
(1967) 12 CAL CK 0016
In the Calcutta High Court
Case No : C.R. No. 1208 (W) of 1964

N.G. Roy

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 07-12-1967

Acts Referred:

Sea Customs Act, 1878 — Section 167(8), 178A, 19

Citation : AIR 1968 Cal 524 : (1968) CriLJ 1407 : (1969) 2 ILR (Cal) 26

Hon'ble Judges : D. Basu, J

Bench : Single Bench

Advocate : Nagendra Mohan Saha and M.A. Razzak, for the Appellant; Amiva Kr. Mukherjee, for the Respondent

Judgement

D. Basu, J.—This Rule is directed against the order dated 1-6-64, made by respondent No. 2, the Collector of Customs (vide Ann. E), by which a package containing 76700 pieces of 7 O'clock blades (made in England) has been confiscated u/s 167(8) of the Sea Customs Act 1878, read with Section 3(2) of the Imports and Exports (Control) Act, 1947, and under the same provision, a penalty of Rs. 2,000 has been imposed on the petitioner.

2. The petitioner is an employee of a firm named Surjamani Suresh Chandra Pal at Shillong. The petitioner's case is that the disputed safety razor blades were purchased by him from Calcutta in August, 1957 and sent from Calcutta to Shillong, but that, finding the market dull at Shillong, the firm sent the same back to Calcutta for resale there. The petitioner was both the consignor and consignee of the Railway parcel in question but for convenience of taking delivery, the P. W Bill was forwarded to one Taslim of 58, Canning Street, Calcutta. While the said Taslim was coming out of the Railway Goods shed, the Superintendent of Customs seized the consignment and on 23-12-57 the Superintendent issued a notice to Taslim to show cause (Ann B) why penal action should not be taken against him u/s 167(8) of the Sea Customs Act on the ground that:

"there is reason to believe that the goods(which were found in your possession) have been imported (by you) from Pakistan into India on 17-12-57 through Sealdah Station without a valid permit....."

2a. Taslim in his explanation, asserted inter alia that he had no connection with the ownership of the consignment and that the petitioner was the owner. On 3-3-58, the petitioner submitted a representation to the Asstt. Collector explaining his case, as stated earlier (Ann C). Finding no reply, the petitioner approached this Court under Article 226 of the Constitution and obtained Rule No 3352/58 which was ultimately disposed of on consent by the order (dated 11-2-63), reproduced in para 7 of the counter-affidavit. It was agreed that the petitioner was the owner of the seized goods and the proceedings should henceforth continue on that footing; that the petitioner shall be allowed to make his representation before the adjudicating authority and that he would abide by the order passed therein after a consideration of his representation and that "he will not be at liberty to take the defence that he was penalised without being asked to show cause against the penalty."

3. The petitioner, accordingly made his representation at Ann. D and after a personal hearing of the petitioner through his learned Advocate the impugned order was made and the petitioner has obtained the present Rule against that order of 1-6-64 Respondent No 2 has filed affidavit-in-opposition on behalf of all the respondents.

4. The two questions to be determined in this Rule are: --

(i) Are the goods in question liable to be confiscated?

(ii) Is the petitioner liable to pay the penalty imposed by the impugned order?

5. I. I shall take up the question of personal penalty first because it is simpler in view of the number of decisions bearing on this point.

6. The following propositions are now well established:

(a) The imposition of a penalty u/s 167(8) of the Sea Customs Act, 1878 is a quasi criminal proceeding to which the general principles of criminal jurisprudence apply and therefore, in a case where the statutory rule of onus embodied in Section 178A is not applicable, the entire onus of establishing the offence mentioned in the first column of Section 167(8) rests on the Customs Authorities: *Ambalal v. Union of India* AIR 1961 SC 264 Admittedly, Section 178A is not attracted to the instant case inasmuch as the goods in question do not come within the purview of that section.

(b) It follows that the penalty cannot be imposed unless the "offence" mentioned in col. 1 of Section 167(8) is established. That "offence is the importation of the disputed goods contrary to the import restriction imposed by or u/s 3(2) of the Imports and Exports (Control) Act, 1947.

7. Section 3(2) of the Imports and Exports (Control) Act, 1947 says that if any

order is made by the Central Government, under this Act prohibiting or restricting the import of any goods, such prohibition or restriction shall be deemed to have been made under the provisions of the Sea Customs Act.

8. Now, the notice at Ann. B to the petition recites that a restriction had been imposed by an order of the Central Government (Notification No. 17/55 of 7-12-55) u/s 3(1) of the Imports and Exports (Control) Act of 1947 according to which blades could not be imported without a valid permit and the case of the respondents is that the disputed blades had been imported without having any such permit. The existence of any such notification has not been questioned in the petition but it has been urged that (Ground (f)), "the import of 7 O'clock blades from England was not banned" at the material time. But Sections 19 and 167(8) of the Sea Customs Act apply not only in the case of a total prohibition but also of a "restriction". An importation with-out a valid permit was thus unlawful.

