

(1983) 08 KL CK 0021
In the High Court Of Kerala
Case No : O.P. No. 4167 of 1980-G

Kollatra Abbas Haji

APPELLANT

Vs

Government of India and Others

RESPONDENT

Date of Decision : 12-08-1983

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 107, 112, 138B, 139
Evidence Act, 1872 — Section 106

Citation : (1991) ECR 131 : (1984) 15 ELT 129

Hon'ble Judges : Kochu Thommen, J

Bench : Single Bench

Advocate : Kunhirama Menon, P. Ramakrishnan Nair and Raghunathan, for the Appellant; P. Santhalingam, for the Respondent

Final Decision : Dismissed

Judgement

Kochu Thommen, T., J.—The petitioner challenges Exts. P6 dated 4-2-1976, P9 dated February, 1980 and P10 dated September, 1980. By Ext. P6 a penalty in the sum of Rs. One lakh was imposed upon the petitioner by the Additional Collector of Customs u/s 112(h)(i) of the Customs Act, 1962. This order was confirmed in appeal by the 2nd respondent the Central Board of Excise and Customs, New Delhi by Ex. P9 and by the 1st respondent-The Government of India by Ex. P10,

2. On 10-2-1974 fifteen gunny bundles of foreign fabrics were recovered from the premises of B.M. Abdul Khader and C.M. Abdalla, Twelve of them were recovered from the premises of the former and three from that of the latter. Neither Abdul Khader nor Abdulla was present at the time of the recovery. During the course of investigation, officers of the Customs took statements of six persons. They are M.M, Abdulla Kunhi, (recorded on 19-2-1974), M-M. Tajuddin (recorded on 19-2-1974). Mamnied (recorded on 25-6-1974), Thoruvath Kasmi (recorded on 11-2-1974), Abdul Khader (recorded on 2-7-1974). Each of them

suited that the smuggled goods contained in the fifteen bundles were landed ashore from vessels and stored by them at the instance and on behalf of the petitioner. Fxt- P4 and P5 are two letters recovered from the house of Abdulla Kuahi on 12 -2-1974 as per Ext. R1 (c) mahazar. In these letters there is no direct reference to the petitioner. But they contain certain code words which the officers have not been able to decipher, but which they suspect to contain reference to the clandestine activities involving the petitioner and the six persons from whom statements were obtained. A statement (Ext. P1) was taken from the petitioner himself on 19-3-1974. This statement which was recorded in the course of investigation by the officers shows that the statement made by Theruvath Kasmi on 11-2-1974 implicating the petitioner had been specifically put to the petitioner. The only explanation which the petitioner had to offer when he was confronted with that statement was that he had nothing particular to say (...).

Significantly the petitioner did not deny the allegations. On the same day, that is, on 19-3-1974 the petitioner made a statement (Ext. P2) before the District Magistrate (Judicial), Kozhikode. He stated :

"...

Significantly enough the petitioner did not say that what is contained in Ext. P1 was wrong. All that he said was that the whole of his statement was not recorded implying thereby that he did not retract from any single word found in Ext. P1. Apparently, what he meant was that Ext. P1 did not show the whole story as it was only a partial recording of his statement. But the fact that he said that he had nothing in particular to say when confronted with Theruvath Kasmi's statement was not denied by the petitioner. The other six persons received show cause notices containing detailed allegations regarding their participation in the smuggling of the goods in question. They sent their replies on 9-8-1974 in which all of them, with the sole exception of Tajuddin, admitted putting their signatures to the statements, but asserted that they were written by the Customs Officers and signed by them under threat. A show cause notice was issued to the petitioner on 27-7-1974 containing detailed allegations and the materials relied on by the department in support of them. This notice contained specific reference to the statements made by the various persons against the petitioner and the two letters recovered from the house of Abdulla Kunhi. The Petitioner sent Ext. P3 reply dated 13-8-1974 in which he stated that he had nothing to do with the alleged smuggling operation of the six persons and that he had no connection with them. He stated that the statements given by those persons were totally false. He further pointed out that he was a respectable person being a member of the State Executive Committee of the Muslim League. He professed total innocence of the allegations made against him. It is important to note that the first time the petitioner denied his involvement in the activities of the six persons was when he sent his reply to the show cause notice on 13-8-1974 which was about five months after he gave Ext. P1 statement. A formal enquiry

