

(1959) 03 BOM CK 0028
In the Bombay High Court
Case No : Misc. Application No. 472 of 1958

Humayun Abdullali

APPELLANT

Vs

M.G. Abrol and Another

RESPONDENT

Date of Decision : 11-03-1959

Acts Referred:

Constitution of India, 1950 — Article 226
Sea Customs Act, 1878 — Section 167, 188

Citation : AIR 1960 Bom 329 : (1959) 61 BOMLR 1633

Hon'ble Judges : K.K. Desai, J

Bench : Single Bench

Advocate : V. Rajgopal and M.H. Thakkar, for the Appellant; Chinoy and Sorabjee, for the Respondent

Judgement

(1) This is a petition under Art. 226 of the Constitution challenging the validity of two orders, one made by the 1st respondent, viz., Additional Collector of Customs and the second made by the Central Board of Revenue in appeal against the order made by the 1st respondent. The relevant facts as appearing from the documents annexed to the petition and the affidavit in reply are as follows:

(2) In 1955 the petitioner received an inquiry from some foreign customer for export and sale from India for coarse white goat-hair or wool. The petitioner had in that connection sent his material which is described as petitioner's type 100AA to that foreign customer. The petitioner was in doubt as to whether he could export his goods as wool waste which did not require export licence or only as raw wool which required export licence. In that connection the petitioner's representative interviewed the Deputy Marketing Development Officer in Bombay with a sample: but the officer refused to give any opinion intimating to the petitioner that it was not his function to give opinions to the petitioner.

(3) The petitioner thereafter in 1956 shipped 25 bales of his goods outside India in the end of January 1956. The petitioner further shipped 10 bales of his goods outside India in May 1956. On 15-10-1956 the petitioner submitted his shipping

bill No. 2402 in connection with 15 bales mentioned in the petition. These bales were described in the shipping bills as 6534 Lbs. of Indian wool waste of the value of Rs. 11,000/- to be shipped by S. S .Aagtedijk. In connection with these goods of the petitioner there being doubt as to whether it was waste wool, the Customs appeared to have taken opinion of the senior Marketing Development Officer, Wool Bristles and Goat Hair Grading Scheme, Bombay. The opinion of the officer was that the petitioner's goods were not waste wool. By a show cause notice dated October 22nd, 1956 the Assistant Collector of Customs gave notice to the petitioner that the shipping bill contained a misdeclaration of the description of the goods and involved an attempt to evade restriction export of the articles in question. The petitioner was called upon to show cause as to why action should not be taken against the petitioner he was informed that his goods were examined by the Officer mentioned above and were found to be "not wool waste." He was also informed that the goods were "Indian Wool Raw" and that they could not be allowed to be exported without a grading certificate from the competent authorities and without the endorsement from the Export Trade Control Authorities for having licensed the goods as "Indian Wool Raw." As to the fact that there existed as regards wool the aforesaid restrictions on export requiring "grading" of the goods and "an Export Trade Control Licence" there is no dispute. The petitioner has not made any grievance in the petition that he was not informed of all the material facts relating to the offence which he had attempted to commit.

(4) By his letter dated 22-10-1956 the petitioner applied for permission to recover back the material from the docks. On 23-10-1956 the Assistant Collector of Customs gave a hearing to the petitioner. On 27-10-1956 the petitioner addressed a letter to the Agricultural and Marketing Adviser, Government of India, for the purpose of obtaining an opinion as regards the question whether the goods of the petitioner were waste wool or raw wool. Waste wool did not require any licence but raw wool required Export Trade Controller's endorsement of having licensed the goods as also a grading certificate of the goods for the purpose of export thereof. By his letter dated 29-10-1956 the petitioner offered to execute a bond in terms of the draft annexed to that letter in connection with the return of the goods to the petitioner pending the decision of the question as to whether the petitioner's goods required "grading" and an Export Licence. On 31-10-1956 a second hearing was given by the Assistant Collector of Customs to the Petitioner; and further hearing was fixed for November 5th, 1956. By his letter dated 1-11-1956 the petitioner made his written submissions to the Assistant Collector of Customs as regards the facts which had arisen in the case of the petitioner. The petitioner informed the Assistant Collector of Customs that he did not accept the decision of the Senior Marketing Development Officer in Bombay as correct. The petitioner had challenged this decision by his letter addressed to the Agricultural and Marketing Adviser at Delhi a copy of which was enclosed with the letter to the Assistant Collector of Customs. The petitioner recorded that pending the decision of the question whether the petitioner's