9. The fact that the blades in question must have been imported by somebody at some point of time is evident from the very fact that they are admittedly of English make.

10. But still the question remains whether the person who imported them (whoever he might have been) had a valid permit for the purpose. There is no direct evidence on the record on this point. The Respondents seek to prove this from the mere fact that the disputed goods are of a foreign origin. It is patent that unless there was a total prohibition, it cannot be held that because a thing was of foreign make, it must have been imported unlawfully without a permit in a case where it is not known, as in the instant case, who the actual importer was.

11. (c) The further ingredient of the offence u/s 167(8) is that even assuming that the disputed goods were imported by somebody without a lawful permit, the person from whose custody they are seized cannot be penalised unless it is shown that he was "connected" or "involved" in the act of such importation (Radha Kishan Bhatia Vs. Union of India (UOI) and Others,), and, further, that the interest or involvement of the person in the commission of the offence must be at a stage prior to the completion of the offence of illegal importation, i.e., before the goods have crossed the customs frontier of India. Once the goods have been imported, any subsequent interest in the smuggled goods or even knowledge that the goods had been smuggled cannot bring the person showing such interest within the purview of Section 167(8), for the purpose of imposition of the penalty

12. In the instant case, the only evidence on the record is that the petitioner was the consignor of the goods in question, which obviously, shows that he was in possession of the imported goods. But there is no evidence to show his interest in the act of importation before the goods entered into the territory of India after crossing the customs frontier.

13. A further ingredient of the offence u/s 167 (8) is that the person sought to

be penalised must have been concerned with the act of such importation

14. The respondents rely on the circumstance that the petitioner labelled the disputed consignment as "stationery" instead of razor blades. But that circumstance can, at most, show that he had the knowledge that the goods had been unlawfully imported. But that this is not sufficient has been established by the same decision: *Radha Kishan Bhatia Vs. Union of India (UOI) and Others*, . This is a conduct subsequent to the importation.

15. The respondents further rely on the fact that the petitioner who claims to have acquired the blades in question by purchase, has failed to produce his documents of purchase. But the failure of the petitioner to produce his documents of title cannot be relied upon by the Respondents because that would be throwing the onus of establishing his innocence upon the petitioner which cannot be allowed in a case outside the pale of Section 178A (*Gian Chand and Others Vs. The State Of Punjab*,).

16. I am, accordingly, clearly of the opinion that the order of penalty of Rupees 2,000 imposed by the impugned order cannot be sustained.

17. II. Let us now turn to the order of confiscation.

18. The argument on behalf of the respondents is that whatever might be the position regarding the order of penalty, the order of confiscation stands on a different footing and this rests on a theory described as the theory of "offending goods". This theory was propounded by Bose J. (as he then was) in the case of *Shew Pujan Rai Indrasan Rai Ltd. Vs. Collector of Customs and Others*, . The substance of this theory is that where it is found that the disputed goods were unlawfully imported, the goods themselves become the offender and that they may accordingly be confiscated without finding out the actual importer and without finding that the person from whose custody the offending goods had been seized had any mens rea. The order in this case was of course, affirmed by the Supreme Court in *Shewpujanrai Indrasanrai Ltd. Vs. The Collector of Customs and Others*, , subject to some modification, which is not relevant for the purposes of the instant case. But the question raised in the instant case was not raised before the -Supreme Court in appeal in *Shewpujanrai Indrasanrai Ltd. Vs. The Collector of Customs and Others*, and cannot therefore, be said to have been authoritatively dealt with by the Supreme Court in that case. The primary question before Bose J. as well as before the Supreme Court was whether the conditions imposed by the Customs authorities on the order of confiscation were valid and the preliminary question dealt with was whether an order of confiscation u/s 167(8) was quasi judicial or administrative. The question as to the onus to establish the ingredients of the offence u/s 167(8) was not discussed by the Supreme Court at all. It is true that the Court affirmed the view that the order of penalty under the second part of col. 3 of Section 167(8) was in personam, whereas the order of confiscation operated in rem, "whether the offender is known or not;" *Shewpujanrai Indrasanrai Ltd. Vs. The Collector of Customs*

and Others, .

19. But the question whether the Customs Officer, in confiscating the goods could rely on any failure on the part of the person from whose custody the goods had been seized to show that the goods had been lawfully imported was not discussed in *Shewpujanrai Indrasanrai Ltd. Vs. The Collector of Customs and Others, .* In fact that question came to the forefront only when the scope and effects of Section 178A had to be dealt with by the Court.