was conducted by the Collector of Customs in September, 1975. All the six persons who had in their statements implicated the petitioner as well as the petitioner himself were present at the enquiry. These persons were in possession of copies of all the materials relied on by the officers including the statements made prior to the enquiry. With the exception of Tajuddin all the other five persons, who implicated the petitioner, admitted their signatures, but stated that they were not responsible for the statements as they were recorded under threat, Tajuddin denied having put his signature to any statement. Apart from these persons, the two customs officers, Sreedharan and M.J. Mathai, who had recorded the statements of the six persons were examined on the side of the department. The petitioner's counsel was present throughout the enquiry and cross-examined the officers of the department as well as the other six persons. In his cross-examination the petitioner's counsel did not put any question to the officers to suggest that any threat was administered to any one of the six persons when their statements were recorded. Nor did counsel ask a single question to any one of the six persons to suggest that they had been subjected to any pressure. No question was put to them as to which officer administered threat to them. On 30-9-1975 the petitioner gave evidence before the Additional Collector of Customs. He denied any involvement in the smuggling activities and said that on the day in question he was attending a conference of the Muslim League at Bombay. He requested that his counsel be given an opportunity to cross-examine the other persons who gave evidence against him. That opportunity was, as I stated earlier, given to the petitioner's counsel.

3. The six persons who gave their statements against the petitioner were also proceeded against for their involvement in the smuggling activity and penalty was imposed upon them. I shall, for convenience, refer to them as co-accused. From the nature of the evidence it would appear that these co-accused in comparison to the petitioner, are of insignificant financial means or social or political connections. The petitioner at the relevant time was a man of considerable political and business connections and financial means. It is inconceivable that a person of his stature would have made Ext. P1 under threat. It is significant that when confronted with the statements made against him by the co-accused he did not choose to deny the allegations personally made against him. All that he said was, as seen above, that he had nothing in particular to say. The first time that he retracted from the statement contained in Ext. P1 was when he replied to the show cause notice which was about five months later. That belated retraction was apparently made on legal advice. It has, as stated by the Supreme Court in Haroon Haji Abdulla Vs. State of Maharashtra, little value and has to be ignored. It is equally important that the co-accused persons, with the exception of Tajuddin, did not deny their signatures to the statements made by them in the course of investigation. Even in their replies to the show cause notices they did not deny their signatures except to say that they signed the statements under duress. This position was maintained by them throughout. When specifically cross-examined on the point by the

adjudicating officer they stated that it was under pressure and threat that they put their signatures. Nevertheless, as stated earlier, the petitioner's counsel did not cross-examine them on the point or elicit from them any information as to the persons who administered the threat. Nor did he cross-examine the two officers as regards the alleged threat or duress.

4. In Ext. P6 the 3rd respondent relies upon the statements made by the co-accused to come to a conclusion against the petitioner. The petitioner's counsel Sri K. Kunhirama Menon submits that the testimony of the co-accused is not substantive evidence. That evidence could not have been relied upon by the officers except for the purpose of assuring themselves as to the reliability of any substantive evidence that was available against the petitioner. He refers to the principle stated by the Supreme Court in *Haricharan Kurmi v. State of Bihar* A.I.R, 1964 SC. J 184as regards the value of retracted confession of a co-accused. Counsel submits that, although the strict requirement of criminal proceedings are not applicable to proceedings before an Administrator in the exercise of his judicial or quasi-judicial functions, nevertheless it is a salutary principle that he should have, before finding a person guilty of the charges, evidence other than that of the retracted confession of co-accused.

5. In *Collector of Customs, Madras and Others Vs. D. Bhoormall*, the Supreme Court stated :

"...Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden.

Smuggling is clandestine conveying of goods to avoid legal duties. Secrecy and stealth being its covering guards, it is impossible for the preventive Department to unravel every link of the process. Many facts relating to this illicit business remain in the special or peculiar knowledge of the person concerned in it. On the principle underlying Section 106, Evidence Act, the burden to establish those facts is cast on the person concerned ; and if he fails to establish or explain those facts, an adverse inference of facts may arise against him, which coupled with the presumptive evidence adduced by the prosecution or the Department would rebut the initial presumption of innocence in favour of that person and in the result prove him guilty...."

