
(1999) 08 CAL CK 0014
In the Calcutta High Court
Case No : Matter No. 1942 of 1986

P.K. Ghosh

APPELLANT

Vs

Kailash Kumar Mazodia

RESPONDENT

Date of Decision : 13-08-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 165
Customs Act, 1962 — Section 108

Citation : (2000) 117 ELT 14

Hon'ble Judges : S.N. Bhattacharjee, J; S.B. Sinha, J

Bench : Division Bench

Judgement

S.N. Bhattacharjee, J.—This appeal is directed against the judgment and Order, dated 19-4-1994 passed by a learned single Judge of this Court in writ application marked as Matter No. 1942 of 1986 whereby the learned trial Judge allowed the writ petition filed by the respondent herein challenging the legality of search and seizure, dated 8-11-1986, 9-11-1986 & 10-11-1986 conducted by the appellants as also the summons dated 12-11-1986 issued by the appellants, D.R.I. Authorities, Calcutta u/s 108 of the Customs Act, 1962.

2. The writ petitioner under the name and style of Steel and Allied Product Exporters at 53D Chowl Patty Road, Calcutta used to manufacture and export various engineering goods. The petitioner obtained advance licence under Duty Exemption Scheme up to the value of Rs. 38,86,000/- for import of G.P. Sheets/Coil Secondary/Prime quality 399 M.T. The Licence was valid for 18 months, subject to the condition that the petitioner was required to export various goods at F.O.B. value of Rs. 5680805/- of total 1105 M.T. and that the goods imported thereunder were to be utilised in accordance with the Notification No. 117/602/14/78-DBK, dated 9-6-1978 read with the Notification No. GSR, dated 5-4-1982. The licence also provided that in the event of failure to fulfil the export obligation within the prescribed time the licence holder shall, inter alia, pay the Customs Authority duty proportionate to the material or corresponding to the product not exported. The petitioner was further required to intimate the

Licensing Authority the actual date of clearance of first consignment of imported goods within 7 days and send quarterly returns of all imports made, goods manufactured and goods exported. The petitioner had to execute a bond and guarantee agreement of the value of Rs. 3,31,000/- before the Licensing Authority. Under above terms and conditions of the licence the writ petitioner exported materials during the period from 8-8-1986 to 22-9-1986 and earned substantial amount of U.S. dollars which was duly deposited to the Reserve Bank of India.

3. The petitioner imported on 7-8-1986 about 271.620 M.T. of G.P. sheets in 64 coils and further imported 23.970 M.T. G.P. sheets in 6 coils under Invoice No...dated 27-8-1986. The goods of both the occasion were cleared for home consumption by Calcutta Customs Authority from the Calcutta Port. The petitioner having no facility of its own factory by decoiling and cutting the coils transported the warehouse of M/s. C.K. Steel Private Limited for decoiling 70 coils and petitioner required the said C.K. Steel private Limited to deliver 64 coils after decoiling on 4-11-1986. M/s. C.K. Steel Private Limited thereupon issued 64 delivery slips in respect of each of the said 64 coils. On 7-11-1986 Rajesh Mazodia arranged a truck bearing No. WGH-7495 for delivery of two decoils from the said warehouse of M/s. C.K. Steel Private Limited and transport of the same to the petitioner's factory. Due to heavy rain the goods could not be delivered by the transporters parked the said truck with the goods at his own place and on 9-11-1986 when the said truck with the said goods was moving on Maharshi Debendra Road, Calcutta towards petitioner's factory, the DRI officers seized the said goods under Customs Act. They also seized on 8-11-1986 68 coils together with Truck No. BHB 9219 from the warehouse of M/s. C.K. Steel Private Limited. Thereafter the DRI officers made various search and seizure at the residence and factory of the petitioner and seized various documents therefrom. Against such search and seizure the writ petition was filed before the learned trial Judge praying, inter alia, for the following writs :-

"A writ in the nature of certiorari commanding the respondents to transmit and certify the records of the case to this Hon"ble Court in order that the said purported searches, seizures and detentions dated 8-1-1986, November 10, 1986 may be quashed and set aside and conscionable justice may be rendered by this Hon"ble Court."

