
(1977) 07 AP CK 0005
In the Andhra Pradesh High Court

Rashed Abdullah	Vs	APPELLANT
The State of Andhra Pradesh		RESPONDENT

Date of Decision : 29-07-1977

Acts Referred:

Customs Act, 1962 — Section 111, 112, 122, 123, 135

Citation : (1977) CriLJ 1792

Hon'ble Judges : Sambasiva Rao, J

Bench : Single Bench

Judgement

Sambasiva Rao, J.—The petitioner was convicted for the offence u/s 135(1)(b) of the Customs Act and sentenced to undergo one year's rigorous imprisonment by the Eleventh Metropolitan Magistrate, Secunderabad. In appeal the Metropolitan Sessions Judge, Hyderabad, confirmed the conviction and the sentence. The present revision case is directed against these concurrent decisions.

2. On 27th of September, 1974 at about 3-30 p. m. a party of the customs officials accompanied by two panchas searched the house of the revision petitioner and found 45 bottles of foreign liquor. They also seized from his possession cash of Rs. 21,900/-. The sum of Rs. 21,900/- was later returned to the petitioner. But on 25th of June 1975 an order was passed confiscating the 45 bottles of foreign liquor and also imposing a penalty of Rs. 1,000/-. On 12-1-1976 the complaint was lodged.

3. What was mentioned is an offence u/s 135(b) of the Customs Act. By an amendment effected in 1973 Section 135 was recast by renumbering Clauses (a) and (b) of the provision as Sub-section (1) and by introducing two other Sub-sections. So, when the charge was mentioned as one being u/s 135(b) it really meant as one u/s 135(1)(b).

4. The defence of the petitioner was that when the Excise Officials searched his house on 27th of September, 1974 they seized from his possession cash of Rs. 21,900/- alone but they did not seize any foreign liquor. He denied the very

possession of foreign liquor and its seizure by the authorities.

5. The trial Court as well as the appellate Court accepted the prosecution case, rejected the defence and convicted and sentenced the petitioner as stated above.

6. The prosecution examined P. Ws. 1 to 4 of whom the first three witnesses were official personnel and the 4th was the panch witness. It also strongly relied on Ex. P-5 a statement given by the petitioner when the search and seizure were made. The petitioner in defence examined one witness.

7. Sri Rajagopala Reddy for the petitioner raises three contentions before me. (1) There is neither a charge nor a finding that the 45 bottles of foreign liquor seized from the petitioner's house had been smuggled and also that he had been keeping them knowing that they had been smuggled. (2) The presumption postulated by Section 123 of the Customs Act does not apply to the petitioner, for on the date of the seizure, there was no notification in respect of liquors as postulated by Section 123(2) of the Customs Act. (3) There is neither a charge nor a finding that there was an attempt at evasion of paying duty on the part of the petitioner.

8. At the outset I would like to notice the provision under which the petitioner has been charged. The portions of Section 135, which is material for consideration of this case, are as follows.

135. Evasion of duty or prohibitions. Without prejudice to any action that may be taken under this Act, if any person (a) is in relation to any goods in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or any prohibition for the time being imposed under this Act or any other law for the time being in force with respect to such goods; or

(b) acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation u/s 111;

x x x x x x x.

9. As I have already noted, the charge is not under Clause (a) but is only under Clause (b). Therefore, the petitioner has not been charged with evasion or attempt at evasion of any duty. Consequently, the third point raised by Sri Rajagopala Reddy does not really arise in this case. What the petitioner has been actually charged with is acquiring possession or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation u/s 111. Section 111 enumerates the classes of goods which are liable to be confiscated. It cannot be doubted that the 45 bottles of liquor said to have been seized from the residence of the petitioner and which are said to have a foreign origin would certainly come within the mischief of Section 111.

10. P. Ws. 1 to 4 speak about the search and seizure of the 45 bottles of liquor.

The learned Metropolitan Sessions Judge concluded after the resume of the evidence on record that on 27th September, 1974 at about 4-30 p. m. P. W. 1 with the assistance of P. W. 3 searched the premises of the petitioner and recovered 45 bottles of liquor (whisky) and cash of Rs. 21, 900/- in the presence of the petitioner. The learned Judge also rejected the argument advanced on behalf of the petitioner that the evidence on record did not establish that the various rooms from which the liquor was seized were under the occupation of the petitioner, The learned Sessions Judge while coming to this conclusion referred to several circumstances which strengthen that conclusion. The petitioner admitted that P. W. 1 had come to his house and made search and seizure. The evidence of P. Ws. 3 and 4 made it clear that when the search and seizure took place no body excepting the petitioner and a maid servant was present in the house. The evidence also disclosed that five bottles of liquor were recovered from a plastic basket which was kept in the very room in which the petitioner was found seated, The petitioner gave a statement Ex. P-5 admitting several things including that the house belonged to him. The petitioner also admitted that a cash of Rs. 21,900/- was also seized from his house. On the basis of these features the learned Sessions Judge agreed with trial Court and concluded that the 45 bottles of liquor were seized from the portion of the house which was in the occupation of the petitioner.

