

(1998) 02 DEL CK 0015

In the Delhi High Court

Case No : C.W. 2166/94

Sudhir Gulati

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 20-02-1998

Acts Referred:

Citation : (1998) 72 DLT 371 : (1998) 45 DRJ 49 : (1998) 100 ELT 344 : (1998) 1 ILR Delhi 325 : (1998) 3 RCR(Criminal) 366

Hon'ble Judges : Y.K. Sabharwal, J;D.K. Jain, J

Bench : Division Bench

Advocate : Mr. Rajiv Dhawan and Mr. Pradeep Aggarwal, for the Appellant; Mr. Keshav Dayal and Ms. C.M. Sudha Ramani, for the Respondent

Judgement

Y.K. Sabharwal. J.

1. The challenge in this petition is to summons dated 30th April 1994 and 2nd May 1994 issued by Air Customs Superintendent u/s 108 of the Customs Act, 1962 requiring the attendance of the petitioner in connection with the enquiry being made regarding export by M/s. Rancan Impex. The petitioner contends that the said summons are vocative of Article 20 of the constitution of India.

2. The facts emerging from the pleadings of the parties briefly are that an FIR dated 30th April 1994 was registered u/s 420, 468 and 471 IPC, interalia, stating that on scrutiny of registers and documents it has come to the notice of Assistant Collector of Customs that three exporters, namely, M/s. Rancan Impex Pvt. Ltd. M/s NOIDA Medicare Centre Limited and M/s Apollo Impex and their custom house agent M/s Aditi Services have exported certain consignments by forging the signatures on the shipping bills. The investigation of the case was handed over to S.I. Umesh Singh. The petitioner claims that he is being falsely implicated in the case and he is neither the employee nor director and/or owner of any of the three companies. One Ram Niwas, Custom House Agent, was arrested in connection with this case. The bail application of Ram Niwas was rejected by Additional Chief Metropolitan Magistrate, New Delhi, on 5th may

1994. The order of learned Magistrate, inter alia, notices that co-accused Sudhir Gulati (Petitioner) has not yet been arrested and, Therefore, it was not found to be a fit case to grant bail to Ram Niwas. The petitioner was, however, granted anticipatory bail by order dated 16th May 1994 passed by learned Additional Sessions Judge, New Delhi. That order, inter alia, notices that according to prosecution Ram Niwas had made a disclosure statement to the effect that Sudhir Gulati had handed over shipping bill to him which included the signatures of Assistant Collector. The petitioner was arrested on 22nd May 1994 but was released because of anticipatory bail order. According to the petitioner the aforesaid sequence of events show that the respondents were clear that the petitioner was an accused and, Therefore, the issuance of the impugned summons contravenes Article 20(3) of the constitution which provides that no person accused in any offence shall be compelled to be a witness against himself.

3. According to respondents Ram Niwas in his voluntary statement recorded u/s 108 of the Customs Act, 1962 on 30th April 1994, 1st May 1994 and 2nd May 1994 had clearly stated that the petitioner was instrumental in carrying on clandestine export of goods on forged documents. As per case set up by the respondents, the attendance of the petitioner was necessary for purposes of enquiry which the Customs Department was making in connection with the smuggling of goods. They say that the petitioner is not a person accused of any offence and that summons have been issued not to investigate the offences for which FIR was registered but have been issued in the course of investigation into the violation of the provisions of the Customs Act. They have also pleaded that Ram Niwas had stated that the goods were not in conformity with the papers filed and the same were grossly, over invoiced which indicates that the exporters stood to benefit under the provisions of DEEC/Advance Licensing Scheme. According to respondents there was no constitutional bar in conducting an investigation and enquiry under the Customs Act for examining the aspect of the smuggling of goods.

4. The petitioner, in the alternative has sought directions for permitting the presence of his lawyer at the time of recording of his statement pursuant to the impugned summons. Now let us have a look on the law on the subject.

5. In *M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others*, , while considering the scope of Article 20(3) it was held that there is no inherent reason to construe the ambit of this fundamental right as comprising a very wide range. Nor would it be legitimate to confine it to the barely literal meaning of the words used, since it is a recognised doctrine that when appropriate, a constitutional provision has to be liberally construed so as to advance the intent thereof and to prevent its circumvention. The right under Article 20(3) was held to consist of the following three components :-

- (1) It is a right pertaining to a person "accused of an offence."
- (2) It is protection against "compulsion to be a witness", and

(3) It is a protection against such compulsion resulting in his giving evidence "against himself."

