
(1960) 09 BOM CK 0006

In the Bombay High Court

Case No : Appeal No. 53 of 1959 and Miscellaneous Petition No. 86 of 1956

Shantilal Chhotelal and Co.

APPELLANT

Vs

M.G. Abrol and Another

RESPONDENT

Date of Decision : 02-09-1960

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Imports and Exports (Control) Act, 1947 — Section 3, 3(2)
Sea Customs Act, 1878 — Section 136, 137, 167(8), 189, 19

Citation : AIR 1961 Bom 234 : (1960) 62 BOMLR 1030 : (1961) ILR (Bom) 299

Hon'ble Judges : Mudholkar, Acting C.J.; Shah, J

Bench : Division Bench

Advocate : S.V. Gupte and R.M. Kantawala, for the Appellant; M.P. Laud and S.J. Sorabjee, for the Respondent

Judgement

Mudholkar, Ag.C.J.

1. This is an appeal under the Letters Patent against the order of Mr. Justice Shelat in Misc. Petition No. 86 of 1956. The Petitioners, who are appellants before us, had preferred a petition under Articles 226 and 227 of the Constitution before this Court for issuing a Writ of Certiorari quashing the order of the Additional Collector of Customs, Bombay levying a fine of Rs. 49,995.75 nP. in lieu of confiscation of a consignment of scrap iron which was exported by the petitioners and imposing a personal penalty of Rs. 35,000/- u/s 167(8) of the Sea Customs Act.

2. The relevant facts may be summarised as follows;-- The Petitioners are a firm of Importers and Exporters of scrap iron. They used to export about 900 tons of scrap iron per year and for that purpose they applied for and obtained a licence from the Iron and Steel Controller. This licence was issued on 7th November, 1956 and thereunder the petitioners were authorised to export 900 long tons of steel skull scrap. Between October, 1956 and March, 1957 the Petitioners purchased scrap iron from various concerns and individuals at rates varying

between Rs. 95/- per ton and Rs. 207-8-0 per ton. Under that licence they were permitted to export steel scrap to Japan by S. S. "Kuibyshev".

3. The export of various commodities including scrap iron is controlled by provisions of Imports and Exports Control Act 1947 and by the Exports Control Order 1954. Under S. 3 of the Act, the Central Government is enabled to make a provision prohibiting, restricting or otherwise controlling in all cases or in specified classes of cases the import as well as export of all goods of any specified description. By virtue of the powers conferred by S. 3 of the Act, Exports Control Order, 1954 was promulgated on the 10th of May 1954. Clause 3 of the Order provides that except as otherwise provided in that Order, no person shall export any goods of the description specified in Schedule I, except under" and in accordance with a licence granted by the Central Government or by any officer specified in Schedule II. Entry No. B-3 contained in Schedule I of the Act relates to scrap containing any of the metals or alloys specified in entry C-9 of the Schedule. Entry C-9 deals with a number of metals one of which is "iron and steel". Thus, reading the two entries together, it will be clear that so far as the export of scrap iron or scrap steel is concerned, it could only be effected under a licence issued by one of the authorities referred to in Schedule II of the Act. Amongst the authorities specified in that Schedule are, the Iron and Steel Controller, a Deputy Iron and Steel Controller, and an Assistant Iron and Steel Controller. The licence issued to the petitioners is signed by the Assistant Iron and Steel Controller.

4. The procedure adopted in regard to exports is as follows:- After a person has obtained a licence, he is permitted to take the goods in respect of which he has obtained the licence to the Docks. After the goods arrive at the Docks the representatives of the Iron and Steel Controller as well as the representatives of such parties as the Iron and Steel Controller may direct are permitted to inspect the goods. For enabling the Iron and Steel Controller to have the goods inspected two clear days notice is required to be given. If it is found as a result of the inspection that the scrap in question could be utilised in India, the exporter would be required to remove the materials from the docks at his own expense and sell it to consumers in India nominated by the Iron and Steel Controller. This is because, so far as the export of iron and Steel scrap other than sheet cuttings is concerned, it is allowed provided the Iron and Steel Controller is satisfied that that scrap is of no use in India. It is common ground that the scrap iron which the petitioners wanted to export to Japan was inspected by a representative of the Iron and Steel Controller. While the scrap was being loaded in a ship the Customs Authorities suspecting that the scrap which was being exported was not of the kind permitted to be exported, intervened and inspected what had actually been loaded. They found that a portion of the scrap at least was not of the kind permitted to be exported and required that scrap to be unloaded. It weighed 22 tons and the petitioner! were not permitted to export it. All this was done on the 19th March, 1957. On the 26th of March, 1957 they seized the goods. They, however, permitted the ship to sail with the goods after retaining with