11. The prosecution strongly relied on Ex. P-5, the statement given by the petitioner at the time of search and seizure. He stated therein that his house was searched by the Central Excise Officers after informing him that they had a reason to believe that smuggled liquor bottles were concealed in his premises. Thereupon, the petitioner informed them that he had four bottles and still the officers wanted to make a search of the premises. Thereafter they discovered 41 bottles more in another room. There were no vouchers with him covering the 45 bottles. He did not possess or maintain any stock register or account for the above goods. The stock was received by him that day itself in the morning. He had disposed of three bottles out of 48 supplied to him for the purpose of selling them away to a party whose name and address the petitioner did not disclose. The goods were to be sold on commercial basis. Since the bottles of liquor were of foreign origin and they were not covered by bills as per customs rules, they were taken in custody. They were liable to confiscation. The panchas were present throughout the search. For the last few months he had been doing this business on commission basis. In addition to the 45 bottles of foreign liquor, the officers recovered Rs. 21,900/- cash from a steel almirah which he had realised by the sale of his assets of President Stationery Mart. Since he was keeping indifferent health and that there was nobody to look after his assets, he was keeping the cash in his house. The description of the 45 bottles of liquor shown in the panchanama was conceded that the statement was given and that it could be used in further proceedings against him.

12. Sri Rajagopala Reddy strongly argues that this is a statement taken from the petitioner under coercion and threat. Both the Courts rejected this contention

advanced on behalf of the petitioner. I see no reason to interfere with this concurrent finding. I, therefore, accept that Ex. p-5 was given by the petitioner freely when the seizure was made.

13. Ex. B-5 is a complete answer to the contentions raised by Sri. Rajagopala Reddy in points 1 and 2. The petitioner clearly admitted in this statement that he had 48 bottles of foreign liquor out of which he had already disposed of three. He also admitted that he did not posses or maintain any stock register or account for the stock of foreign liquor. That stock of foreign liquor, he also admitted, was not covered by bills as required by the Customs Rules. In fact he had been doing this business on commission basis for the last few months. There is no substance in the contention that there was neither a charge nor a finding that the 45 bottles of foreign liquor seized from the petitioner had been smuggled and that he had been keeping them knowing that they had been smuggled. In the very complaint the nature of the offence was described thus:

Acquiring possession of liquors of foreign origin in contravention of the provisions of Chapter IV-A of the Customs Act, knowing or having reason to believe them to be liable for confiscation and thereby committing an offence punishable u/s 135(b) of the Customs Act, 1962.

14. This description of the nature of offence is very clear and leaves no scope for ambiguity. It was specifically alleged that the petitioner had acquired possession of liquors of foreign origin in contravention of the provisions of Chapter IV-A.

15. Chapter IV-A is comprised of Sections 11-A to 11-G, Clause (a) of Section 11-A defines "illegal import" as "the import of any goods in contravention of the provisions of this Act or any other law for the time being in force." Section 11-B empowers the Government to notify goods about which it is satisfied that it is expedient in the public interest to take special measures for the purpose of checking the illegal import etc. Section 11-C requires every person - possessing the notified goods to intimate the place of storage etc. Precautions to be taken by persons acquiring the notified goods are stated in Section 11-D. According to Section 11-E they should maintain accounts in regard to the notified goods. Sale of notified goods is required to be evidenced by vouchers as per Section 11-F. However, according to Section 11-G nothing in the above sections applies to any notified goods which are in personal use of the person by whom they are owned, possessed or controlled.

16. Ex. P-5 shows that the petitioner had not complied with any of these requirements despite the admitted importation of foreign liquors which is clearly "illegal import" within the meaning of Clause (a) of Section 11-A. Quite apart from Ex. P-5, there has been no attempt on the part of the petitioner to adduce evidence in Court that he had complied with these requirements of Chapter IV. This is what the Courts below have held. Thus, I see that there is not only a charge but also a finding that the bottles of foreign liquor seized from the petitioner's house had been in his possession contrary to law and that he had

been keeping them knowing that such possession was illegal and was an offence. There is, therefore, no force in the first contention.

17. The second point raised by Sri. Rajagopala Reddy pertains to burden of proof. Sub-section (1) of Section 123 of the Customs Act lays the burden of proving that the goods seized are not smuggled goods on the person from whose possession the goods have been seized where such seizure has taken place in the reasonable belief that they are smuggled goods. Sub-section (2) states that the section applies to gold, diamonds, manufacture of gold or diamonds, watches and any other class of goods which the Central Government may by notification in the official Gazette, specify. In this case, the search and seizure took place on 27th of September, 1974. Till 10th October, 1974 there was no notification Under Sub-section (2) of Section 123 specifying that Section 123 applies to liquors also. Such a notification was made only on 10th October, 1974. The order of confiscation was, however, made on 25th of June, 1975. The contention advanced on behalf of the petitioner is that since the notification was made after the seizure, it has no retrospective effect and does not apply to the petitioner's case with the consequence that the burden is on the prosecution itself to show that they were smuggled goods. Learned Counsel contends that the Courts below have proceeded on an erroneous assumption that the burden is on the petitioner. Reliance is placed on *Amba Lal v. Union of India* (UOI) AIR 1961 SC 264 : 1961 (1) Cri LJ 326.

