

(1961) 12 MAD CK 0043
In the Madras High Court
Case No : Writ Petition No. 176 of 1961

S.V.M. Syed Cassim

APPELLANT

Vs

Collector of Central Excise, Madras

RESPONDENT

Date of Decision : 18-12-1961

Acts Referred:

Constitution of India, 1950 — Article 226

Sea Customs Act, 1878 — Section 167, 167(1), 167(12), 167(2), 167(3)

Citation : AIR 1962 Mad 366

Hon'ble Judges : Ganapatia Pillai, J

Bench : Single Bench

Judgement

1. Syed Cassim, the petitioner in this application under Art. 226 of the Constitution for the issue of a writ of certiorari to quash the order of the Collector of Central Excise, Madras, dated 22-10-1960, is the lessee of the island called Muyaltheevu which lies off the coast of Ramanathapuram Dt. near Pamban. On 29-6-1960 the Custom,, Preventive Inspector, Mandapam, seized the petitioner's cargo boat No. 101 carrying 25 bundles of cocoanut leaf thatties from Muyaltheevu to Vedalai on Ramanathapuram coast. The said boat was under the control of tindal Hamid Sultan at the time. On 13-7-1960 the Superintendent of the Customs Preventive circle, Ramanathapuram, issued a show cause notice to the petitioner calling upon him to show cause why the boat should not be confiscated under S. 168 of the Sea Customs Act on the ground that the cocoanut leaf thatties were attempted to be landed at Vadalai which was not declared a port for landing of goods and hence punishable under S. 167(2) and (3) and See. 168 of the Sea Customs Act.

On 20-7-1960 the petitioner is said to have submitted an explanation stating that the produce of the island were all perishable and non-dutiable goods and that all along such produce were landed at Vadalai without any restrictions. Later, That is on 19-9-1960, the petitioner asked his counsel to appear before the Collector of Central Excise Madras to make re-presentations about the charge contained in the show cause notice. Without hearing his counsel the collector passed the

impugned order.

(2) By the order the Collector gave an option to redeem the confiscated goods on payment of a fine of Rs. 50 and the confiscated boat on payment of a fine of Rs. 1000. In addition, the collector also imposed a penalty of Es. 500 on the petitioner and also a similar penalty on the, tindal under S. 167(8) of the Sea Customs Act.

(3) Before I deal with the contentions of counsel for the petitioner I may advert to a preliminary objection taken by the Additional Government Pleader regarding the maintainability of this application. Against the order of the Collector of Central Excise an appeal is provided to the Central Board of Revenue under the Sea Customs Act. Counsel for the respondent contended that would be an adequate and appropriate remedy, and, in the absence of any explanation by the petitioner in his affidavit showing why that remedy was not availed of the, extraordinary jurisdiction of this court under Art. 226 of the Constitution should not be invoked.

(4) it is now well settled that the mere existence of an alternative remedy would not be a bar to the exercise of jurisdiction by this court under Art. 226 of the Constitution. It has to be shown further that the alternative remedy would be effective and also sufficient. Counsel for the petitioner argued that as a condition precedent to the filing of an appeal to the Central Board of Revenue the rules require payment of fines imposed by the Collector, and, as the fines in this case are heavy sums it was not possible for the petitioner to comply with this condition precedent. He also maintained that an appeal to the Central Board of Revenue at Delhi was a very expensive remedy and would not be in the circumstances an effective remedy for him. I am satisfied on the grounds urged by counsel for the petitioner that an appeal to the Central Board of Revenue, Delhi, would not be an effective alternative remedy in this case and I do not therefore uphold the Preliminary objection raised by counsel for the respondent.