Referring to this decision, this Court stated in *Abraham v. Addl. Collector of Customs*, 1976 KLT 660, 669 :

"If the officer has come to a decision on the basis of materials having sufficient probative value, in the sense that the decision has the necessary logical proximity with the materials available, the decision cannot be challenged. As stated by Oiplock L J. in *Reg. v. Deputy Industrial Injuries Commr. Ex-parte Moora* 1965 (2) W.L.R. 89 :

"It means that he must not spin a coin or consult an astrologer, but he may take

into account any material which, as a matter of reason, has some probative value in the sense mentioned above."

This Court further observed :

"An administrator performing judicial or quasi-judicial function is not a court, and therefore his proceedings are not governed by the procedure generally followed in courts. He is the master of his proceedings, and so long as he conducts them fairly and justly, they cannot be challenged...."

In *State of Mysore Vs. S.S. Makapur*, the Supreme Court stated the following principle in regard to judicial or quasi-judicial proceedings before an administrator :

"....the purpose of an examination in the presence of a party against whom an enquiry is made, is sufficiently achieved, when a witness who has given a prior statement is recalled, that statement is put to him, and made known to the opposite party, and the witness is tendered for cross-examination by that party...., "

The petitioner was given copies of statements of the co-accused. They had not retracted from their statements until they said in their reply to the show cause notice that they signed the statements under pressure. In the case of Abdulla Kunhi, his, reply to the show cause notice was sent on 9-8-1974, whereas his statement had been recorded as early as 19-2-1974. The same was the case with Tajuddin. Theruvath Kasmi replied to the show cause notice on 10-8-1974 whereas his statement had been recorded on 11-2-1974. For nearly six months these persons, who apparently had obtained legal advice in the meantime, failed to retract in any manner from the statements made by them. As stated by the Supreme Court in *Haroon Haji Abdulla Vs. State of Maharashtra*, such retraction has little value. In the case of Mammed and Abdul Khader and Abdulla the retraction was after a period of more than one month. Considering that these people also had the benefit of advice of competent lawyers, their retraction has to be regarded with suspicion. In any case the retraction of Theruvath Kasmi, Abdulla Kunhi and Tajuddin was far too belated to be of any value to the petitioner. Their statements cannot therefore be ignored. The fact that these persons were also proceeded against along with the petitioner in respect of the same incident does not make their testimony unacceptable, In the first place, the proceeding before the Collector of Customs is not of the same nature as a proceeding in a criminal court. Even in a criminal court the testimony of a co-accused, as stated by the Supreme Court, is evidence in a generic sense and is useful for the purpose of lending assurance to the court in regard to the veracity of substantive evidence. But in so far as an administrator is concerned, he is entitled to rely on any evidence so long as it has some probation value. It is important to remember in this connection that the petitioner himself had made a statement wherein he failed to deny the allegations made by these six persons in their statements. The fact that he failed to deny the allegations and merely

stated that he had nothing in particular to say in regard to them "amounts to acceptance of the allegations. Such conduct on the part of the petitioner necessarily leads to a presumption of admission. Retraction from that admission would not detract from its value. Ext. P1 thus constitutes substantive evidence on the basis of which alone the petitioner could have been found guilty of the charges. Strangely enough there is no reference to Ext. P1 in Ext. P6 or in Ext. P9 or Ext. P10. Apparently the respondents chose to rely solely on the testimony of the co-accused. Whatever be the value of counsel's criticism against the acceptance of the testimony of the co-accused for the purpose of finding the petitioner guilty, the fact remains that the finding of the respondents can be justified, not only on the basis of the evidence they relied upon, but also on the basis of Ext. P1.

6. Section 138B of the Customs Act, 1962 reads:

"138-B. Relevancy of statements under certain circumstances. (1) A statement made and signed by a person before any gazetted officer of customs during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains;

(a) When the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the court and the court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.

