
(2013) 03 DEL CK 0043
In the Delhi High Court
Case No : CrI. M.C. 1752/2012

Saket Aggarwal

APPELLANT

Vs

Directorate of Revenue

RESPONDENT

Date of Decision : 06-03-2013

Acts Referred:

Citation : (2013) 3 AD 433 : (2013) 135 DRJ 619 : (2013) 2 ILR Delhi 1474 :
(2013) 2 JCC 865 : (2013) 2 JCC 862

Hon'ble Judges : G.P. Mittal, J

Bench : Single Bench

Judgement

G.P. Mittal, J.—Aggrieved by an order dated 16.07.2011 passed by the learned Additional Chief Metropolitan Magistrate (ACMM), New Delhi, the Petitioner seeks to invoke the inherent powers of this Court u/s 482 of the Code of Criminal Procedure (Code) to set aside the summoning order and quashing of the complaint for an offence punishable u/s 174 and 175 of Indian Penal Code (IPC). As per the averments made in the Petition, one M/s. Kartik Traders having its office at S-27, Brindavan Garden, Sahibabad imported 22400 kgs of "dry medicinal herb material Inula Racemosa" and 400 kgs of "dry medicinal herb material Chinese Ginseng" which arrived at Inland Container Depot(ICD) Tuglakabad on 07.01.2008. The officials of DRI after receipt of certain information that the importer was importing some restricted items examined the said consignment on 08.01.2008 in presence of the proprietor of Kartik Traders, his custom house agent, two independent witnesses and officers of Wildlife Crime Control Bureau. The Petitioner was summoned by the Customs Officer to appear before him on 11.01.2008 along with all import and sale documents for the last five years in respect of earlier said M/s. Kartik Traders. The summons were handed over to the father of the Petitioner on 11.01.2008 at about 2:00 am. Since the Petitioner was out of town, he wrote a letter to the Respondent and expressed his inability to appear on 11.01.2008. However, the Petitioner showed his willingness to appear after 5-7 days. Another summons were issued for the Petitioner's appearance on 22.01.2008 at 2:00 pm. The Petitioner again sought

10 days time as his wife was not keeping good health and was under medication. The instant complaint under Sections 174 and 175 of the Indian Penal Code (IPC) was filed by the Respondent against the Petitioner on the ground that the Petitioner had committed an offence punishable under Sections 174 and 175 IPC as he intentionally omitted to appear before a public servant although he was to appear before the Respondent in pursuance of the summons. Similarly, violation of the provision of Section 175 IPC was alleged on the ground that the Petitioner being legally bound to produce or deliver all documents failed to produce the same.

2. A short submission raised by Mr. Mohit Mathur, the learned counsel for the Petitioner is that it is admitted case of the parties that as per the provision of Section 108 of the Customs Act, 1962, as it was in force at the time of issuance of the earlier said summons, only a Gazetted Officer of Customs duly empowered by the Central Government in this behalf was entitled to summon any person or to produce documents or other things which were necessary for any inquiry by the said officer under the Customs Act. However, as per the M.F. (D.R.) Notification No. 8/2008-Cus.(N.T.) dated 20th February, 2008 issued by the Government of India which came into force on 10.05.2008, the words "duly empowered by the Central Government in this behalf" were omitted w.e.f. 13.07.2006. Thus, as per the provision of Section 108 of the Act which was in force at the time of issuance of the summons for appearance of the Petitioner and production of documents for 11.01.2008 and 22.01.2008, the customs officer who issued the summons was not duly empowered by the Central Government in this behalf. Thus, he was not entitled to issue the summons u/s 108 of the Act. However, by virtue of the amendment in Section 108 of the Act which came into force retrospectively w.e.f. 13.07.2006, he got an authority to issue the summons as required u/s 108 of the Act. The only question for determination is whether on account of the retrospective amendment in Section 108 of the Act, the Petitioner could be prosecuted under Sections 174 and 175 IPC?