(5) The three grounds on which counsel for the petitioner attacks the order are the following First, the order is opposed to the principles of natural justice because the petitioner was not, give an opportunity to make oral representation to the Collector by his counsel. Such a request was made in the first instance only after the time allowed for such representation in the show cause notice had expired. Paragraph 3 of the show cause notice informed the petitioner that if he desired to be heard in person in his defence he should inform the Superintendent at Ramanathapuram within ten days from the date of receipt of the, show cause notice. Admittedly no such Information was sent to the Superintendent. Thereafter a request was made for a personal hearing to the Collector and under the rules the Collector was not bound to comply with the request. It cannot be said that in the circumstances the refusal to grant a personal hearing was unreasonable. I do not find any substance in this contention.

(6) The second ground urged is that the respondent had no jurisdiction to impose

a penalty on the petitioner under Sec. 167(8) of the Sea Customs Act. That provision relates to the importation or exportation of goods which for the time being were either prohibited or restricted by or under Ch. IV of the, Sea Customs Act. There is no importation of goods in this case because, Moyaltheevu is Indian territory and it lies three-miles off the coast of Ramanathapuram Dt. The, contravention alleged in this case really relates to the landing of goods at a place which was not declared a port for the coastal trade by the concerned authority under the Sea Customs Act. Ch. III of the Sea Customs Act gives power to the Collector of Customs to appoint ports, wharves and customs house to declare places to be ports, for the carrying on of coasting trade and foreign trade and to declare warehousing ports and public warehouses. Admittedly neither Moyaltheevu is declared a port for shipment nor Vedalai, is declared a port for landing goods carried in the coastal trade.

Mr. Cassim, counsel for the petitioner contended that the authorities should have taken steps for declaring Moyaltheevu and Vedalai as ports in the coastal trade to enable the petitioner to enjoy his property. According to him the petitioner could not be compelled to take his goods to a declared port for the purpose of shipment and to land them at another declared port far away from the property. This is a matter for consideration by the authorities. Though counsel for the respondent informed me that the absence of a port for the coastal trade in the vicinity of Moyaltheevu is usually remedied by the issue of "a special permit by the Collector of Central Excise for the landing of goods, at Vedalai, how far such a permit is valid under the Sea Customs Act is another question. which was raised by counsel for the petitioner and that, in my opinion, is beside the point.

(7) It is enough for the present purpose to state that neither Moyaltheevu nor Vedalai has been declared under the Sea Customs Act ports for shipping and landing respectively for the coastal trade. In the absence of such a declaration by the authorities concerned the attempt to ship goods from Moyaltheevu and to land at Vedalai contravenes S. 167(2) and (3) of Sea Customs Act. S. 167(1), (2) and (3) reads thus:

Offence. Section of this Act to which offence has reference Penalties

1. Contravening any rule made under this Act (for the contravention of which no specific penalty is prescribed.) General Penalty not exceeding five hundred rupees.
2. If any goods be landed or shipped, or if an attempt be made to land or ship any goods, or if any goods be brought into any bay, river creek or arm of the sea, for the purpose of being landed or shipped at any port or place which at the date of such landing, shipment, attempt or bringing, is not a port for the landing and shipment of goods. II Such goods shall be liable to confiscation
3. If any person or ship land goods or aid in the shipment or landing of goods knowingly permit or procure to be kept or concealed, or knowingly permit or procure to be shipped or landed or intended, contrary to the provision of this Act,

or if any person be found to have been on" etc. General Such person shall be liable to penalty not exceeding one thousand rupees.

Clause (1) of Sec. 167 has no application here. Clause (2) however applies to the goods landed at Vedalai and shipped from Muyaltheevu. The penalty for such contravention is confiscation of the goods. Clause (3) permits (?) the person who ships or lands goods in contravention of the orders under the provisions of the Act. The penalty for such contravention is the imposition of a fine not exceeding Rs. 1000 on such person. Clause (8) of Sec. 167 deals with the importation or exportation of goods prohibited or restricted by or under Chapter IV of the Act. As already pointed out by me, the contravention complained of in this case does not fall under Sec. 167(8) of the Sea Customs Act. In the counter affidavit filed by the respondent it is explained that the mention of Sec. 167(8) of the Sea Customs Act in the order of the, Collector is an inadvertent mistake for section 167(3). This Explanation can be accepted because the show cause notice itself refers only to S. 167(3) and not to Sec. 167(8). However, the authorities of the Customs Department entrusted with the duty of punishing persons by the imposition of a fine for contravention of the provisions of the Sea Customs Act should be more careful in drafting their orders imposing a penalty. In this case, however, I am satisfied that the mention of Sec. 167(8) in the order of the Collector is a bona fide error for S. 167(3) and the jurisdiction of the Collector is not vitiated by this error. I do not therefore find any substance in this contention.