goods were or were not wool waste by the Marketing Adviser at Delhi it would not be possible to complete the question that had arisen in respect of the petitioner's goods and that the hearing by the Assistant Collector of Customs on 5-11-1956 should not therefore proceed. The petitioner desired that the petitioner should be permitted to remove his goods from the docks and that the Assistant Collector of Customs should consider the merits of the case after a final report had been obtained from the Marketing Adviser, at Delhi. The petitioner thereafter executed a bond on 7-11-1956, relevant part whereof runs as follows:

"In consideration of the Assistant Collector of Customs allowing us to take the consignment in the schedule below, back into town, we hereby undertake in the event of the samples drawn from the consignment in our presence being found to be "wool" and not "wool waste" by the Agricultural and Marketing Adviser, Ministry of Food and Agriculture, Government of India within three months,

(1) to pay such penalty as may be imposed by the Customs authorities,

(a) for not having produced the Export Trade Control licence for the correct description "Raw wool.

(b) for not having not the wool graded in accordance with Wool Grading and Marking Rules 1953.

(c) for having misdescribed the goods as "wool waste" instead of "wool raw"

(2) to bring back the said goods to enable the Customs authorities to confiscate the same or in default pay such fines in lieu of confiscation as may be adjudged by the Customs authorities".

The contents of this bond I will have to refer to in dealing with the arguments of the petitioner before me once again.

(5) By his letter dated 13-12-1956, the Marketing Adviser of the Government of India gave his opinion in respect of the goods of the petitioner. The relevant part of that letter runs as follows:

"It is found that the consignment is not of wool waste but consists of mixed wool containing pulled wool and skirtings, obtained from hairy type of South Indian Sheep. This cannot be allowed for export unless graded under Agmark.

The waste wool known in commerce consists of noils, soft waste, hard waste and finishing wastes; these are obtained during different processing operations such as combing, carding, drawing, spinning and finishing.

The Senior marketing Development Officer, Bombay has been asked to grade this consignment under Agmark and allow it for export if it fulfils conditions under grade X".

(6) By the first impugned order dated 23-8-1957 the ADDITIONAL Collector of Customs recited the relevant facts: including the opinion of the Senior Marketing Officer, Bombay and recited that it was ascertained that an export licence was

not produced as necessary and that offence attracting the provisions of Section 167 clause 8 read with Section 19 of the Sea Customs Act was thereby established and a show cause memo was accordingly served on the exporter. He relied upon the findings of the Agricultural Marketing Adviser to the Government of India and in the operative part of his order he mentioned as follows:

"The explanation tendered by the exporters is not at all satisfactory and I am satisfied that Messrs. Faiz and Company deliberately misdeclared the description of goods in order to evade grading of bales. Further the licensing policy of raw (Indigenous) wool is stricter than that for wool waste".

He therefore imposed a personal penalty of Rs. 1,00/- u/s 167 clause 8 of the Sea Customs Act and ordered payment thereof.

(7) Against that order the petitioner filed an appeal under the provisions of s. 188 of the Sea Customs Act to the Central Board of Revenue in appeal No. 207 of 1958 on 18-10-1957. A copy of the memorandum of appeal is part of Ex. F to the petition. The headings of the grounds on which his appeal was filed are to be found in paras (sic) after paras 5, 6 and 20 in the memo of appeal. The first ground is that the above order is illegal and invalid as passed without giving the appellant a hearing or an opportunity to give his explanation. The second ground is that the appellant did not deliberately misdeclare the description of the goods and acted bona fide. The third ground is that the respondent should not have imposed a personal penalty or any penalty in the circumstances of this case even if export of the goods was not allowed. These grounds are elaborated in paras 6 to 25 in the memo of Appeal;.

(8) The petitioner was admittedly called upon to appear before the Central Board of Revenue if he so desired. The petitioner however failed to appear before the Central Board of Revenue. By its decision dated 13-8-1958, the Central Board of Revenue held as follows:

"The appellants were given an opportunity to appear for a personal hearing, asked for, but they did not avail of it. The Board has, therefore, considered the appeal with the help of records of the case".

