

(1986) 02 MAD CK 0025

In the Madras High Court

Case No : Writ Petition No's. 11373 and 11392/85

K. Srinivasan

APPELLANT

Vs

Collector of Customs

RESPONDENT

Date of Decision : 20-02-1986

Acts Referred:

Customs Act, 1962 — Section 110, 110(1), 110(2), 119, 124

Citation : (1986) 9 ECC 257 : (1987) 27 ELT 656

Hon'ble Judges : S. Mohan, J

Bench : Single Bench

Advocate : M.R.M. Abdul Kareem, for the Appellant; P. Narasimhan, Senior Central Government Standing Counsel, for the Respondent

Judgement

1. In both these writ petitions, the petitioner is one and the same. However, the facts slightly differ. Therefore, I will first deal with W.P. No. 11392

of 1985.

2. On an information received on 11th May, 1983 by the Special Investigation Department of the Customs Department that M/s. T.G. Elumalai &

Co., the Customs House Agents were carting into harbour 79 packages for shipping and these packages contained snake skins. The same were

packed and loaded in lorries in Triplicane and were moved to harbour at W.Q. III. On this information, a careful watch was arranged at the place

of harbour for the arrival of the goods. In the meanwhile, the Customs House Agents filed Shipping bills Nos. 9346 and 0343 both dated 9th May,

1983 in the case of the petitioner's firm Jaival Tex. It was declared in the same bills that the goods were handloom cotton coloured towels. Both

the Exporters and the Customs House Agents have signed the declarations u/s 59(2) of the Customs Act, 1962. The shipping bills were presented

in the Customs Exports Documentation Counter on 9th May, 1983. The said bills were assessed on condition that the goods for shipment should

be allowed after opening and inspection of selected two packages weighing the nett contents and ripping open and inspection of 8 more selected

cases and after verifying the description of the goods with that of the declarations made in the shipping bills.

3. After assessment, the relative documents in original along with other documents were handed over to the Customs House Agents for effecting

shipment of the goods on completion of the inspection. The Customs House Agents on behalf of the exporters applied for posting of officers on

over-time for inspection of the goods on 11th May, 1983. Till 9 p.m. on 11th May, 1983, the shipping bills were not presented for examination.

The vessel was to sail on 13th May, 1983. Till 4 p.m. on 12 May, 1983 the shipping bills were not at all presented. It was then decided to open

and examine all the packages for verification of the contents thereof. The examination was conducted in the presence of the Customs House

Agent's representative. The examination revealed that 38 cases were packed with 84,000 pieces of snake skins of various sizes.

4. Exports of all forms of wild life - deal or alive or part thereof or produced therefrom - are completely banned except those mentioned in Para B

of Schedule I to the Exports (Control) Order, 1977, issued u/s 3 of the Imports and Exports (Control) Act, 1947. Therefore, the attempted export

of snake skins is completely prohibited and consequently the goods were liable to confiscation u/s 113(d) of the Customs Act, 1962. It would also

attract penalty u/s 114 of the said Act.

5. In view of the illicit export attempted to, summons were issued to the petitioner u/s 108 of the Customs Act whereupon the petitioner filed W.P.

No. 4447 of 1983 before this Court. Pending that writ petition, in W.M.P. No. 6671 of 1983, the petitioner prayed for permission to allow his

counsel at the time of interrogation by the department. That petition was dismissed. The appeal also suffered the same fate. Against these, the

petitioner filed a SLP before the Supreme Court in SLP (Civil) No. 8835/83. In addition, another independent SLP was filed. Both these special

leave petitions are now pending in the Supreme Court. The Supreme Court, in SLP (Civil) No. 8835 of 1983 ordered as under on 23rd June,

1983 :

It has been stated by learned counsel for the respondents that the interrogation will be stopped till the disposal of these petitions. Counter-affidavit

will be filed on or before 21-7-1983 and rejoinder, if any, be filed one week thereafter. The matters are adjourned and will be listed on 1-8-

1983.

In view of this, the show cause notice could not be issued.

6. It is under these circumstances, the writ petition for mandamus is filed for the return of 44 cases of goods seized by the respondent on 12th

May, 1983.

7. M/s Vaz Forwarding Private Limited, Madras, a Customs House Agent filed Shipping Bill No. 860 dated 27th April, 1984 on behalf of the M/s

Gaydev Exports, No. 67, Arunachala Naicken Street, Chintadripet, Madras-2 for the export of 27 cases declared to contain 567 pieces of paper

elephants (Panel Boards). The value as declared in the shipping bills was Rs. 14,175/-. On an examination of the goods, 24 cases contained snake

skins of 30,925 pieces and 3 cases contained 61 pieces of paper elephants. As stated above, this is a banned item from export since the goods,

namely, snake skins are not allowed for clearance for exportation u/s 51 of the Customs Act.