"A writ in the nature of mandamus commanding the respondents and each of them and their servants and agents to forthwith cancel withdraw recall and rescind the said purported searches, seizures and detentions dated November 8,1986, November 9,1986 and November 10,1986."

"A writ in the nature of prohibition restraining the respondents and each of them and their servants and agents from proceeding any further with or giving any effect to or taking any steps whatsoever relating to or under the purported searches, seizures and detentions."

4. The D.R.I. authorities justified the action taken by them in the Affidavit-in-opposition sworn by Sri Kunja Behari Mallick contending, inter alia, that on secret information received and on enquiries made it appeared that the writ petitioner along with his brothers and others were wrongfully selling G.P. Sheets imported by them duty free under the "Duty Exemption Scheme" by various manipulations. Thereupon a watch was maintained on the said goods recently imported on or about 17th October, 1986 and 23rd October, 1986 by the writ petitioner and thereafter the said search and seizure was made in accordance with the provisions of law. Their further contention is that the records seized and in particular the Delivery Order and the statements made by Biresh Chandra Pal, the transport contractor, Abani Bhattacharjee, a sircar of the clearing agents, P.D. Tebriwal, purchaser of some of the said goods, Madan Gopal Mazodia, the brother and that of Kailash Mazodia clearly corroborate the said information which was received by the Customs Authorities. As regards the 68 coils of G.P. Sheets seized at the premises of the respondent No. 5, it is evident from the statement of the representative of M/s. Capital Transport, the Transport Contractor that the imported G.P. Sheets of M/s. Steel and Allied Product Exporters were being loaded in a truck bearing No. BHB 9219 for transportation of G.P. Coils to Patna along with the two coils of indigenous G.P. Sheets of identical nature. The said two coils of imported G.P. Sheets of the said M/s. Steel and Allied Products were seized along with truck bearing No. WGH 7495 while the same were attempted to be unloaded at 18/1, Maharshi Debendra Road. It is evident from the statement of said Sri Tibrewal, the buyer of the subject imported G.P. Sheets, the lorry driver and the representative of the lorry owner that the said two coils of imported G.P. Sheets were loaded at the respondent No. 5's godown for delivery at Lohapatty along with one coils of indigenous G.P. Sheets. The fact of the said coil being purchased by Sri Tibrewal from M/s. Steel and Allied Products Exporter also being admitted by Tibrewal in his statement. According to the respondents, the petitioner in gross violation of the stipulation and/or condition of the licence granted to him has partly sold the said imported goods in the country and had the intention of selling the entire consignment within the country so that after disposal of the entire consignment they would be entitled to claim set off of the said consignment allegedly showing the same to have been exported on the basis of manipulated export documents procured by them against the said advance licence.

5. In course of hearing, some interim orders were made both by the trial court as well as by the Division Bench whereby seized goods were sold in auction under the supervision of the Special Officer and the sale proceeds were invested in fixed deposits with the nationalised banks and adjudication proceedings were allowed to continue subject to following direction of the Division Bench :-

"We modify the said part of the order under appeal by directing that in the pending adjudication proceedings the respondents will have a right to ask the adjudicating authority to produce the persons whose depositions may be used against the respondents for cross-examination and if such request is made to the

adjudicating officer he will consider the same and pass suitable orders and directions. In the event the adjudicating officer rejects such request of the respondents he will record his reasons in writing for doing so."