The Central Board of Revenue decided as follows:

"All the arguments put forth in the appeal have been carefully considered but the Board sees no reason to interfere with the Order (original) passed by the Additional Collector of Customs, BOMBAY".

(9) The petitioner has challenged the orders passed by the Additional Collector of Customs and the Central Board of Revenue on diverse grounds mentioned in the petition; but the grounds on which the petition is argued before me are as follows:

1. The impugned order of the Additional Collector of Customs was passed in violation of the fundamental principles of legal and natural justice inasmuch as he failed and neglected to give a hearing to the petitioner subsequent to the

opinion dated 13-12-1956 given by the Agricultural Marketing Adviser to the Government of India. It is contended that for that reason the order is a nullity, and is passed without any jurisdiction.

2. There is an error apparent on the face of the record inasmuch as the offence, if any, has been committed under S. 167 clause 37 of the Sea Customs Act.

3. There were no facts in existence for making a finding against the petitioner under the provisions of S. 167 clause (8) of the Sea Customs Act.

4. There was no power in either of the tribunals to impose any penalty on the petitioner under S. 167 clause 8 of the Act.

(10) On the basis of the aforesaid contentions it is argued that the orders passed by both the tribunals are without jurisdiction and it is further argued that the order of the Additional Collector being a nullity does not merge in the order of the Central Board of Revenue and this Court has therefore jurisdiction to give relief to the petitioner.

(11) I will first deal with the contention of the petitioner that a finding could not be made against the petitioner under S. 167 clause (8) of the Act. The relevant part of clause (8) may be paraphrased as follows:

"If any attempt be made to export any goods, the exportation of which is for the time being prohibited restricted by or under Chapter IV of this Act there would be an offence".

(12-13) Now, it is admitted by Mr. Rajgopal for the petitioner that there was at all material times a prohibition and restriction imposed under Chapter IV of the Sea Customs Act in respect of raw wool and not on export of wool waste. It is admitted that a grading certificate was required and it was also necessary to obtain Export Trade Control licence before raw wool could be tendered for export. It would therefore follow that if the petitioner's goods were wool waste, the same could be exported without any export licence and if his goods were in fact raw wool he would be committing an offence under item (8) of S. 167. That failure to comply with the aforesaid conditions was the charge against him was clear to the petitioner as appears from the terms of the bond which was executed by the petitioner on 7-11-1956 in favour of the Customs. Para 1 of the bond deals with the offence which he would be committing, viz., that he had attempted to export raw wool without a licence and without the same being graded and had for that purpose misdescribed the goods as wool waste.

(14) Mr. Rajgopal has referred me to item (37) of s. 167 the relevant part whereof runs as follows:

"If it be found, when any goods are entered at, or brought to be passed through, a custom house for exportation (a) the packages in which they are contained differ widely from the description given in the bill of entry or application for passing them, or (b) the contents thereof have been wrongly described in such

bill or application as regards the denominations, characters or conditions according to which such goods are chargeable with duty, or are being imported or exported" and such circumstance is not accounted for to the satisfaction of the Customs Collector".

(15) Mr. Rajgopal has contended that the petitioner's goods had not been exported and that according to the findings of the 1st respondent the contents of the bales of the petitioners were wrongly described in shipping bill as regards the denominations, characters or conditions according to which such goods were chargeable with duty. There are considerable difficulties in accepting the contention that describing of "wool" as "wool waste" relates to wrong description of denominations character or conditions of packages tendered for export.

(16) I do not accept the contention of Mr. Rajgopal that item 37 is the only item under which action could be taken by the Customs authority against the petitioner. The contention that the conduct of the petitioner was such that he was committing an offence under item 37, and the petitioner therefore could not be by the same conduct committing an offence under another item of S. 167 of the Act I have not appreciated. It is not impossible that an exporter or an importer may be committing offences under more than one item contained in S. 167 by reason of the same acts or conduct. It is not as if the enquiry officer is bound to charge an offender under each of the items of offences committed. In my view the contention of the petitioner that action might have been taken against him under item 37 of S. 167 is wholly irrelevant.