8. Enquiries at the premises No. 67 Arunachala Naicken Street, Chintadripet, Madras-2 revealed that the room in the ground floor was let out to

the petitioner. The goods were packed in the said room by one Mr. M. Ramu and his wife deployed by the petitioner. The invoices were handed

over to the Customs House Agents at the directions of the petitioner and one Kesavan for processing the shipping bill. Interrogation of the driver of

the van TMG 8604 wherein the goods were transported to Air Cargo Complex revealed that the petitioner was present at the time of removal of

the goods from Arunachala Naicken Street. The goods were examined of 28th April, 1984 in the presence of the Customs House Agent's

representative.

9. On further enquiries, the Customs Department came to understand that one Thyagu, son of the petitioner, is the proprietor of Gaydev Exports.

It was further learnt that Thyagu was introduced to Indian Overseas Bank at the Esplanade Branch by the petitioner and on 3 or 4 occasions, the

petitioner, on behalf of M/s. Gaydev Exports, drew money from the Bank. The Department was able to contact one Kabali, brother of the

petitioner, and confirmed from him that Thyagu is the son of the petitioner. The Department has recorded statements from various persons and

those statements prima facie revealed that the petitioner is involved in the illicit export of snake skins in the guise of paper elephants in the name of

M/s Gaydev Exports, Madras.

10. Based on such evidence, a show cause notice date 23rd September 1985 was issued to the petitioner. It is under these circumstances, the

prayer made by the petitioner is to direct the respondent to return 30,925 pieces of snake skins and 3 cases of paper elephants seized from the

petitioner on 28th April, 1984.

11. Mr. M.R.M. Abdul Kareem, learned counsel for the petitioner, would contained that u/s 110(2) of the Customs Act, if the show cause notice

is not issued within six months of seizure of the goods, the goods shall be returned to the person from whose possession they were seized.

Irrespective of the ownership of these goods, for the failure to comply with the mandatory provision, the petitioner is entitled to succeed.

12. Mr. P. Narasimhan, Senior Central Government Standing Counsel, contends, after drawing my attention to the various provisions of the

Customs Act, that this is not a case of seizure at all. This is merely a detention of the goods for examination and for investigation. Only when they

are seized, Section 110 of the Act would come into play. The learned counsel for the Department fairly states that after confiscation of the goods,

they have been sold to Bharat Leather Corporation. Whatever may be the position of law, the learned counsel would place strong reliance on the

letter written by the petitioner on 14th May, 1983 disclaiming ownership to these goods. Therefore, he is not entitled to the return of the goods at

all. His definite stands throughout was that the petitioner attempted to export handloom coloured cotton towels but what tendered were snake

skins. Therefore, in view of the letter of the petitioner, he is not entitled to succeed.

13. As regards the other case, though, no doubt there is no letter of disclaimer as in the previous one, in so far as there is merely a detention of the

goods, the petitioner is not entitled to their return. In any event, in both the

cases, Section 119 of the Customs Act would get attracted.

Consequently, if they are liable to confiscation, there is no duty cast on the Department to return them u/s 110(2) of the Act.

14. In order to appreciate the rival contentions, let me refer to the important provisions of the Customs Act which may have a bearing on the issue in question.

15. u/s 8 of the Act, the Collector of Customs may approve landing places and specify limits of Customs area. Section 50 of the Act states that the

exporter of any goods shall make entry thereof by presenting to the proper officer in the case of goods to be exported in a vessel or aircraft, a

shipping bill, and in the case of goods to be exported by land, a bill of export in the prescribed form. Sub-section (2) is as under :

The exporter of any goods, while presenting a shipping bill or bill of export, shall at the foot thereof make and subscribe to a declaration as to the truth of its contents.

16. In the Handloom Coloured Cotton Towels case, (I call it so), the shipping bill issued by T.G. Elumalai & Co., gave the description of the

goods as ""Handloom Coloured Cotton Towels"". Therefore, the truth of the contents will have to be vouched by the exporter, namely, the petitioner.

17. Then we go on to Section 52 in Chapter VIII - Goods in Transit. That section is as under :

The provisions of this chapter shall not apply to (a) baggage, (b) goods imported by post, and (c) stores.

The Chapter relating to ""Confiscation of Goods and Conveyances and Imposition of Penalties"" is Chapter XVI. Section 111 deals with the classes

of goods brought from a place outside India which are liable to confiscation. Section 112 imposes penalty for improper importation of goods.