3. This question is answered by a judgment of a Co-ordinate Bench of this Court in Rakesh Kumar Goyal Vs. NCT of Delhi and Another, where this Court held that although by retrospective legislation the legislature can confer a procedural competency on an officer, however, an act or omission cannot be made punishable as an offence unless the competency exists on the day when the offence is committed. Paras 6 to 13 of Rakesh Kumar Goyal are extracted hereunder:

6. It may be noted that prior to the amendment on 13th July, 2006 Section 108 of the Customs Act enabled any Gazetted officer of Customs to summon any person to give evidence. By Section 25 of the Taxation Laws Amendment Act, 2006 Section 108 of the Customs Act was amended with effect from 13th July, 2006 and it entitled a Gazetted officer of Customs specifically empowered by the Central Government in this behalf to summon a person, to give evidence or

produce documents. By M.F. (D.R.) Notification No. 8/2008-Cus. (N.T.) dated 20th February, 2008 Central Government empowered all Gazetted officers of the Customs for the purpose of Section 108 of the Customs Act. By Section 69 of the Finance Act, 2008 Section 108(1) of the Act was amended so as to remove the words "duly empowered by the Central Government in this behalf". This Finance Act came into force on 10th May, 2008 however the amendment was made retrospectively with effect from 13th July, 2006. It would be thus evident that when the summons were issued, Respondent No. 2 was not empowered by the Central Government to summon a person, to give evidence or produce documents u/s 108 of the Customs Act. This empowerment was conferred on 20th February, 2008, and thereafter the words "duly empowered by the Central Government in this behalf" were deleted on 10th May, 2008 with retrospective effect from 13th July, 2006.

7. The issue before this Court is whether this retrospective amendment brought by Section 69 of the Finance Act though procedurally can empower an officer to summon retrospectively, however can retrospectively create an offence for non-compliance of the summons issued u/s 108 of the Customs Act. All the summons issued to the Petitioner i.e. on 12th June, 2006, 3rd July, 2006, 3rd November, 2006, 10th January, 2007, 2nd April, 2007, 21st May, 2007 and finally on 10th July, 2007 were issued when Respondent No. 2 was not duly authorized to issue summons. Even on the date when the cognizance of the offences under Sections 174 /175 IPC was taken by the Learned ACMM on the complaint of Respondent No. 2, the Respondent No. 2 was not authorized to issue summons to a person to give evidence or to produce documents. The retrospective amendment by Section 69 of the Finance Act, 2008 can ex-post facto ratify the acts of officers in issuing summons u/s 108 of the Customs Act, however cannot make them liable for the offence for the non-compliance thereof because when the non-compliance of the summons was done the same was not an offence. It is well settled that by a retrospective amendment no offence can be created as the same is contrary to Article 20 of the Constitution of India.

8. A plain reading of Section 108 of the Customs Act shows that the offence is attracted only if a summon being issued by the officer duly authorized in this behalf is intentionally disobeyed. Thus, violation or avoidance of summons issued by an officer who is not authorized or competent to issue the same cannot sustain a conviction u/s 174 /175 IPC. Dealing with this issue in *Shiam Lal Vs. Emperor*, it was held that:

Shiam Lal has been convicted u/s 174 of the Indian Penal Code and sentenced to a fine of Rs. 30. The case has been submitted to this Court by the Additional Sessions Judge with the recommendation that the conviction and sentence be set aside. It appears that a decree was transferred to the Collector by the Civil Court for execution inasmuch as the property to be sold was ancestral property. In the course of the proceedings held in this execution case a Tahsildar, who is an Assistant Collector of the second Class, issued a summons to Shiam Lal to attend

his Court in order to enable the Tahsildar to ascertain whether there was any incumbrance on the property ordered to be sold. Shiam Lal did not attend and thereupon he was prosecuted and sentenced as stated above. In order to sustain a conviction u/s 174 it must be shown that the summons issued was issued by a public servant legally competent as such public servant to issue the same and the accused intentionally omitted to attend in pursuance of the summons. In this case under the rules framed by the Local Government in regard to the sale of ancestral land, the Collector is empowered to summon any person whom he thinks it necessary to summon for the purpose of ascertaining the matters to be specified in the proclamation of sale and under rule 44 he can delegate his powers only to an Assistant Collector of the first Class. He could not delegate his authority to an Assistant Collector of the second class and, therefore, the Tahsildar, was not legally competent to issue the summons which Shiam Lal did not obey. Furthermore, in this case there is nothing to show that the non-compliance with the summons was intentional. Under these circumstances the conviction of Shiam Lal was illegal. I accordingly set it aside and direct that the fine imposed on him, if paid, be refunded.

9. In *Khota Ram and Ors. Vs. Emperor*, 6 (1907) Crl.L.J. 107 it was held:

There is nothing in the Revenue Act authorizing the issue of such summons. Section 149 of that Act only provides for the attendance of persons within the limits of the estate within which they reside.

Queen-Empress v. Subanna (1) shows that in the Madras Presidency there is an act III of 1869, giving power to issue summons for attendance of persons for purposes connected with the Revenue administration, but there is no such Act in the Punjab.

