

(1995) 09 CAL CK 0005
In the Calcutta High Court
Case No : Criminal Revision No. 1105 of 1988

Radheshyam Khemka

APPELLANT

Vs

M.S. Puri and Another

RESPONDENT

Date of Decision : 11-09-1995

Acts Referred:

Constitution of India, 1950 — Article 21, 22, 227
Criminal Procedure Code, 1973 (CrPC) — Section 155(2), 177, 178, 179, 180
General Clauses Act, 1897 — Section 26
Imports and Exports (Control) Act, 1947 — Section 5

Citation : (1996) CriLJ 871

Hon'ble Judges : R.P. Gupta, J

Bench : Single Bench

Advocate : Biswanath Sanyal, for the Appellant;

Final Decision : Dismissed

Judgement

R.P. Gupta, J.—This petition under Article 227 of the Constitution of India read with Section 482 Cr. P. C. has been filed by one of the accused, Radheshyam Khemka, for quashing of the proceedings of prosecution pending against him in the Court of Metropolitan Magistrate, 7th Court, Calcutta, in Case No. C/452/1970 u/s 5 of Import and Export (Control) Act, 1947, T. R. 134/70.

2. Seven accused were tried before the Court for the offence u/s 5 of Import/and Export Control) Act, 1947, for contravention of conditions of licence of import of goods imported for utilisation at the factory at Patna and instead of those being utilised at Patna were sold some-where in Calcutta for which violation the present prosecution was launched.

3. One of the relevant conditions of the licence was "All items of imported goods shall be used only in the licence-holders" factory and no portion thereof will be sold to or permitted to be utilised by any of the parties. "The allegation of the prosecution case was that those goods were sold in Calcutta instead of those being utilised in the factory at Patna.

4. The accused/petitioner had contended before the Magistrate that a prosecution had been launched against them before the Patna Court for contravening the provisions of licence for non-utilisation of the imported goods at Patna factory. It was urged that for selling the same goods in Calcutta a fresh prosecution could not be launched in Calcutta as this too amounts to contravention of provisions of licence of import.

5. The Magistrate was of the view that non-utilisation of goods at factory at Patna can be conclusively proved only on additional evidence that goods were sold in Calcutta and so the Calcutta Court had jurisdiction to try the case.

6. The case made out in the grounds of petition is that the factum of alleged sale in Calcutta is nothing but evidence of contravention of conditions of licence which were to be complied with at Patna factory and not a new offence. It has also been asserted that in any case the present trial was continued since 1970 when the complaint was filed and therefore so much delay has occurred in the trial that it becomes unfair for the accused. For these reasons the prosecution is sought to be quashed.

7. The question involved in this case is whether criminal trial can be quashed because another trial for the same offence against some of the persons is pending at Patna in the State of Bihar. Simply stated the allegations are that contravention of a licence, for import of goods, issued by competent authority, for user at Patna factory of the accused, was made. The material came to Port at Calcutta under the concerned licence, one of the conditions of which was actual user at the factory and at Calcutta they were disposed of to some of the buyers who are also accused in the present case.

8. The C. B. I. have investigated the case. The licence had been issued in 1968 and FIR was lodged in 1968 at Patna. A Magistrate at Patna had permitted investigation by Police u/s 155(2) Cr. P. C. as it was a non-cognizable offence then. The allegations are that there was contravention of provisions of licence and therefore an offence punishable u/s 5 of the Import and Export (Control) Act, 1947. In the Special Magistrate's Court at Patna the prosecution was started by complaint made by Deputy Chief Controller of Exports and Imports on the basis of investigation made by the C. B. I. Prosecution in such cases is to be started by the prescribed authorities. In Patna the case was started in 1968 against the licensee-company and its Director who were responsible to the Company for its conduct and management of its affairs. In 1970, however, the present case was started in Calcutta against the licensee-Company and its Directors responsible to it for its management and also against those who purchased the goods as abettors and/ or conspirators in the contravention of Section 5 of Import and Export (Control) Act, 1947.

9. In the present case the Magistrate had recorded 33 witnesses at the charge stage and the matter had come to the stage of hearing on charge. This much evidence has been recorded before expiry of 1971. The case at Patna is still

pending although the charges have been framed.

10. Learned counsel for the petitioner has made two-fold submissions: (1) offence alleged is non-utilisation of goods for manufacture as one of the conditions of licence. The same allegations are in the prosecution at Calcutta with further assertion that by sale of those goods in Calcutta some of the accused who were licensee committed offence of contravention of Section 5 of the Import and Export (Control) Act, 1947, while the other accused abetted the offence or conspired in the commission of offence. Second point urged before this Court is that the prosecution is continuing ever since 1970 and twenty years have passed. The trial is unfair to the accused due to inordinate delay and hence the same should be quashed.

11. Coming to the first point, the rule against double jeopardy has been provided u/s 300 Cr. P. C. which runs thus :

300(1) - A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Sub-section (1) of Section 2, 21 or for which he might have been convicted under Sub-section (2) thereof.