20. Section 178A had been introduced in 1955 and could not be referred to in *Shew Pujan Rai Indrasan Rai Ltd. Vs. Collector of Customs and Others, or in appeal therefrom.* That section was interpreted and the question of onus, both under and outside Section 178A was dealt with in 1962 in the cases of *The Collector of Customs, Madras Vs. Nathella Sampathu Chetty and Another, and Pukhraj Vs. D.R. Kohli, .*

21. It is clearly established by the latter case that neither part of col. 3 of Section 167(8) applies unless the offence mentioned in the first column has first been established by the Revenue authorities and that offence is that the goods in question were imported in contravention of the statutory prohibition or restriction. Ordinarily, the onus on this point is entirely upon the Revenue authorities because the order of confiscation is as much a "penalty" as the fine authorised by the latter part of col. (3) of Section 167(8), so that the principles of criminal jurisprudence as to onus are attracted to a proceeding for that imposition of either of such statutory penalties, unless the statute which creates the offence itself engrafts an exception in this behalf. This proposition has been established by numerous decisions such as *Harding v. Price* (1948) 1 All ER 283; *R. v. Hallam* (1957) 1 All ER 665; *Reynolds v. Austin and Sons* 1951) 1 All ER 606; *Lim Chin v. R* (1963) 1 All ER 223 (229). This principle does not cease to exist merely because a person is sought to be penalised not in respect of his person, but in respect of his property. In the case of a criminal offence, a further requirement is required, namely, *mens rea* but though that may not be required in the case of a statutory offence in general the law of onus to establish contravention of a prohibition imposed by law still remains in the case of a statutory offence. This is illustrated by the observations in the case of *Sachidananda Benerji, Assistant Collector of Customs Vs. Sitaram Agarwala and Another, .* In a case u/s 167(81) which constitutes a "criminal offence", knowledge and intent to defraud has to be proved in addition to evasion of the statutory prohibition or restriction. Though so much is not required in a case coming u/s 167(8) which constitutes a statutory "customs offence", it must nevertheless be established by the Customs authorities, seeking to confiscate the goods that "the goods have been imported against the prohibition or restriction imposed under Ch. IV of this Act". It is only after this primary condition of the offence is established that the goods may be seized and confiscated "even in the hands of third persons who may not have had anything to do with the actual import. So long as it is proved that the goods had been imported against the restrictions imposed under Chapter IV the goods

remain liable to confiscation whenever found even if this is long after the import is over and even if they are in possession of persons who had nothing to do with the actual import". But mere suspicious circumstances or the failure of the person in question to give a satisfactory account is not enough to discharge the Government from discharging the onus to establish the primary condition to confiscate the goods,

22. Of course, it is difficult for the administration in the general run of cases, to adduce negative evidence on this primary question particularly after the seizure take place long after the act of importation, and that difficulty, for instance, was pointed out by Sinha J. (as he then was) in the case of *Shermal Jain Vs. Collector of Central Excise and Land Customs, Calcutta*, . It is because the Courts refused to yield to this "difficulty" that Parliament had to engraft an exception overriding the genera" rule of onus, in the case of those goods in respect of which smuggling had become a social menace, by engrafting Section 178A But if that exception is permitted to be extended to goods not covered by Section 178A the action of the Legislature must be held to have been meaningless, apart from the burial of the principle of criminal jurisprudence which has been applied to statutory offences from the beginning

23. It is in this light that the meaning of a proceeding for confiscation being described as a proceeding in rem is to be understood. Once it is established that the goods were unlawfully imported, they are liable to be confiscated even though the person from whose custody they were seized was not involved in the act of illegal importation vide *Pukhraj Vs. D.R. Kohli*, But unless the first condition is first established by the authorities, the goods cannot be confiscated merely because the goods are of a foreign make except where the goods were seized as a *res nullius*, there being nobody to claim it. This position was explained by me in paragraph 34 onwards of my judgment in the Division Bench case of *Mangala Prosad Vs. V.J. Manerikar and Others*, Subject to this, the theory of "offending goods" can still operate within a limited field as pointed out in para 46 of that judgment Nothing has been shown to persuade me to depart from those conclusions or to necessitate reference to a larger Bench.

24. In the result, where the goods are seized from the custody of some person, they can be confiscated only on proof that they had been imported by somebody without possessing the requisite permit. In this case the goods were seized from the custody of one Taslim and the proceedings rest on the assumption that the petitioner was owner of the goods (vide the consent order, reproduced in para 7 of the counter-affidavit) and that he had imported the goods from Pakistan or was concerned with such importation (*Ann E*, para 15). Save some suspicious circumstances the respondents have no evidence to show this. The failure of the petitioner to produce his purchase documents cannot be relied upon by the respondents in a case where Section 178A was not attracted. That could be done if there was a law making it unlawful for anybody to possess goods of foreign make, such as blades, So long as there is no law, a person cannot be deprived of

his property simply because his property is of foreign origin and he cannot account for how it was imported.

25. It follows that the confiscation order also must be struck down.

26. In the result, the Rule is made absolute and the respondents are restrained from giving any effect to the impugned order at Ann. E. There will be no order as to costs.

27. As prayed for by Mr. Amiya Kumar Mukherjee, learned Advocate for the respondents the operation of the order will remain stayed for a period of six weeks from this date.