6. After having heard the learned counsel for both the sides the learned trial Judge allowed the writ petition on a finding that the petitioner has fulfilled the entire export obligation of the licence and the said export had been accepted by the Customs Authorities and the Licensing Authority, that the goods in question were lawfully imported under valid licence acquired by the Customs Authorities for home consumption and as such were not liable to confiscation. The learned trial Judge further held that there was no basis to believe that the importation of the goods were either illegal or in violation of law, that the condition precedent for holding the belief for making the search and seizure was absent. The Id. trial Judge on the basis of the above findings allowed the writ application with the following directions :-

"Search and seizure dated 8th November, 1986, 9th November, 1986 and 10th November, 1986 by the respondents are quashed and set aside. Consequently all proceedings, orders and notices including show-cause notice dated 21st November, 1986 are also quashed and set aside.

The respondents are directed to return all seized documents to the petitioner forthwith.

Since, the seized goods have been sold under orders of the Court the sale proceeds thereof after taking into account the interest accrued thereon and all expenses incurred therefrom, be released to the petitioner forthwith by the Joint Special Officers Sri R.N. Dutt and Sri S.K. Dutt, Advocates.

The Bank Guarantee furnished by the petitioner to the Collector of Customs, Calcutta for Rs. 32,17,072/- under order dated 9th April, 1990 be discharged and released to the petitioner.

The Bank Guarantee furnished by the petitioner to the Joint Special Officers for Rs. 15,00,000/- under order dated 24th September, 1992 be discharged and released to the petitioner.

The Joint Special Officers shall be entitled to encash the fixed deposits with UBI, High Court Branch, Calcutta before the date of maturity.

Out of the funds, lying with the Joint Special Officers in UBI, High Court Branch, Calcutta the Joint Special Officers shall be entitled to final remuneration of Rs.10,000/- each.

The Joint Special Officers are hereby discharged and filing of accounts by them are dispensed with."

7. Being aggrieved, the D.R.I. Authorities have preferred this appeal challenging the order by the learned trial Judge.

8. It has been argued by learned counsel for the appellant, the learned trial Judge has sought to sit on appeal over the conduct and act of the appellant-authorities. According to him the learned trial Judge has failed to consider the decision in *Dr Partap Singh and Another Vs. Director of Enforcement, Foreign Exchange Regulation Act and Others*, where it has been held, *inter alia*,

"The material on which the belief is grounded may be secret, may be obtained through intelligence or may be conveyed orally by information and as such the officer is not bound to disclose his material on the mere allegation that there was no material before him on which his reason to believe can be grounded.

It was further held, "illegality of search would not render the seizure illegal so as to enable the accused to claim the return of the material. This principle has in effect followed the judgment of *R.S. Seth Gopikrishan Agarwal Vs. R.N. Sen, Assistant Collector of Customs and Others*, where search was also made on the basis of information received for reason to believe and subsequently gold was found on search and seizure."

He has also relied upon a decision reported in *Union of India Vs. Shyamsunder and others*, Supreme Court where it has been held that the reasonable belief have to be viewed from the experienced eye of seizing Customs Officer the Court will not sit in appeal over belief so long as *prima facie*, there were grounds to justify the belief. It has been further pointed out that the *Id.* trial Judge has observed that except *P.D. Tibrewal* or other persons who made the deposition in the said investigation have subsequently retracted their statement in the criminal court and/or otherwise. The learned trial Judge failed to appreciate that the statement and admission made u/s 108 of Customs Act, even if retracted, is binding and can be relied upon and further that the refusal of permission to cross-examine the witnesses did not allow to vitiate the principle of natural justice in view of the decision reported in *Surjeet Singh Chhabra Vs. Union of India and others*, . He has further argued that the learned trial Judge has taken serious exception as the writ petitioner was not allowed to cross-examine the witnesses despite the order of the trial Judge and in doing that the learned trial Judge has failed to appreciate the order, of the appellate court.

9. The learned counsel appearing for the respondents /writ petitioners while supporting the Judgment of the learned trial Judge has argued that the learned Judge did not sit in appeal or substitute his opinion over the recorded reasons nor did he go into the adequacy or sufficiency of the reasons.