(2) a person acquitted or convicted of any offence may be afterwards tried with the consent of the State Government, for any distinct offence for which a separate charge might have been made against him at the former trial under Sub-section (1) of Section 220.

(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constitute a different offence from that of which he was convicted, may be afterwards tried for such last mentioned offence, if the consequences had happened, or were not known to the Court to have happened at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may be notwithstanding such acquittal or conviction be subsequently charged with or tried for any other offence constituted by the same acts which he might have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) A person discharged u/s 258 shall not be tried again for the same offence except with the consent of the Court by which he was discharged or of any other Court to which the firstmentioned Court is subordinate.

(6) Nothing in this connection shall affect the provisions of Section 26 of the General Clauses Act 1897 or of Section 188 of this Code.

Explanation : The dismissal of a complaint or the discharge of the accused is not

an acquittal for the purposes of this section.

12. Article 22 of the Constitution of India also provides a rule against double jeopardy. A perusal of those provisions clearly shows that what is prohibited is conviction for a second time for the same offence or conviction after the accused has been acquitted in an earlier trial for the same offence. The wording of those provisions nowhere suggest that two trials cannot continue at different places. In this case the goods were received at Calcutta Port under a licence which had a restriction that the goods should be used in the factory of some of the accused at Patna. Instead of such user, those accused disposed of the goods to the other accused at Calcutta. The prosecution allegations is that goods never reached at Ratna factory. By selling the goods in Calcutta the vendors of the goods placed the goods outside their control to an extent that possibility of user in the factory at Patna was ousted.

13. The contention of the learned counsel for the petitioner who is alleged one of the Directors of the Company is that the act of non-user was a complete offence, and therefore sale at Calcutta is not part of offence and the place of trial cannot be at Calcutta. In any case, secondly, it is urged that the trial to two places will be unfair to the accused. Thirdly, it is urged that inordinate delay of trial has breached the mandate of Article 21 of the Constitution.

14. Learned counsel for the petitioner has not been able to show me any authoritative pronouncement which says that trial of the accused at two places cannot take place. The sale of goods at Calcutta put the goods out of control of the company and so at that stage contravention of terms of licence was completed. Sale of the imported goods is the means by which contravention has been achieved. It may also be called as consequence of the contravention. From whatever angle we look at it, it is integrally connected with the non-user that is violation of the terms of licence. The abetment of the offence or conspiracy to commit this offence was thus made in Calcutta.

15. Sections 177 to 186 Cr. P. C. deal with places of trial. Section 178 lays down that where offence is committed partly in one local area and partly in another, then the offence can be tried at either of those places i. e. in Courts having jurisdiction over any of such local areas. Section 179 lays down that when act is an offence by reason of anything done and consequence ensues the offenders may be tried by a Court within whose jurisdiction the act had been done or consequence ensued.

16. In the present case the goods were to be actually used in the factory of the licensees at Patna. That clearly means their sale was also prohibited by the terms of the licence. So the sale at Calcutta would prima facie be a contravention of the terms of licence. The resulting non-user of the goods at Patna factory would also mean a contravention of the terms of licence. Thus it cannot be said from any angle that part of the offence has not been committed in Calcutta. If that is so, then Calcutta Court could certainly have jurisdiction to try the case.

17. Next question is if case is tried in one place having jurisdiction, should the trial at other place be quashed? Quashing of a trial is done when no offence is disclosed and not due to the fact that there is lack of territorial jurisdiction. In the present case one significant factor is that a number of accused are not being proceeded against in Patna Court who are the licensee and Directors responsible to the Company for the conduct of the business of the company who are allegedly proceeded against in Calcutta. Learned counsel for the petitioner submits that charges have not been framed in Patna Magistrate's Court. But the present case is on hearing of charges to be made. By quashing the present criminal trial in Calcutta even those accused who are not being tried at Patna would be discharged.

18. For lack of territorial jurisdiction a criminal proceeding cannot be quashed. It may be stated from record that 33 witnesses had been examined before expiry of 1971 and the case was at the stage of consideration of charge when one or other accused started absenting themselves.

19. An application has been moved before the trial Magistrate at Calcutta that he had no territorial jurisdiction to try the case, because another prosecution was pending before the Patna Court. Learned Magistrate by his order dated 16-5-88, which is also impugned in the present petition before this Court held that the Calcutta Court had jurisdiction to try the case. The Magistrate's notice that one of the terms of licence was that all items of goods imported under it (licence) shall be used only in the licence-holders' factory and no portion thereof will be sold or be permitted to be utilised by any of the parties. So the Magistrate observed that sale at Calcutta was also a contravention of terms of licence which occurred at Calcutta and so the Calcutta Court had jurisdiction.