themselves the documents relating to those goods. Eventually those documents were released by them and returned to the Petitioners upon their furnishing bank guarantee for Rs. 49,995.75nP.

5. On the 27th of May, 1957, the Customs Authorities served the petitioners with a notice to show cause within three days why the scrap iron should not be confiscated and why personal penalty should not be levied upon them. After hearing the petitioners the Additional Collector of Customs, Bombay, passed an order on 21-12-57 levying a fine of Rs. 49,995.75 nP on the petitioners in lieu of confiscation u/s 167(8) of the Sea Customs Act and imposing a personal penalty of Rs. S5.000/- under the same section as already stated.

6. On 4th of March, 1958 the petitioners preferred the petition before this Court under Art. 226 of the Constitution for quashing the order of the Additional Collector of Customs, Bombay. On 25th of March, 1958 they also preferred an appeal before the Central Board of Revenue.

7. The petition was opposed on behalf of the Union of India and the Customs Authorities on a number of grounds. One of the grounds was that the petitioners had another remedy by way of appeal under S. 189 of the Sea Customs Act, that they had actually availed themselves of that remedy and, therefore, their petition was incompetent. Another ground was that there was deliberate suppression of facts by the petitioners regarding their appeal before the Board of Revenue and, therefore, they were not entitled to any relief being granted by this Court. On merits it was contended that the Customs Authorities had the right to inspect the goods for satisfying themselves as to whether the terms of the licence were complied with and had likewise the power to seize and confiscate the goods if they came to the conclusion that what was being exported was not what was permitted to be exported under the licence and under the Exports Control Order in question. They also say that from the material which was before them they came to the conclusion that the petitioners have exported out of India a considerable quantity of scrap which was not iron skull scrap and that since such scrap was not permitted to be exported under the licence they contravened the terms thereof.

8. When the matter went up before the learned Single Judge, he upheld the contention of the Customs Authorities that what the petitioners were trying to export was something which was not permitted to be exported under the licence. He also seems to have held that the Customs Authorities were entitled to inspect, seize and confiscate the scrap iron which the petitioners were wanting to export to Japan. He also accepted the contention that the petitioners had suppressed certain relevant facts. He, however, granted the petitioners a limited relief to the extent that he reduced the personal penalty of Rs. 35.000/- to Rs. 1,000/- on the ground that this Court had ruled that the maximum penalty leviable u/s 167(8) of the Sea Customs Act is Rs. 1,000/-. It would, thus, appear that the learned Judge did not accept the preliminary objections urged on behalf of the Customs Authorities that the petitioners were not entitled to relief on the

ground of suppression of facts and on the further ground that they had another remedy available to them.