6. Dealing with mainly scope and connotation of the second of the three components it was held that protection afforded to an accused insofar as it is related to the phrase "to be a witness" is not merely in respect of testimonial compulsion in the court room but may well extend to compelled testimony previously obtained from him. It is available, Therefore, to a person against whom a formal accusation relating to commission of an offence has been leveled which in the normal course may result in prosecution. The Supreme Court further held:-

"Considered in this light, the guarantee under Article 20(3) would be available in the present cases to these petitioners against whom a First Information Report has been recorded as accused therein. It would extend to any compulsory process for "production of evidentiary documents which are reasonable likely to support a prosecution against them. The question then that arises next is whether search warrants for the seizure of such documents from the custody of these persons are unconstitutional and hence illegal on the ground that in effect they are tantamount to compelled production of evidence.

7. It is urged that both search and seizure of a document and a compelled production thereof on notice or summons serve ; the same purpose of being available as evidence in a prosecution against the person concerned, and that any other view would defeat or weaken the protection afforded by the guarantee of the fundamental right. This line of argument is not altogether without force and has the apparent support of the supreme Court of the United States of America in (1884) 116 US 616 (b)".

8. In *The State of Bombay Vs. Kathi Kalu Oghad and Others*, it was held that in order that a testimony of an accused person may be said to have been self incriminatory, the compulsion of which comes within the prohibition of the constitutional provision. It must be of such a character that by itself it should have the tendency of incrimination the accused. If not also of actually doing so. The Supreme Court further held that:-

(1) "To be a witness" means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing made or given in Court or otherwise.

(2) "To be a witness" in its ordinary grammatical sense means giving oral testimony in Court. Case law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in Court or out of Court by a person accused of an offence, orally or in writing.

(3) To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made.

Both the aforesaid decision were also taken note of in Ramanlal Bhogilal Shah and Another Vs. D.K. Guha and Others, . The Supreme Court rejected the contention of the government that the petitioner had not been specifically named as an accused in the First Information report and Therefore, he is not entitled to the protection under Article 20(3). Holding that the petitioner is a person accused of an offence within the meaning of Article 20(3) the Supreme Court held that the only protection that Article gives to him is that he cannot be compelled to be a witness against himself but this does not mean that he need not give information regarding himself which do not tend to incriminate him. In this view, the Supreme Court declined to set aside the summons and held that the petitioner must appear before the Deputy Director and answer such questions as do not tend to incriminate him.

9. In the present case it is no doubt true that no one has been named as an accused in the FIR recorded on 30th April 1994 at PS IGI Airport on the basis of written application filed by Devender Singh, Assistant Collector of Customs (Export), Air CARGO Unit, IGI Airport, New Delhi. But that by itself does not mean that the petitioner was not an accused of any "offence" when impugned summons were issued. From the order of learned Additional Chief Metropolitan Magistrate as also of Learned Additional Sessions Judge, referred to above, and also the counter affidavit filed by the respondents, it appears that, according to respondents, the petitioner was an accused of an offence in respect of which FIR as lodged on 30th April 1994.

10. In Poolpandi Vs. Superintendent, Central Excise and others etc. etc., , following Ramanlal Bhogilal Shah's case it was again reiterated that such questions which do not tend to incriminate a person are required to be answered. Further the contention that the appellant was within his right to insist on presence of lawyer on the basis of Article 21 of the Constitution was rejected. It was held that there was no force in the argument that if a person is called away from his house and questioned in the atmosphere of Customs office without the assistance of his lawyer or friends, his constitutional right under Article 21 is violated.

11. In view of the aforesaid discussion, we are of the view that the petitioner is accused of an offence in respect of the FIR noticed hereinbefore within the meaning of Article 20(3) and cannot be compelled to be a witness against himself. But the scope of offence under the aforesaid FIR and scope of enquiry under Customs Act, 1962 is different. An enquiry under Customs Act primarily relates to the smuggling of goods. Section 108 confers upon a Gazetted officer of the Customs the powers to summon any person whose attendance he considers necessary to give evidence or to produce a document or any other thing in any enquiry which such officer is making in connection with the smuggling of goods. The person so summoned is bound to attend and to state the truth upon any subject respecting which he is examined or makes statements and produce such documents and other things as may be required. Therefore, the impugned

summons cannot be set aside. The petitioner is required to appear and answer such questions and give such information regarding himself which do not tend to incriminate him. In our view the petitioner is also not entitled to assistance of a lawyer at the time of recording of his statement u/s 108 of the Customs Act.

12. Thus, the petition is partly allowed and it is declared that the petitioner is a person accused of an offence within the meaning of Article 20(3) but he is bound to appear before the concerned officer u/s 108 of the Customs Act to answer such questions which do not tend to incriminate him. The writ petition is disposed of in the above terms leaving parties to bear their own costs.