(17) The only question which the petitioner may raise and is entitled to raise is that the finding that he had committed an offence under clause (8) of S. 167 of the Act was finding without jurisdiction altogether or was otherwise bad because the 1st respondent and/or the Central Board of Revenue in the proceedings before them acted in violation of the principles of natural justice.

(18) Mr. Rajgopal contends that to the facts of the petitioner's case item 8 of S. 167 cannot apply at all.

(19) Now the findings of facts on which it is held that the petitioner committed an offence under item 8 of S. 167 are clear. It is found as a fact that the petitioner attempted to and tendered for export the goods which under relevant notifications ought to have been graded and which required the Export Trade Controller's licence. That was held to be an attempt to export goods contrary to the provisions and restrictions made under Chapter IV of the Act. Having regard to these findings of facts I am unable to accept Mr. Rajgopal's contention that on these facts it was not permissible for these authorities to make a finding that the petitioner was committing an offence under item 8 of S. 167.

(20) As regards the contention of the petitioner that no opportunity was given to the petitioner to be heard after the opinion of the Marketing Adviser to the Government of India dated 13-12-1956 was received; there is no doubt that the petitioner was not informed that the 1st respondent was going to make his

findings on the basis of that opinion. The Petitioner was not given any opportunity to be heard on the opinion given by the Marketing Adviser of the Government of India. That he was not given such opportunity was developed in several of the grounds mentioned in the memo of appeal before the Central Board of Revenue. It is admitted that the petitioner was called upon to be present to be heard before the Central Board of Revenue. The petitioner never availed of that opportunity to argue this contention as also to make his contentions on the merits of the case before the Central Board of Revenue. The petitioner by his own conduct neglected to appear before the Central Board of Revenue.

(21) It is well established that where appeal is provided for and is filed the whole of the case is rendered open for arguments before the appellate authority; and the decision in appeal ceases to be final. The order of the first Court would be subject to revision, alteration, variation and setting aside by a decision of the appellate tribunal. Except in the event of the appellate tribunal deciding the appeal on technical questions of law, such as, jurisdiction or limitation or other similar questions the order of the 1st tribunal would merge in the decision of the appellate tribunal. Technical or other defects existing in the proceedings before the first Tribunal would be subject matter of investigations by the appellate Tribunal. The grievance of the petitioner that he had not been given a hearing after the opinion of the Marketing Adviser to the Government of India was received was before the appellate tribunal and I must assume that the same was considered by the appellate Tribunal. I must further assume that the appellate Tribunal considered the merits of the petitioner's case as appearing in the memo of appeal as has been mentioned in the operative part of the order of the appellate Tribunal, viz., Central Board of Revenue. It is significant that in his memo of appeal the petitioner has developed in great detail every possible argument which could be advanced for arriving at a conclusion in favour of the petitioner. In spite of the petitioner being absent all these arguments are stated to have been considered by the Central Board of Revenue. The question therefore is (that though the Appellate Tribunal considered all the grievances of the petitioner including the grievance that the petitioner has had no hearing ;and opportunity of being heard before the 1st respondent) whether for the reason that in the proceedings before the 1st tribunal i.e. the 1st respondent principles of natural justice were violated, the findings of the Central Board of Revenue must be set aside. In my view the question is not of setting aside the order of the 1st respondent. The real question is whether there are any reasons why this Court should set aside the decision of the Central Board of Revenue.

(22) In this connection Mr. Rajgopal had relied upon the decision in Collector of Customs, Madras Vs. A.H.A. Rahiman, and contended that if the proceedings before the 1st respondent are held to be vitiated by reason of violation of principles of natural justice, the decision of the 1st respondent must be held to be a nullity and that in the event of the decision of the 1st respondent being held to be nullity, the decision of the Central Board of Revenue must fall altogether and

need not be at all considered as regards the validity thereof. Mr. Rajgopal contends that the decision of the first respondent is a nullity and therefore does not merge in the decision of the appellate Tribunal. The relevant part of the observations in that case are at p. 658 where relying upon certain observations in the case of *Barnard v. National Dock labour Board* (1953) 2 QB 18, it is held as follows:

"We agree with what Rajagopala Ayyangar J. has said in the judgment under appeal, namely,

If the order of the Collector was one passed with jurisdiction then there might be some basis for the argument that it got merged in the appellate order. But if that order was nullity in that procedure dictated by natural justice was not followed, there was no order which could be the subject and confirmation by the appellate authority."