9. Mr. Laud, who appears for the Customs Authorities, reiterated the preliminary objections which were urged on behalf of the Customs Authorities before the learned Single Judge. While we were inclined to think that in this case the petitioners did not satisfy the Court that no adequate remedy was available to them under the Sea Customs Act, it would not be proper to reject the petition and dismiss the appeal on that sole ground. It is no doubt true, as has been pointed out by Mr. Gupte who appears for the petitioners, that Section 189 of the Sea Customs Act, which provides for an appeal to the Central Board of Revenue, requires that where the decision or order appealed against relates to any duty or penalty leviable in respect of any goods, the owner of such goods shall, pending the appeal, deposit in the hands of the Customs Collector at the port where the dispute arises the amount demanded by the officer passing such decision or order. Until such amount is deposited, the appeal is not heard by the Central Board of Revenue. Therefore, according to Mr. Gupte, the remedy itself was onerous and in the circumstances, it was open to the petitioners to come straightway to this Court for having the order of the Customs Authorities quashed. In support of this contention, he relied upon the decision in *Himmatlal Harilal Mehta Vs. The State of Madhya Pradesh and Others*, . It is doubtful how far this decision would assist the petitioners in this case, because here, they had actually preferred an appeal before the Central Board of Revenue. Apart from that, they have not stated either in the petition or in the affidavit in rejoinder that "they were unable to pay the penalty imposed upon them by the Additional Collector of Customs and consequently the remedy was onerous. Indeed, from their letter dated 25th of June, 1955 addressed to the Under-Secretary to the Central Board of Revenue, it could be inferred that they were in fact in a position to pay the penalty, but were unable to pay it because of an injunction issued by this Court after issuing a rule nisi. However, that may be, the fact remains that here the learned Single Judge had chosen to interfere in this petition. The learned Single Judge not only entertained the petition but actually granted some relief to the petitioners. The existence of an alternative remedy is no bar to the exercise of jurisdiction by this Court to issue any of the high prerogative writs or to issue any other writ, direction or order under article 226 of the Constitution, but it is only the practice of this Court not to use its extra-ordinary powers under article 226 or its revisional powers under Article 227 if there exists an alternative remedy which is adequate and readily available. From the fact that the petition was entertained by the learned Judge and relief was granted to the petitioners, it follows that he exercised his discretion in their favour and did not regard the existence of an alternative remedy by way of appeal as an obstacle in their way of obtaining relief from this Court. In appeal the exercise of discretion by a Court from whose order appeal has been brought, is not lightly to be interfered with. No adequate reasons have been brought to our notice why there should be a departure from this rule in the present case. We are, therefore unable to accept

Mr. Laud's contention that the petitioners are not entitled to relief, on the mere ground that they not only had an adequate remedy at their disposal, but had actually sought to avail themselves of it by preferring an appeal.

10. Now, on the question of suppression or facts what the learned Judge has observed in his judgment is as follows:

"Having considered the correspondence between the petitioners and the Central Board of Revenue I have come to the conclusion that the statements made by the petitioners in their affidavits in rejoinder were deliberately equivocal and far from being frank an attempt to create an incorrect impression on the Court that the appeals had been rendered unmaintainable by their having refused to pay the personal penalty was made".

and then again later on in the judgment after referring to certain correspondence and certain other facts, the learned Judge observed:

"In my view, the omission if not suppression of facts was in respect of material facts as they were relevant to the issue raised in the affidavit in reply whether the right of appeal to which the petitioners had recourse to was an adequate remedy and was not and cannot be due to either inadvertence or want of appreciation of the true legal position".

It may be mentioned that what the learned Judge, was referring to in this connection is the omission of the petitioners in the first instance to file copies of certain correspondence which was carried on between their attorneys and the Central Board of Revenue. Secondly, what he had in mind was the omission of the petitioners to make any reference to it in their affidavit in rejoinder, though they had written a letter on the 25th of June, 1958 a letter which was addressed by their attorneys to the Central Board of Revenue six months before their affidavit in rejoinder was filed. Now, the correspondence which took place between the petitioners' attorneys and the Board of Revenue was concerning the non-payment of the penalty by the petitioners. The Board of Revenue informed the petitioners' attorneys by its letter dated 29th May, 1958 that unless they deposited the penalty within one month their appeal was liable to be dismissed. In reply to this, the petitioners' attorneys stated in their letter dated 25th June, 1958 amongst other things, that the Petitioners had preferred a petition before this Court on the 3rd of March, 1958 and that Mr. Justice K. T. Desai had issued a rule nisi and had also by order dated 4th of March, 1958 restrained the Additional Collector of Customs, Bombay from taking any steps or proceedings in enforcement of his order. Then they stated:

"Our clients say that by reason of the said order dated 4th March, 1958 the Additional Collector of Customs, Bombay and the Union Government are restrained from recovering from our clients pending the hearing and final disposal of the said petition the personal penalty of Rs. 35,000/-. Our clients cannot make payment of the said sum of Rs. 35,000/- in view of the said order. Under the circumstances, our clients respectfully submit that the requisition

contained in your letter under reply requiring our clients to make the deposit is not proper and justified as it would result in contravening the order of the High Court and the said order would be nullified".