Crown v. Kashi Ram (2) and *Crown v. Kuria* (3), show that arbitrators cannot be such be required to attend Court, and *Ghulam Khan v. Empress* (4) decided that it had not been shown that the attendance of a lambardar for the purpose of appointing a village chaukidar could be legally enforced.

We are of opinion that the Tahsildar was not legally competent to issue summons for the attendance in Court of those munsifs, and we set aside the convictions and sentences. The fines, if paid, will be refunded.

10. It is well settled that though by a retrospective legislation, the Legislature can confer a procedural competency on an officer, however an act or omission is not punishable as an offence unless it existed on the day when it was committed. In *Rao Shiv Bahadur Singh and Another Vs. The State of Vindhya Pradesh*, , the Constitution Bench of the Hon"ble Supreme Court held:

7. The next and the only serious question that arises in this case is with reference to the objections raised in reliance on Art. 20 of the Constitution. This question arises from the fact that the charges as against the two appellants, in terms, refer to the offences committed as having been under the various sections

of the Indian Penal Code as adapted in the United States of Vindhya Pradesh by Ordinance No. 48 of 1949. This Ordinance was passed on 11-9-1949, while the offences themselves are said to have been committed in the months of February, March and April, 1949, i.e., months prior to the Ordinance. It is urged therefore that the convictions in this case which were after the Constitution came into force are in respect of an ex post facto law creating offences after the commission of the acts charged as such offences and hence unconstitutional. This contention raises two important questions, viz., (1) the proper construction of Article 20 of the Constitution and (2) whether the various acts in respect of which the appellants were convicted constituted offences in this area only from the date when Ordinance No. 48 of 1949 was passed or were already so prior thereto.

8. Article 20(1) of the Constitution is as follows:

No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

This Article, in its broad import has been enacted to prohibit convictions and sentences under ex post facto laws. The principle underlying such prohibition has been very elaborately discussed and pointed out in the very learned judgment of Justice Willes in the well known case of "Phillips v. Eyre", (1870) 6 Q.B. 1, at pp 23 and 25 (D), and also by the Supreme Court of U.S.A. in "Calder v. Bull" (1798) 3 Dal 386; 1 Law Ed 648 at p. 649 (F).]. In the English case it is explained that ex post facto laws are laws which voided and punished what had been lawful when done. There can be no doubt as to the paramount importance of the principle that such ex post facto laws, which retrospectively create offences and punish them are bad as being highly inequitable and unjust. In the English system of jurisprudence repugnance of such laws to universal notions of fairness and justice is treated as a ground not for invalidating the law itself but as compelling a beneficent construction thereof where the language of the statute by any means permits it. In the American system, however, such ex post facto laws are themselves rendered invalid by virtue of Art. 1, Ss. 9 and 10 of its Constitution. It is contended by the learned Attorney-General that Art. 20 of the Constitution was meant to bring about nothing more than the invalidity of such ex post facto laws in the post-Constitution period but that the validity of the pre-Constitution laws in this behalf was not intended to be affected in any way.

11. Thus, by revival of the procedure the officer can be made competent to issue summons however it cannot make the act an offence which was not an offence when it was allegedly committed in view of the want of competency of the officer issuing summons. No offence having been committed at the time when it is alleged, the Petitioner cannot be prosecuted for an offence by giving retrospective competence to the officer issuing summons.

12. The contention of the Learned Additional Solicitor General that this Court will

not decide the issue regarding the competency of the officer to issue summons at the relevant time and thus the violation thereof being an offence as the same would be an issue to be decided during trial and in exercise of its power under 482 Cr.P.C. this Court by considering the same will not quash the criminal proceedings pending before the Learned Trial Court deserves to be rejected. In *State of Haryana and others Vs. Ch. Bhajan Lal and others*, the Court considered in detail and summarized the legal position by laying down the following guidelines to be followed by the High Court in exercise of its inherent powers to quash criminal complaint.

102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers u/s 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised. 1. Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima-facie constitute any offence or make out a case against the accused.

2. Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers u/s 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code. 3. Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

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104. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the Court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the F.I.R. or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice.

13. It may be noted that the competence of issuing summons by the officer is

sine-qua-non for a valid summon. In the absence of a valid summon the violation thereof cannot be an offence and even taking the allegations in the complaint as they are, no offence is made out. In such a situation this Court is duty bound to exercise its jurisdiction u/s 482 Cr.P.C. and not relegate the Petitioner to the trial.

4. I do agree that making an action punishable retrospectively by an amendment in the Statute would be hit by Article 20 of the Constitution of India. In view of this, the complaint under Sections 174 and 175 IPC and the summoning order dated 16.07.2011 are hereby quashed. Pending Applications stand disposed of.