The above observations came to be made because in the case before the Madras High Court it was found as a matter of fact that no notice was issued to the appellant before proceedings were taken to impose penalty and the appellant was not given an opportunity to show cause why the penalty should not be imposed and even if it should be imposed, the circumstances which should be taken into account in determining the quantum. The contention that was raised was that by reason of failure to give notice of any kind having been given the proceeding of the Collector was "void ab initio" the order made by the first tribunal would not merge into the order of appellate tribunal. the ratio of that decision appears to me to be that where no notice of any kind is given in respect of the proceedings being "void ab initio" the order made by the first tribunal would not merge into the order of appellate tribunal. the ratio of that decision appears to me to be that where no notice of any kind is given in respect of the proceedings for imposing penalty the proceedings should be held to be "void ab initio" and in such a case the decision of the first Court would be entire nullity. Now the facts in this petition are in material particulars different. Admittedly the proceedings were commenced by the show cause notice dated 22-10-1956. The proceedings cannot therefore be held to be "void ab initio". In fact admittedly the petitioner appeared before the assistant Collector of Customs and had hearings and entered into correspondence for allowing the petitioner to withdraw the goods on execution of a bond. The petitioner gave an undertaking by the bond to accept the decision as regards penalty and forfeiture of his goods in the event of the opinion of the marketing Adviser to the Government of India being contrary to the submissions of the petitioner. I cannot therefore make a finding that the proceedings which were undertaken in this case were "void ab initio". There is no doubt that at a much subsequent stage having regard to the undertaking given by the petitioner in the bond already referred to by me the 1st respondent proceeded to levy penalty and make his findings without giving any notice to the petitioner that the 1st respondent was about to proceed to make his findings. If the petitioner had not filed an appeal he may have well argued that the

decision of the 1st respondent was vitiated by reason of failure of the 1st respondent to give to the petitioner a further opportunity to be heard. the setting aside of the order of the 1st respondent on that ground would not be setting aside the order on the ground of want of jurisdiction or on the ground that the proceedings were void ab initio. the ground of failure to give a hearing having arisen at a much subsequent stage the proceedings were not void ab initio. In my view the observations in the Madras case cannot be applicable to the facts in this petition and I would not be justified in accepting the contention of Mr. Rajgopal that the order of the 1st respondent does not merge in the decision of the Central Board of Revenue.

(23) It is also relevant in this connection to refer to the provisions of S. 188 of the Act. The relevant part of s. 188 runs as follows:

"Any person deeming himself aggrieved by any decision or order passed by an officer of Customs under this Act may xx xx x appeal therefrom to the Chief Customs authority xx xxx such authority or officer may thereupon make such further inquiry and pass such order as he thinks fit, confirming, altering or annulling the decision or order appealed against. x x x x x

Every order passed in appeal under this section shall, subject to the power of revision conferred by S. 191, be final".

It is patent on the language of this section that once an appeal is filed the whole of the subject matter of inquiry is open for decision by the appellate Tribunal. The decision which the appellate Tribunal has to arrive at would be confirming, altering or annulling the decision or order appealed against. the appellate Tribunal for the purpose of deciding the subject matter of inquiry has power to make such further inquiry as it deems fit. In my view this provision makes it abundantly clear that the appellate Tribunal takes up the whole of the subject matter of inquiry as if in original Court and both the parties to the appeal would be entitled to submit all relevant evidence before the appellate Tribunal. This being the position in my view where an appeal is filed and disposed of on merits under the provisions of s. 188 of the Sea Customs Act it would not be possible to accept the contention that the order of the first tribunal does not merge in the decision of the appellate tribunal. It is in that connection important to bear in mind that the section provides that it is the order of the appellate Tribunal which is final. In this case every grievance of the petitioner was recited as and by way of ground of appeal in his memo of appeal and was before the appellate Tribunal. The appellate Tribunal after coming to the conclusion that the 1st respondent had failed to give an opportunity to the petitioner to be heard was entitled to hear and would have heard every submission which the petitioner wanted to make in connection with the final order that should be passed in the matter of the case of the petitioner. The petitioner by his own conduct failed to appear before the appellate Tribunal and his grievance appears to me to arise out of his own negligence and conduct. He has no explanation to give why he did not appear before the appellate Tribunal. He is not in a position to contend that the