Then they made a plea on behalf of the petitioners to the effect that the requirement of payment of personal penalty as a condition precedent to the hearing of the appeal may be waived. The learned Judge took the view that by suppressing this letter from the Court in their rejoinder the petitioners attempted to create an impression on it as if their appeal before the Board of Revenue must have been dismissed for non-payment of the penalty while it perhaps created an impression on the Board of Revenue that the penalty could not be paid by them because of the order of the High Court with the result that the Board of Revenue were led to keep their appeal alive despite their failure to deposit the penalty. The learned Judge has taken the view that the Petitioners, apart from suppressing material facts from this Court, have been guilty of equivocal conduct, but in spite of that the learned Judge did not think it fit to penalise them for this in any way. If he was of the opinion that the petitioners having been guilty of improper conduct were not entitled to relief in this jurisdiction he should have dismissed the Petition but that is not what he has done. He has given them some relief. No doubt he has not granted the petition in its entirety, but that is not because he felt that the Plaintiffs were not entitled to it on the ground of suppression of facts or on the ground that their conduct was improper, but on an entirely different ground. Apart from that, we would like to express our opinion that the language of the affidavit is capable of the interpretation that the petitioners did not want either to suppress any fact or to create any erroneous or false impression upon this Court. In this connection, we would refer to the following passage from paragraph 3 of their affidavit dated 8th of December, 1958:

"The Central Board of Revenue by its letter dated 29th May, 1958 intimated to the petitioners that the payment of personal penalty before the appeal was considered was a statutory requirement under the Sea Customs Act and required the petitioners to submit proof of payment of personal penalty within one month from the date of the said letter and that in default thereof the appeal would be liable to be rejected for non-compliance with the provisions of the Sea Customs Act. In these circumstances I submit that the remedy by way of appeal to the Central Board of Revenue is not an adequate or effective remedy".

Now, the last sentence in the above passage does not convey the impression that their appeal before the Board of Revenue has been rejected because of non-payment of the penalty. It is true that the petitioners have not set out what was stated on their behalf by their attorneys in the letter dated 25th June, 1958. But we do not think that the omission to make a reference to that letter or to set out fully what is stated in that letter amounts to suppression of a material fact. In the circumstance, therefore, it would not be right to reject the petition upon the second preliminary ground urged on behalf of the respondents by Mr. Laud.

11. On the merits Mr. Gupte has raised three contentions. The first contention is that the Customs Authorities had no jurisdiction to consider whether the scrap iron which was being exported was such as could be used in India, because in the Remarks Column in "The Statement of the Export Licensing Policy" as on 30-4-57 under item 3(ii) (b) which deals with iron and steel scrap other than sheet cuttings, it is stated:

"Export of any other ferrous scrap is allowed by the Iron and Steel Controller provided he is satisfied that the material is of no use in India".

The second point urged by him is that the Customs Authorities had no power to order confiscation of the goods after he permitted those goods to go out of their control.

12. The third point that was urged by Mr. Gupta is that there was no material on the basis of which the Customs Authorities could come to the conclusion that a part of the consignment consisted of scrap iron which did not conform with the licence and which was of a kind as could be used in India.

13. The entire matter was argued before us on the footing that the Statement of the Export Licensing Policy has a statutory force, though we must confess we have not been able to find any reference either in that Statement or anywhere else in "the Hand Book of Export Trade Control", in which this statement is incorporated, that it has such force, However, since it was not urged by Mr. Laud on behalf of the respondents that the remarks contained in Column 4 of the Statement of the Export Licensing Policy against item No. 3(ii)(b) have no legal validity, we will proceed upon the basis that they have a legal validity and a statutory force. The language used there clearly shows that the satisfaction on the question as to whether the material is or is not in use in India is to be that of the Iron and Steel Controller and no one else. It would follow from this that the matter pertains solely to the sphere of the Iron and Steel Controller and that the Customs Authorities are not entitled to sit in judgment with regard to this question. Sub-section (2) of Section 3 of the Imports and Exports Control Act, 1947 provides that all goods to which any order under Sub-section (1) applies shall be deemed to be goods of which the import or export has been prohibited or restricted u/s 19 of the Sea Customs Act and that all the provisions of that Act shall have effect accordingly. Section 19 of the Sea Customs Act is in the following terms:

"The Central Government may, from time to time, by notification in the Official Gazette, prohibit or restrict the bringing or taking by sea Or by land goods of any specified description into or out of India across any customs frontier as defined by the Central Government".