10. The court has only examined the existence, the relevancy and rational nexus of the matters of law and fact upon which the validity of exercise of power of search is predicated. According to him the *Id.* trial Judge rightly held that the Customs Officers cannot search and seize the goods in the hope of ultimately discovering some grounds to justify the search and seizure nor they can go on fishing expedition to find out whether any irregularities are committed. The *Id.* Court below relied upon the decision reported in *Innovation, Secunderabad and*

Another Vs. Central Board of Excise and Customs and Another, (vide page 32 of the Judgment and 159 of the paper book). According to him the Affidavit-in-Opposition refers to the alleged statements of witnesses obtained subsequent to seizure which cannot form the lawful basis for the formation of the requisite belief at the time of seizure, it has been further argued on behalf of the respondent that the Id. trial Judge rightly took serious exception to the refusal of the permission to cross-examine the witnesses by the respondent particularly when the Adjudicating Authorities had to rely entirely upon oral evidence. The Adjudicating Officer by order dated 21-11-1988 completely refused the permission to cross-examine the witnesses had been challenged by an interim application, in the writ petition herein, in January 1989, which is pending. As this is a very vital aspect of the adjudication proceedings inasmuch as the entire show cause notice is based on certain statements extracted by D.R.I, in course of investigation subsequent to search, the Id. counsel for the respondent has prayed that the question be directed to be decided by the Trial Court.

11. It is to be noted that the dispute over the validity of search and seizure has lost much of its significance after auction sale of the seized goods under the supervision of the Special Officer appointed by the Trial Court which was upheld by the Division Bench. The adjudication proceedings have been allowed to be completed subject to the terms imposed by the Division Bench but the adjudication proceedings could not be completed because the order of the Adjudication Authorities refusing the right of the respondent to cross-examine the witnesses has been under challenge in the writ petition. The Division Bench by its order dated 28-4-1988 upheld the trial Judge's order of holding auction issued direction as under,

"After meeting the costs, charges and expenses of the sale the Special Officers will keep the balance amount in a suitable fixed deposit account with a nationalised bank. The rights and claims of the parties in the goods as at present will shift to the sale proceeds. The appellants will be entitled to enforce order or orders, if any, passed in the pending adjudication proceedings, if ultimately sustained, against the sale proceeds." *****

***. "We direct that the final order passed in the adjudication proceedings will not be communicated to the respondents except upon a fortnight's notice and this order will not prevent the respondents from taking - further or other proceedings in respect of the final adjudication order as they may be advised."

12. In view of the above order of this Bench and the facts appearing from the materials on record indicating the stage of the adjudication proceedings we are of the opinion that the impugned order of the Id. trial Judge quashing the search and seizure and directing to release the sale proceeds has the effect of instantaneous burial of the order of this Bench. The order of the Id. trial Judge setting aside the seizure of the goods as illegal and wrongful and directing to release the sale proceeds in respect of the goods sold in auction after such wrongful seizure must have proceeded from the conception that no adjudication

proceedings should be allowed to continue in respect of the articles seized on the basis of wrongful search and seizure. The Id. trial Judge might have received support from the Judgment of the Id. single Judge of Calcutta High Court in *New Central Jute Mills Co. Ltd. Vs. T.N. Kaul and Others*, and in *Bishnu Krishna Shrestha Vs. Union of India (UOI)*, . In both the cases direction was given to return the documents seized on the basis of the search and seizure which was found illegal not being based on "reasons to believe".

13. The Apex Court in *Dr Partap Singh and Another Vs. Director of Enforcement, Foreign Exchange Regulation Act and Others*, has laid down the law in this respect as under,