appellate Tribunal did not consider every aspect of his case which was argued in detail in his memo of appeal. In my view the order of the 1st respondent merged in the decision of the Central Board of Revenue. It is not contended that the Central Board of Revenue had not jurisdiction to consider the appeal. It is not possible to contend that the Central Board of Revenue violated any principles of natural justice. The order of the Central Board of Revenue is an order passed by a tribunal with jurisdiction and in accordance with the procedure prescribed by law. This is the final order in this case and must be held to be binding on the petitioner.

(24) Mr. Rajgopal has relied upon the phraseology of that order and contended that the only effective order in existence is the order of the 1st respondent and therefore I should set aside the order of the 1st respondent. The operative part of the decision of the Central Board of Revenue is as follows:

"The Board sees no reason to interfere with the Order (original) passed by the Additional Collector of Customs, Bombay".

Now, by reason of the provisions of S. 188 this is the final order. The question is whether I should therefore construe this order that there "is no reason to interfere with the order passed by the Additional Collector of Customs" as final, or whether I should hold that on a true construction of this order the effect of it is that the order as made by the 1st respondent is the final order made by the Central Board of Revenue. The final order in every case must be an effective and operative order. There was authority in the Central Board of Revenue "to confirm" the order of the 1st respondent or "to alter or to annul" it. When the Central Board of Revenue decided that it saw no reason to interfere with the order passed by the Additional Collector of Customs what in effect it decided was to confirm the order of the Additional Collector of Customs. The effect of an order of confirmation under S. 188 of the Act in my view must be that the operative part of the order of the 1st tribunal is really the operative part of the order of the Central Board of Revenue. The true construction of the decision of the Central Board of Revenue is that the Board itself has passed the order the terms whereof are to be found in the order of the 1st respondent. In my view there is no outstanding existence of the order of the 1st respondent in this case and the only subsisting and effective order is the order made by the Central Board of Revenue.

(25) In this connection it is also relevant to point out that whilst granting the rule nisi in this petition on 10-10-1956 I had taken the view that the 2nd respondent (Central Board of Revenue and the Tribunal) which made the final order being situated in Delhi, this Court had no jurisdiction at all to issue a writ against the 2nd respondent. The rule that was given was granted only against the 1st respondent though in terms of prayers (a) and (b) of the petition. I have already held that the final order which must be questioned and set aside for the petitioner to succeed in this petition is the order of the Central Board of Revenue. It is apparent that the rule nisi having not been issued against the 2nd respondent this Court would not proceed to set aside the order of the 2nd

respondent; and that for that purpose the 2nd respondent would be a necessary party to such a rule. Accordingly the petitioner must fail in this petition for two further reasons. This Court has no jurisdiction to proceed against the 2nd respondent and give relief by way of writ as against the 2nd respondent in respect of the order passed by the 2nd respondent. This rule also must fail as the 2nd respondent is not a party to the rule nisi issued by this Court on 10-10-1956 though in the absence of the 2nd respondent relief for setting aside its decision cannot be granted.

(26) there are several contentions taken by the 1st respondent in his affidavit in reply. He has contended that the petitioner has not shown good faith or bona fides and has in his petition not mentioned several relevant facts including the fact of his having given the bond dated 7-11-1956. He has also demanded for justice before filing this petition and that the prayer for refund of moneys paid by way of fine in a writ petition is misconceived. He has further contended that the petitioner had not at any stage of the proceedings before the 1st respondent or the Central Board of Revenue made any contention that the 1st respondent or the Central Board of Revenue were not entitled to proceed against the petitioner under S. 167(8) and should have proceeded only under s. 167(37) and that accordingly this new contention could not be agitated in the present proceedings. These are substantial contentions but I have not heard the 1st respondent in connection with these contentions as I have taken the view that even otherwise the petitioner was not entitled to succeed.

(27) In the result the petition is dismissed with costs. Rule discharged.

(28) Petition dismissed.