Apart from Section 19, there is no other provision in the Sea Customs Act dealing with this particular matter. Reading Section 19 with Sub-section (2) of Section 3, it will follow that except to the extent prohibited or restricted by an order made under the Imports and Exports Control Act, the export of any goods out of India

is not prohibited. As already pointed out, so far as iron and steel scrap is concerned, its export is not completely prohibited, but is restricted in the sense that it has to be in pursuance of the terms of the licence obtained under this Order. Therefore, where a person holds a licence permitting him to export scrap iron, it must be said that there is no prohibition upon him on exporting that commodity. Here, the petitioners held a licence entitling them to export 900 long tons of Steel Skull Scrap. Before granting a licence, the exporter is ordinarily expected to give inspection of the scrap iron which he wants to export. Such an inspection was given by the petitioners of a portion of the scrap which they had already secured. They did not have the entire 900 tons of scrap in their possession at that time, but they expected to receive the remaining scrap from Krishna Steel Industries Private Ltd. It seems, however, that they could not secure more than 470 tons or so from, them and therefore they secured some scrap from other sources. In fact, even before they obtained the licence they were able to secure about 87 turns from other sources. Subsequent to the obtaining of the licence they procured nearly 240 tons from other sources. Now, after the licence was granted to the petitioners, they sent the scrap to the Docks for being exported. There after it was inspected by the representatives of the Iron and Steel Controller and passed for export by the Iron and Steel Controller. In pursuance of this, the petitioners started loading the scrap in s. s. "Kuisischev". While loading was going on the suspicions of the Customs Authorities were aroused and that was why they sent some of their Officers for inspection. It seems to us that since the satisfaction as to whether a particular consignment of scrap is capable of being used in India or not is to be, under the statement of export policy, that of the Iron and Steel Controller, the Customs Authorities were not entitled to consider afresh whether that scrap was or was not usable in India.

14. It was argued before us by Mr, Laud that under the Sea Customs Act the Customs Authorities are entitled to satisfy themselves whether what was being exported was something which was permitted to be exported, that under the licence what the petitioners were entitled to export was Skull Scrap and that it was not only open to the Customs Officers, but it was their duty to satisfy themselves as to whether what was being exported was that commodity and not something else. He further pointed out that in Schedule II to the Export Control Order, a Customs Collector is mentioned as one of the Officers competent to grant licence and, therefore, under this Order a Customs Collector is entitled to exercise certain powers.

15. As regards the last point, it is sufficient to say that Clause 3 read with Schedule II would only entitle a Customs Collector to grant a licence provided under Clause 4(1) of the Order the Chief Controller of Imports and Exports authorises him in that behalf. No such authorisation has been brought to our notice. Apart from that, the licence in question not having been granted by the Customs Collector, but by the Iron and Steel Controller, it was not open to the Customs Authorities to rely upon the provisions of the Imports and Exports

Control Act, 1947 or the Exports Control Order, 1954 for the purpose of making inspection of the consignment which the petitioners were exporting.

16. We will now examine Certain provisions of the Sea Customs Act to which our attention was drawn by Mr. Laud and on which he relied in support of his contention that under the Sea Customs Act a Customs Officer is entitled to inspect a consignment which is to be exported. The provision to which he referred first is Section 136 of the Sea Customs Act which reads as follows:

"Except with the written permission of the Customs Collector, no goods other than passengers' baggage, or ballast urgently required for a vessel's safety, shall be shipped or water-borne to be shipped in any vessel in a customs-port until an order has been obtained u/s 61 for entry outwards of such vessel.

When such order has been obtained, the export- cargo of such vessel may be shipped, subject to the provisions next hereinafter contained".

But this provision has to be read along with Section 61 of the Act to which it refers. That section is in the following terms:

"No vessel shall take on board any part of her export, cargo, until a written application for entry of such vessel outwards, subscribed by the master of such vessel, has been made to the customs-collector, or before an order has been given there on by such officer for such entry.