20. To my mind, in the facts and circumstances of the case and allegations on record, the Magistrate rightly held so.

21. The rule against double jeopardy is not a rule against trial. It is a rule against punishment twice or punishment after acquittal. After hearing, learned counsel for the petitioner in details and going through the records I am of clear view that by trial at Calcutta the rule against double jeopardy is not infringed.

22. The next point is regarding delay in trial, and therefore, alleged unfairness in trial in contravention of Article 21 of the Constitution. Article 21 of the Constitution provides:

"No person shall be deprived of his life or personal liberty except according to procedure established by law."

This provision came up for interpretation before the Supreme Court of India in a recent case reported in Abdul Rehman Antulay Vs. R.S. Nayak and another etc. etc., In this case Their Lordships enunciated the following principles for assessing or testing whether there has been inordinate delay in the trial so as to infringe the right of the accused for fair trial:

i) That fair, just and reasonable procedure implicit in Article 21 of the Constitution of India creates a right in the accused to be tried speedily.

ii) This right encompasses all the stages namely stage of investigation, enquiry, trial, appeal, revision and retrial.

iii) The important concerns underlying the right to speedy trial from the point of view of the accused

a) period of remand and pre-conviction detention;

b) Anxiety and expenses to the accused and disturbance to his vocation resulting from prolonged trial;

c) possibility of impairment of ability of the accused to defend due to lapse of time. The witnesses may not be available.

iv) Their Lordships recognised that accused, in many cases, are interested in delaying the trial. Their Lordships recognised that in a number of cases delay was known-defence tactic and that delay ordinarily prejudices the prosecution as the witnesses become not available. Their Lordships said that the test of unfairness would be the question as to who was responsible for delay and that proceedings taken by either party in good faith to vindicate their rights and interest, as perceived by them, cannot be treated as delaying tactics nor the time taken in pursuing such proceedings, be counted towards delay.

v) All the attending circumstances must be looked into including the nature of offences, number of accused and witnesses, the workload of Courts concerned and prevailing local condition etc. Their Lordships terms these delays as "systemic delays".

vi) These would not be counted towards unfairness of trial.

vii) Each and every delay does not necessarily prejudice the accused. So test of prejudice is also important.

viii) The Court has to balance and weigh several relevant factors and determine in each case if right to speedy trial has been denied.

ix) It is neither advisable nor practicable to fix time limit for trial.

23. The other principles laid down are either conclusions from the earlier noted factor to what orders may be passed by Courts in case delay is noticed or other incidental aspects. So they need not be noticed in detail.

24. The proceedings of trial in the present case are to be tested on the touchstone of above principles and not merely on the factual aspect that in certain cases on the given proceedings, the Supreme Court reached a particular conclusion of delay.

25. Their Lordships had also laid down that in a number of cases delay in trial is

useful to the accused so far as final result is concerned and also every case has to be determined on its own course of trial. In the present case, as I have already noticed, 33 witnesses have been examined by the end of the year 1971. The order sheet shows that thereafter as far back as in November 1971 the accused approached the High Court and obtained stay of the proceedings of the trial. This is so recorded in the order dated 10th November, 1971. Thereafter, I find that the accused continued to seek adjournment or being absent, sometime one accused would be absent and another time other accused would be absent. On some of the hearing, the Court Presiding Officer had been transferred and new one had not joined. The ordersheet shows that several other revision petition had been filed from time to time before the High Court and proceedings before the trial Court continued to be stayed. One stay was obtained from the High Court in a revision petition filed in the year 1971 and the proceedings continued to be remained stayed upto 1976. Then another revision was filed in 1976, It was Crl. Rev. No. 125 of 1976. Again the proceedings of the trial Court was stayed upto 21st June, 1977. The records had remained with the High Court. Again the proceeding was stayed in a revision petition filed before the High Court, it was Crl. Rev. No. 1756 of 1978. The rule was discharged on 24-7-81. Then the present proceeding was filed in the year 1988. Even upto the year 1988, I find that the trial could not proceed because one or other stay was obtained in the High Court or the accused started absenting which is recorded in the ordersheet. It appears that the accused was playing with procedure and taking advantage of joint trial and some or other accused would absent themselves or seek adjournments. This was continued till the present revision petition had been filed in 1988. A persual of the records makes it clear to me that the accused were responsible for the delay in the trial by again and again obtaining stay of the proceedings or absenting themselves or making prayers of adjournments. When delay is due to those factors, it is not covered by the rule of unreasonable delay resulting in unfair trial. The delay has been sought by the accused, one or the other, by active steps on their part. Of course, this revision is pending for the last seven years which is an unfortunate factor, the Courts being over burdened with lots of cases.

26. I am of the clear view that the prayer for quashing the proceedings in the present case against the petitioner cannot be granted. The accused person themselves are responsible for the delay on trial. They have dragged on the case from, the stage of hearing of charge. Accordingly, I dismiss the criminal revision and uphold the impugned order dated 16-5-88.

Let a copy of this order be sent down to the Trial Court for proceeding with the case expeditiously in preference to other cases.