18. In the first place, it may be pointed out that even supposing that the burden of showing that the 45 whisky bottles seized from the petitioner were smuggled goods, was on the prosecution, the statement of the petitioner Ex. P-5 provides clear proof of the allegation. Therefore, it can be, without hesitation, said that prosecution has discharged the burden, if it rested on it.

19. Even otherwise, the notification was issued on 10th October, 74 in respect of liquors and the actual confiscation order was made on 25th June, 1975. The goods which can be confiscated are given in Section 111. Section 112 lays down the penalties for improper importation of goods which are liable to confiscation. Section 122 lays down the procedure for adjudication of confiscation and imposing of penalties. When the goods are seized under the Customs Act, they are seized in a reasonable belief that they are smuggled goods. Straightway it is not adjudicated that they are smuggled goods, that they are liable to be confiscated and that penalties can also be imposed. If the customs authorities entertain a reasonable belief, then they are empowered to seize the goods without deciding even then that they are smuggled goods. Whether they are really smuggled goods or not will have to be decided later in an enquiry that will have to be conducted in accordance with the procedure, laid down by the Customs Act. That decision in this case has been rendered by the order of the authorities on 25th of June, 1975 when confiscation was ordered. Therefore, the date on which the proceedings relating to confiscation and imposing of penalty have commenced appears to be the crucial date for fixing the burden of proof. In

this case those proceedings started after the notification dated 10th October, 1974 was issued including liquors within the category of goods mentioned in Section 123(2).

20. In *Amba Lal v. Union of India* (UOI) 1961 (1) Cri LJ 326 (SC) (supra), the decision on which learned Counsel for the petitioner relies, the Supreme Court was dealing with Section 178A Sea Customs Act which corresponds to Section 123 of the present Act. Subba Rao, 3. (as he then was), speaking for the Court, pointed out that the appropriate Customs authority was empowered under the Sea Customs Act to make an enquiry in respect of an offence alleged to have been committed by a person under the said Acts, summon and examine witnesses, decide whether an offence is committed, make an order of confiscation of the goods in respect of which the offence is committed and impose penalty on the person concerned. The burden of proof is on the Customs authorities and they have to bring home the guilt to the person alleged to have committed a particular offence under the said Acts by adducing satisfactory evidence. But the Customs authorities raised the contention that the onus shifted to the appellant in that case for three reasons, one of them being the provisions of Section 178-A of the Sea Customs Act. Dealing with this contention the learned Judge pointed out in paragraph 6 thus:-

Section 178-A of the Sea Customs Act does not govern the present case, for that section was inserted in that Act by Act No. XXI of 1955 whereas the order of confiscation of the goods in question was made on January 18, 1952. The Section is prospective in operation and cannot govern the said order.

21. The observation of the Court that Section 178-A was prospective in operation is strongly relied on by Sri Rajagopala Reddy to say that the notification of 10th October 1974 would not apply to the seizure made on 27th of September, 1974, However, the importance given to the order of confiscation by the Supreme Court is noteworthy. Manifestly, the learned Judges were of the opinion that the date of the order of confiscation was crucial in order to decide whether Section 178-A would apply to the case or not. directly dealt with Section 123 of the Customs Act. No doubt, in this decision no reference was made to the earlier decision in *Amba Lal v. Union of India* (UOI) 1961 (1) Cri LJ 326 (SC), (supra) which is a decision of a Bench of five Judges. The later decision is that of a Bench of three Judges. In the later case *Beg, J.* (as he then was) rendering the judgment of the Court, said that Section 123 could be applied when the case came up for trial before the Magistrate and it was immaterial whether the appellant in that case was found in possession of the goods on 21-4-1967, to the view I have expressed that it would be sufficient if the notification was in force by the time the proceedings for confiscation have started I derive support from the above two decisions.

23. Further, what is contained in Section 123 relates to proof and is, therefore, a procedural matter. It is well settled that procedural provisions of law can be given retrospective effect. There is abundance of authority for this proposition. Vide

Garikapatti Veeraya Vs. N. Subbiah Choudhury, ; Jose Da Costa and Another Vs. Bascora Sadasiva Sinai Narcornim and Others, ; Balumal Jamnadas v. State of Maharashtra (supra) and Narhari Shivram Shet Narvekar Vs. Pannalal Umediram, . It is unnecessary to refer to the above cases individually. I would only extract a passage from the latest of these decisions i. e., Narhari Shivram Shet Narvekar Vs. Pannalal Umediram, ; Fazl Ali, J. observed in paragraph 8:

A fortiori the execution proceedings being purely a matter of procedure it is well settled that any change in law which is made during the pendency of the cause would be deemed to be retroactive in operation and the appellate court is bound to take notice of the change in law.

24. I am not therefore, persuaded to accept the contention of Sri. Rajagopala Reddy in regard to the burden of proof.

25. Thus, I see no substance in any of the three contentions raised on behalf of the petitioner. I am satisfied that the decisions of the Courts below are quite correct.