case of a sale in market overt, the contract not being an agreement to buy within the Factory Act, 1889 or the Sale of Goods Act, 1893."

15. In passing, it is useful to notice that the Hire Purchase Act of 1972 (Central Act No. 26 of 1972) that has not so far come into force and cannot, therefore, be relied on also recognises the above distinctions and does not destroy the true concept of a Hire Purchase as understood in Common Law.

16. In the case of a vehicle that is subject to hire purchase, the registered owner of the vehicle is only a hirer of the same, and its real owner is only the financier of that vehicle. The hirer does not become the owner till he pays all the instalments and the purchase price, though he is recognised as its "registered owner" in the records of the authorities functioning under the 1939 Act. While the hirer is under no obligation to purchase the vehicle, he becomes its owner on payment of all the instalments, exercises the option to purchase and pays the purchase price to the real owner of the vehicle. The mere user of the recognition by the authorities under the 1939 Act, does not by itself make him the owner of that vehicle.

17. On facts there is no dispute that petitioner No. 1, the registered owner, had not paid all the instalments, exercised the option of purchase and had not paid the purchase price to petitioner No. 2. When that is so, it follows that petitioner No. 2 was the owner of motor vehicle No. MEL 4681 as on the dates the same was seized, proceedings were initiated and the order for confiscation was made by the Collector. But, the same is not the position in the case of respondent No. 3 to whom a show cause notice had been issued.

18. Section 124 of the Act peremptorily directs that an order for confiscation or penalty, cannot be made without notifying the owner of the goods or the vehicle and an opportunity of oral hearing, if demanded by the owner. Section 124 couched in negative terms is a mandatory provision and a proceeding as in this case in disobedience of the same cannot be allowed to stand. In Pradeep and Company's case, Sinha. J. has also taken a similar view and I am in respectful agreement with the same.

19. Even in the absence of a statutory provision, the authority on the application of the principles of natural justice could not have made an order prejudicial to the interests of petitioner No. 2 without notice to it and providing an opportunity of hearing. In this view also, the order of the Collector is liable to be quashed.

20. Learned counsel for the petitioners urged that having regard to the delay and time already occupied, there is no justification to permit the Collector to issue a fresh show cause notice and re-determine the matter.

21. Sri Narayana Rao urged that the infirmity, if any, in issuing a show cause notice and the time already spent are not sufficient to order the release of the vehicle without holding a fresh enquiry.

22. On a total misunderstanding of law, to which the petitioners have to some

extent contributed, the Collector did not issue a show cause notice to petitioner No. 2 and thus committed an illegality. By reason of such an illegality alone this Court would not be justified in directing the release of the vehicle without compelling the authority to perform its legal duty in accordance with law. Unfortunately, for reasons that are not necessary to examine, considerable time has elapsed, but the same cannot be a ground to order the release of the vehicle. Lastly, petitioner No. 2 who was originally impleaded as respondent No. 2 was transposed as petitioner No. 2 at whose instance this Writ Petition is not allowed by this Court. For all these reasons, I am of the opinion that this Court cannot order the release of the vehicle and the matter was necessarily to be re-examined by the Collector.

23. The order impugned is not separable and, therefore, the same cannot be maintained even against petitioner No. 1. In this view, it is necessary to quash the impugned order and direct the Collector to issue notices to the petitioners and dispose of the matter in accordance with law.

24. As it is, the matter relating to the release of the vehicle that is subject to deterioration and decay is pending for well over five years. In this view, it is necessary to direct the Collector to complete the proceedings with utmost expedition in any event within a period of three months from the date of receipt of the order or writ of this Court.

25. In the light of my above discussion, I quash the order dated 31-12-1977 of the Collector in so far as it relates to the confiscation of motor vehicle No. MEL 4681 and direct him to issue a show cause notice to the petitioners, in particular, petitioner No. 2 and dispose of the matter in accordance with law with all such expedition as is possible in the circumstances of the case and in any event within a period of three months from the date of receipt of the order or writ of this Court.

26. Rule issued is made absolute.

27. In the circumstances of the case, I direct the parties to bear their own costs.

28. Let the Order/Writ be sent to respondent No. 1 within a week from this day.