"Assuming that it is obligatory upon the officer proceeding to take search or directing a search to record in writing the grounds of his belief and also to specify in such writing, so far as possible, the thing for which the search is to be made, is mandatory and that non-recording of his reasons would result in the search being condemned as illegal, what consequence it would have on the seizure of the documents during such illegal search. The view taken by a learned Single Judge of the Calcutta High Court in *New Central jute Mills Co. Ltd.* case that once the authorisation for carrying out the search is found to be illegal on account of the absence recording of reasons in the formation of a reasonable belief, the officer who has seized documents during such search must return the documents seized as a result of the illegal search is against the weight of judicial opinion on the subject and does not commend to us. In fact this decision should not detain us at all because virtually for all practical purposes, it can be said to have been overruled by the decision of the Constitution Bench in *Pooran Mal v. Director of Inspection*. This Court held that "courts in India and even in England have consistently refused to exclude relevant evidence merely on the ground that it is obtained by illegal search or seizure, if, therefore, the view of the learned Single Judge of the Calcutta were to be accepted meaning thereby that if the search is shown to be illegal, anything seized during such illegal search will have to be returned to the person from whose premises the same was seized, it would tantamount to saying that evidence collected during illegal search must be excluded on that ground alone. This was in terms negated by the Constitution Bench. It has been often held that the legality in the method, manner or initiation of search does not necessarily mean that anything seized during the search has to be returned. After all in the course of a search, things .or documents are required to be seized and such things and documents when seized may furnish evidence. Illegality of the search does not vitiate the evidence collected during such illegal search. The only requirement is that the court or the authority before which such material or evidence seized during the search shown to be illegal, is placed has to be cautious and circumspect in dealing with such evidences or material. This is too well- established to necessitate its substantiation by a precedent. However, one can profitably refer to *Radhakishan v. State of U.P.* wherein the Court held that assuming that the search was illegal the seizure of the articles is not vitiated, it may be that because of the illegality

of the search the court may be inclined to examine ensues." (See State of Maharashtra v. Nativarlal Damodardas) (para 15)

14. The Calcutta High Court in Bishnu Krishna Shrestha Vs. Union of India (UOI), held that there should be no hesitation in following the decision given by the 5 Judges of the Supreme Court in The Commissioner of Commercial Taxes and Others etc. Vs. R.S. Jhaver and Others etc., wherein it was held,

"Therefore, as the safeguards provided in Section 165 of the Code of Criminal Procedure were not followed, anything recovered at a defective search of this kind must be returned."

15. It, therefore, appears that the judicial opinions differ on the point of return of goods when it is found that the search and seizure by the Statutory Authorities or Seizing Officers was found to be illegal and not based on "reasonable grounds to believe".

16. In the instant case the learned trial Judge held that the validity of search and seizure was to be justified by formation of the requisite belief at the time when the decision was taken to conduct the search. He has further held that there was no basis before the Seizing Officer to form requisite belief that the goods in question was liable to confiscation.

17. We are of the opinion that the learned trial Judge lost sight of the fact that the Director of Revenue Intelligence on the basis of secret information that the writ petitioner along with brothers were wrongfully selling inside the state, G.P. Sheets imported by them duty free under Duty Exemption Scheme and manufacturing document of export by various manipulations. This information was short of "reasonable grounds to believe". Thereupon a watch was maintained on the said goods imported on or about 17 October, 1986 and 23rd October, 1986 by the writ petitioner and noticed that the goods were removed to the West Bengal State Warehouse Corporation at Paharpur and therefrom the goods were taken to the godown premises of M/s. C.K. Steel Pvt. Ltd., Howrah and the truck was intercepted on the way. Thus the suspicion arising out of the information hardened into reasonable belief and thereafter search and seizure followed. Documents and goods were seized on search and investigation was conducted by examining witnesses giving out incriminating evidence justifying search and seizure. It is true that the individual liberty has been sought to be protected by the courts against the abuse of power by the authorities executing a statutory obligations by means of (a) procedural restraints in the form of the ground rules for search and seizure, (b) statutory restraints provided in the Act and judicial restraints and (c) Judicial restraints evolved by the courts of law. In our opinion, such cloak of protection thrown around a suspect should not be pushed to the extreme verge so as to degenerate it into a taboo of disability in dealing with economic offences by an organised Section of the community. We are, therefore, unable to agree with the learned trial Judge that the search and seizure was not conducted without reasonable grounds to believe that the goods were being sold

inside the country in violation of the terms of licence.