These two sections are not relevant for our present purpose because we are concerned with the export. The relevant section is Section 113 which

talks of ""Confiscation of goods attempted to be improperly exported."" Clause (d) of the said section is as follows :

(d) any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to any

prohibition imposed by or under this Act or any other law for the time being in

force.

Clause (e) is as under :

(e) any dutiable or prohibited goods found concealed in a package which is brought within the limits of a customs area for the purpose of exportation.

Of course, having regards to the fact, export of snake skins is banned the goods in question are liable to confiscation. When the learned counsel for

the department contends that this is not a case of seizure but merely a detention of goods, it is not an argument which is acceptable to me because

Section 110(1) and (2) reads as follows :

110. Seizure of goods, documents and things. - (1) If the proper officer has reason to believe that the goods are liable to confiscation under this

Act, he may seize such goods :

Provided that where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not

remove, part with, or otherwise deal with the goods except with the previous permission of such officer.

(2) 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 seizure of the goods, the goods shall be returned to the person from whose possession they were seized :

Provided that the aforesaid period of six months may, on sufficient cause being shown, be extended by the Collector of Customs for a period not

exceeding six months.

(The rest of the sub-section are omitted as not necessary)

It is not the case of the Department that it was not practicable to seize the goods and therefore the Department issued an order of detention.

Therefore, and proviso to Section 110(1) extracted above has no application to the facts of this case. It really, passes my comprehension as to

how there could be a confiscation of goods without seizure because Section 110(1) gives power to seize and it is only by reason of that power,

seizure was effected prior to confiscation. As I said above, by virtue of Section 113(d) and (e) extracted above, the goods are liable to

confiscation.

18. It is common case that snake skins are banned export. Therefore, their confiscation was permissible. It that be the position, it is impossible to

contend that without effecting seizure there was confiscation. The net result is there was a confiscation. If there was a confiscation, the procedure

laid down u/s 110(2) ought to have been followed in that if the goods were seized under sub-section (1) of Section 110, it is incumbent upon the

Department to issue notice in respect to those goods under clause (a) of Section 124. Section 124 makes it obligatory to issue notice in the

following terms :

Issue of show-cause notice before confiscation of goods, etc. 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;

(b) is a given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds

of confiscation or imposition of penalty mentioned therein; and

(c) is given a reasonable opportunity of being heard in the matter :

Provided that the notice referred to in clause (a) and the representation referred to in clause (a) may, at the request of the person concerned, be

oral.

The failure to follow the procedure laid down u/s 124 entails the return of the goods to the person from whose possession they were seized. As

rightly contended by Mr. Abdul Kareem, it does not matter who the owner is. If they are seized from the possession of a person, that person from

whose possession they were seized is entitled to their return. That is clear by reading of Section 110(2). Therefore, he would be entitled to their

return. But, unfortunately for the petitioner, he had written a letter to the Collector of Customs, through his counsel dated 14th May, 1983 which

extracted below :

Sir,

Under instructions from my client Sri K. Srinivasan, Madras I give you the following notice :

My client is a Textile Dealer and Exporter of Textiles. He got an order from

Singapore for the purchase of and export of Handloom Coloured Cotton Towels.

Accordingly my client packed in 44 cases the above said goods. My client informed his Clearing Agents, T.G. Elumalai & Co., Jaffar Sarang

Street, Madras-1 on 9th May, 1983 that 44 cases are ready and he can take delivery of the same and Clearing Agents took delivery on 11th

May, 1985. After such entrustment to the Clearing Agents my client had no control or possession of the same. My client is surprised to understand

from his Clearing Agents that on 12th May, 1983 and 13th you caused the opening of certain cases bearing my client's address and found that

they contained snake skins instead of textiles. My client packed only textile goods in all the 44 cases at the time of entrustment to the Clearing

Agents. My client was not aware of what happened after the entrustment to the Clearing Agents. My client is not aware of and never had any

transactions in snake skins. My client is absolutely certain that some third party had tampered with my client's packages. My client has instructed

me to take legal action against the lorry transporter.

My client is prepared to appear before you along with me as his advocate and to give the statement before you in the presence of myself, his

advocate.

The Supreme Court has held in the case reported in AIR 1979 SC 447 that when a suspected or accused person is examined by the Customs

Officers, he is entitled to have the assistance and presence of his advocate during the examination and you have no right to refuse the person to be

assisted and to be accompanied by his advocate.