(2) The provisions of Sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a court, as they apply in relation to a proceeding before a court."

The respondents' counsel, Shri P. Santhalingam submits that the fact that a statement made and signed by a person is relevant for the purpose of clause (b) makes it equally relevant for the purpose of confronting a person when examined u/s 107. The petitioner was confronted, counsel points out, with the statements of the co-accused and those statements are relevant material in the light of Section 138B. Counsel further points out that clause (b) says that statement has to be admitted in evidence when the maker of the statement is examined as a witness. Counsel then refers to Section 139 which reads :

"139. Presumption as to documents in certain cases.-Where any document-

(i) is produced by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law, or

(ii) has been received from any place outside India in the course of investigation of any offence alleged to have been committed by any person under this Act, and such document is tendered by the prosecution in evidence against him or against him and any other person who is tried jointly with him, the court shall-

(a) presume, unless the contrary is proved, that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;

(b) admit the document in evidence, notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence;

(c) in a case falling under clause (i) also presume, unless the contrary is proved, the truth of the contents of such document."

This shows, that the Court shall presume, unless the contrary is proved, that the signature and every other part of the document referred to in the Section is genuine. There is much force in Counsel's submission. Section 138B makes it clear that in proceedings before an administrator, as in the case of a proceeding in a court of law, a statement made and signed by a person is material and it has to be admitted in evidence in the interest of justice. Section 139 places the burden upon the maker of the statement to deny the genuineness of his signature or any statement contained in the document. It is not disputed by the petitioner's counsel that the expression "document" would include the statements signed by the co-accused. Section 139 leaves no doubt that a court shall presume, unless the contrary is proved, that the signature of the maker is genuine and every other part of the document is equally genuine.

This is the principle on which the court must act. Section 139 does not exclude the applicability of this principle in proceedings before an administrator. If it is open to a court to draw the statutory presumption, it is equally open to an administrator in proceedings of this kind to draw a like presumption and conclude, in the absence of evidence to the contrary, that every word contained in the statement and the signature appearing on the face of it are those of the maker. This being the position in law, the respondents were entitled to rely upon every word in the statements signed by the witnesses, notwithstanding their attempt to retract therefrom, especially when there is no evidence of threat. As stated earlier, counsel for the petitioner made no attempt to elicit any such information from the officers or from the co-accused themselves. In *R.S. Kalyanaraman v. Collector of Customs, Madras* 1978 ker L.R. 1735 the Madras High Court repelled the contention that the confession of a co-accused was not evidence on the basis of which a person could be found guilty in departmental proceedings. The Court stated :

"...The fact that the criminal Court had acquitted the petitioner would be of no consequence since the acquittal was on the footing that the confession of a co-accused could not be used against the petitioner. In departmental proceedings, there is no bar to use such statements..."

7. It is a well accepted principle that in proceedings under Article 226 of the Constitution this Court would not interfere with the decision of an administrator except when it is established that he has failed to take into account relevant materials, or has taken into account irrelevant materials, or has failed to correctly apply the relevant law or has acted without evidence or has otherwise come to a conclusion which is totally inconsistent with the only conclusion that can reasonably be reached. In the present case, the petitioner has not established that the impugned orders are vitiated by any of these reasons. The respondents relied upon the statements made by the six persons implicating the petitioner. These statements, as I stated earlier, were not successfully retracted from. Even if those statements are liable to be criticised as statements of the co-accused, they are of sufficient evidentiary value for the purpose of coming to a conclusion against the petitioner in departmental proceedings. The belated retraction does not, in my view, affect the value of those statements. The department having discharged their initial burden of setting up a prima facie case against the petitioner, the burden, as stated by the Supreme Court in *Collector of Customs, Madras and Others Vs. D. Bhoormall*, , shifted to the petitioner to establish and explain the relevant facts, especially in regard to matters falling within his special or peculiar knowledge. Even assuming that the respondents were not justified in reaching a conclusion solely on the statements of the six persons, the conclusion is unassailable, particularly because the statements of these persons must be seen in the context of Ext. P 1. For all those reasons the conclusion reached in the impugned orders is perfectly valid. The Original Petition is accordingly dismissed. No costs.