18. It appears from materials on record that the adjudication proceedings has advanced to a great extent and the same is only pending for final order. It appears from the written submission of the respondent herein that an application was filed in the writ petition challenging the order of the adjudication officer denying the right of the respondent to cross-examine the witnesses and that petition has not been disposed of by the learned trial Judge. The learned trial Judge also in his impugned Judgment has observed as follows :-

"The adjudicating officer contrary to and in violation of the aforesaid orders of this Court and the law totally rejected the said request for cross-examination by an order dated 21st November, 1988. An interim application against the said order is pending in this Court wherein the said adjudication proceedings have been stayed."

19. Therefore, the writ petition has been disposed of by the learned trial Judge without disposing of the petition filed therein although the adjudication proceedings have been stayed by an interim order. The respondent has prayed for passing appropriate order on the petition. It should be noted that this Division Bench considered the question of writ petitioner's right to cross-examine in adjudication proceedings. This Bench considered two Judgments of the Apex Court reported in 1967 SC 122 (State of Jammu & Kashmir and Ors. v. Boxi Gulam Mohammad and Anr.) reported in Union of India and Another Vs. Tulsiram Patel and Others, The judgments were found conflicting although both the judgments were passed by the Division Bench consisting of five Judges. After having considered the relevant decisions on the point this Bench by its order dated April 20, 1988 gave the following directions :-

"The matter needs consideration and we are not expressing our final opinion on this point. We modify the said part of the order under appeal by directing that in the pending adjudication proceedings the respondents will have a right to ask the adjudicating authority to produce the persons whose depositions may be used against the respondents for cross-examination and if such request is made to the adjudicating officer he will consider the same and pass suitable orders and directions. In the event the adjudicating officer rejects such request of the respondents he will record his reasons in writing for doing so."

20. Admittedly the prayer of the respondent herein was disallowed by the adjudicating officer by a reasoned order, dated 21-11-1988 which is set out in the memo of appeal in paragraph 14 at page 192 of the paper book volume (I). In our opinion, the learned trial Judge in exercising writ jurisdiction cannot sit upon the reasonings offered by the adjudicating officer particularly when such reasonings were given at the order of the Division Bench after having considered the relevant decisions on the point of entitlement of the writ petitioner to cross-examine the witnesses.

In view of the discussions made above we hold that the Judgment and orders

passed therein by the learned trial Judge are liable to be set aside and accordingly the same is hereby set aside. The writ petition is dismissed without any order as to costs.

S.B. Sinha, A.C.J.

21. In my opinion, the question as to the validity of search has lost its importance in view of the subsequent events.

22. As an adjudication proceedings have already been started, the same is required to be considered in its own merits.

23. Before us, arguments at great length have been advanced as regard the orders passed in the adjudication proceedings. Unfortunately, Division Bench of this Court has passed interim orders from time to time but the fact remains that the validity of the adjudication proceedings is not the subject matter of this writ petition.

24. The writ petition has not been amended and, thus, this appeal must be confined to the question as to whether the search and seizure of the materials was good in law or not.

25. The said question has become academic, unfortunately though, in view of the interim orders passed by this court.

26. Although an appeal is a continuation of the writ petition and it may be open to the parties to bring in subsequent events to the notice of this court, which may be considered, but a fresh cause of action cannot be the subject matter of adjudication in this appeal.

27. It has been accepted at the bar that illegal search does not vitiate the trial or the adjudication proceedings. Thus, the adjudication proceeding should be allowed to continue, and in the event any illegality is committed by the adjudicating authority in passing a final order. The same may be questioned by the party aggrieved thereby before an appropriate forum. But as the validity of the adjudication proceeding has not been question before us, the same has to be directed to proceed in accordance with law.

28. Interim orders passed by this court have for all practical purposes rendered the proceedings infructuous as no order of release of the goods can now be passed even if it be held that certain irregularities were committed by the concerned authority.

29. I for the aforementioned reason agree with the order proposed to be passed by my learned Brother.