The relevant portion of the judgment in paragraph 3 at Page 448 in the above case read as follows :

It appears that when the interrogation of the detenu was going on while he was in custody of the Customs Officials, Smt. Devyantiben Shah, an

advocate of the detenu addressed a letter as also a telegram, both dated December 14, 1977, making a grievance about the wrongful restraint and

illegal custody of the detenu by the Customs Officers beyond 24 hours and detained with a view to obtain confessional statements against his will.

The receipt of the letter was disputed but the Assistant Collector of Customs admitted the receipt of the telegram from the Advocate on December

15, 1977. By his reply dated December 15, 1977 sent to the Advocate, the Assistant Collector denied the allegations made in the telegram.

Admittedly on December 14, 1977, the Advocate had gone to the Customs Officer, and had sought permission to remain present at the time of

interrogation of the detenu but her request was not accorded to as the Customs Officers were of the view that there was no provision in law

permitting an Advocate to remain present at the time of interrogation.

At page 451 the Supreme Court has held as follows :

"In this case the request to have the presence/consultation of a lawyer was turned down owing to some misconception of the legal position but that apart....."

The Supreme Court has observed in *Nandini Satpathy Vs. P.L. Dani and Another*, that a lawyer's presence at the time of interrogation is a

safeguard against the use of force or threats or intimidation for obtaining incriminating statements.

The Supreme Court had observed in paragraphs 58 and 59 at page 1047 in the above case as follows :

"58. Right at the beginning we must notice Art. 22(1) of the Constitution which reads :

No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be

denied the right to consult, and to be defended by, a legal practitioner of his choice.

The right to consult an advocate of his choice shall not be denied to any person who is arrested. This does not mean that persons who are not

under arrest or custody can be denied that right. The spirit and sense of Art. 22(1) is that it is fundamental to the rule of law that the services of a

lawyer shall be available for consultation to any accused person under circumstances of near-custodial interrogation. Moreover, the observance of

the right against self-incrimination is best promoted by conceding to the accused the right to consult a legal practitioner of his choice.

59. Lawyer's presence is a constitutional claim in some circumstances in our country also, and, in the context of Art. 20(3), is an assurance of

awareness and observance of the right to silence. The *Miranda* decision (1966) 384 US 436 has insisted that if an accused person asks for

lawyer's assistance, at the stage of interrogation, it shall be granted before commencing or continuing with the questioning. We think that Art. 20(3)

and Art. 22(1) may, in a way, be telescoped by making it prudent for the police to permit the advocate of the accused, if there be one, to be

present at the time he is examined. Over-reaching Art. 20(3) and Section 161(2) will be obviated by this requirement. We do not lay down that

the police must secure the services of a lawyer. That will lead to "Police Station Lawyer" system, an abuse which breeds other vices. But all that

we mean is that if an accused person expresses the wish to have his lawyer by his side when his examination goes on, this facility shall not be

denied, without being exposed to the serious reproof that involuntary self-crimination secured in secrecy and by coercing the will, was the project."

My client is seriously apprehensive that your officers may violate my client's fundamental right to legal assistance which my client is entitled to at

any time of interrogation on the suspicion or allegation of commission of any offence. The Supreme Court has held that the right to legal assistance

arises whether before or after arrest.

My client therefore requests your immediate permission to appear along with his advocate and give a statement before you.

Yours faithfully,

(Sd.) K.A. Jabbar.

In view of the fact that the petitioner disclaims not only ownership to the goods and states that he has nothing to do with them but suggests that

somebody had surreptitiously introduced the snake skins, certainly he would not be entitled to the return of the snake skins. I am unable to accept

the argument of Mr. Abdul Kareem that this letter does not amount to disclaimer when the letter speaks eloquently to that effect. Consequently, in

respect of the snake skins for which the petitioner made a total disclaimer and pleaded complete ignorance, he would neither be the owner nor the

person from whom they were taken possession of. Therefore, he is not liable to the return of the snake skins.

19. The next question is whether Section 119 of the Act would be applicable to the facts of the case. The learned counsel for the department fairly

concedes that even for taking action u/s 119, no notice has so far been issued. If that be so, that section cannot advance the case of the

Department.

20. In view of the above, the petitioner will be entitled to the return of the handloom cotton coloured towels and I am informed by the learned

counsel for the department that 6 packages containing handloom cotton coloured towels are in the possession of the Department and they shall be

ordered to be returned.

21. Turning to the other case relating to Paper Elephant (Panel boards), in view of what I have stated above, there being no disclaimer as in the

other case, the petitioner will be entitled to their return. Consequently, a mandamus directing the return of 30,925 pieces of snake skins; (2) 6

packages of handloom cotton coloured towels and (3) three cases of paper elephant (board panels) shall be made on or before 15-3-1986.

22. In the result, the writ petitions are allowed to the extent indicated above. No costs.