Every application made under this section shall specify the name, tonnage and national character of the vessel, the name of the master, and the name of every place for which cargo is to be shipped".

Reading the two provisions together, it is clear that written permission of the Customs Collector is necessary for shipping goods other than passengers' baggage, or ballast urgently required for vessel's safety and that a vessel is not empowered to take on board any part of her export-cargo until a written application for entry of such vessel outwards has been made to the Customs Collector. Section 137 of the Act deals with "clearance for shipments". Under this provision, no goods shall be shipped or water-borne to be shipped for exportation, until-

"(a) the owner has delivered to the Customs-Collector, or other proper officer, a shipping bill of such goods in duplicate, in such form and containing such particulars in addition to those specified in S. 29 as may from time to time be prescribed by the Chief Customs-officer;

(b) such owner has paid the duties (if any) payable on such goods; and

(c) such bill has been passed by the Customs Collector".

Now, Section 29 of the Act requires the owner of the goods to declare the real value, quantity and description of the goods which he wants to export. This section further empowers the Customs Collector to require the owner to furnish

him with the relevant information whereby the real value, quantity or description of such goods can be ascertained, but it does not go any further. These provisions even taken collectively do not confer a power on a Customs Officer to examine the goods for the purpose of satisfying himself on the question as to whether those goods are of a kind which can be used in India or not. We are not quite sure whether these provisions would empower Customs Officers to inspect the goods with a view to satisfy themselves whether the goods sought to be exported conform to the licence. But we will assume for the purpose of this case that they do so empower the Customs Authorities. That, however, is not sufficient, because, before taking action under the Sea Customs Act and before coming to the conclusion that the goods are of a kind as could not be exported in view of the provisions of the Sea Customs Act, the Exports Control Order and the Statement of the Export Licensing Policy, a finding had to be arrived at that the goods were not usable in India. As we have already pointed out, the duty is cast on the Iron and Steel Controller alone to decide this question.

17. Mr. Laud contended that what was permitted to be exported under the licence was only Skull Scrap and not any other kind of scrap and, therefore, the Customs Authorities could satisfy themselves whether what was being exported was something other than Skull Scrap. It is true that in the licence it is specifically stated that the commodity, allowed to be exported is Steel Skull Scrap, but the expression "Skull Scrap" is nowhere to be found in the Act or the Control Order of the Statement of Policy. The export of iron and steel scrap is, as already stated, permissible only under a licence and that to, when the scrap is other than sheet cuttings, upon the condition set out in the Remarks Column in the Statement of Policy against entry No. 3(ii)(b). If, therefore, what was being exported was not Skull Scrap, but still was something the export of which was permitted by the Iron and Steel Controller on the ground that that scrap was not usable in India, there was nothing which the customs Authorities were entitled to do. For these reasons, we must hold that the Customs Authorities were not entitled to seize the goods or to confiscate them. It follows, therefore, that they were not entitled to levy any fine or penalty on the petitioners.

18. Upon the view which we have taken on this point, it is really not necessary to express any opinion on the remaining two contentions raised by Mr. Gupte. We will, however, say only this that so far as the third contention is concerned, we are unable to accept it, because, assuming that the Customs Authorities had the power to consider for themselves whether the goods were usable in India or not, they had material before them in the shape of a report Ex. G. made by a firm of surveyors and obtained by the petitioners themselves upon the basis of which it was possible for them to arrive at the conclusion which was actually reached by them. As regards the second point, we would like to observe that the petitioners by their conduct having induced the Customs Authorities to allow the consignment to leave India after handing over the documents concerning them to the Customs Authorities and subsequently having obtained those documents back from the customs Authorities upon furnishing a bank guarantee for their

value, it is not open to them in these proceedings to say that the Customs Authorities had terminated the seizure of the goods by attending the ship to sail with the goods.

19. For the reasons already - stated, we allow the appeal, set aside the order of the learned Single Judge and make the Rule absolute in terms of prayers (a), (b) and (c) of the Petition. In the particular circumstances of the matter, we make no order as to costs here or in the Court below. Each party will bear its own costs throughout. Liberty to the appellants attorneys to withdraw the amount deposited by them in this Court.

20. Appeal allowed.