(8) The third contention is that in the show cause notice the petitioner was not asked to show cause against the imposition of any penalty for contravention of Sec. 167(3). But the notice specifically asked the petitioner to show cause against the confiscation of the boat under Sec. 168 of the Sea Customs Act.

(9) The order for confiscation of the boat under Sec. 168 stands on a separate footing from the imposition of a fine or penalty under S. 167(2) and (3). I am not concerned with Sec. 167(2) in this argument because the goods were prima facie liable to confiscation and, the order of confiscation of the goods cannot be taken exception to but, Section 167(3) provides for, the imposition of a penalty not exceeding Rs. 1000 on any person who ships or lands goods in contravention of the provisions of the Act. The petitioner was entitled to be told that he should show cause against the imposition of such penalty. It would not be sufficient as the learned Additional Government Pleader for the respondent contended, to mention the statutory provision in the show-cause notice and to omit the penalty proposed to be imposed.

A penal provision in the Sea Customs Act must be construed strictly and the Collector of Central Excise should see that every show cause notice issued under the provisions of the Act strictly complies with not only the letter of the law but also the spirit of it. The object of a show cause notice is not only merely to mention the statutory provisions under which the person to whom the notice is issued is liable to, be punished by the imposition of a penalty, the real object of such a notice is to indicate besides the nature of the contravention which is

sought to be punished under Sec. 167 or any other provision of the Act the, penalty also that is sought to be imposed upon the petitioner. I am satisfied that real prejudice was caused to the petitioner by his not being, called upon to show cause against the Imposition of the penalty under Sec. 167(3).

(10) It was contended by counsel for the respondent that no real prejudice was caused in this case because the petitioner had in his explanation admitted the contravention complained of in the show cause notice. This cannot be construed as an admission of liability to the penalty imposed under Sec. 167(3). As I have already indicated, the mere insertion of the section or the rule contravened in the show cause notice would not be sufficient compliance with the spirit of the law. In addition the show cause notice must also mention the penalty for the contravention of the provisions of the Act for which penal action is proposed to be taken.

(11) In this view, that part of the order imposing a penalty of Rs. 500/- on the petitioner must be held to be illegal as it is not preceded by a proper show-cause notice.

(12) The contention of the counsel for the petitioner that there was no finding in the order of the Collector that the petitioner stripped or landed the goods in contravention of the provisions of the Act has really no substance because that was the basis upon which the show cause notice was issued and the petitioner very well understood by reason of the explanation given by him what was the substance of the accusation against him.

(13) Counsel for the petitioner took another point that under S. 168 of the Sea Customs Act it was not obligatory to create the vessel in every case, and, that in this case the Collector failed to take note of instigating circumstances and that amounted to an error apparent on the face of the record. Another argument with reference to this point was that the Collector had no power under S. 168 to confiscate the boat because it was not used for the removal of any goods liable to confiscation. I will deal with this contention first. Section 168 reads thus.

The confiscation of any vessel under this Act includes any package in which they are found, and all the other contents thereof. Every vessel, cart or other means of conveyance, and every horse or other animal, used in the removal of any goods liable to confiscation under this Act shall in like manner be liable to confiscation.

The confiscation of any vessel under this Act includes her tackle, apparel and furniture".

It is common ground that the goods attempted to be landed in Vedalai in this case were liable to be confiscated. It is also common ground that "the boat in which the goods were carried was liable to confiscation if the word "removal" of goods in the second part of the section would include carriage of the goods by sea.

Mr. Cassim for the petitioner contended that S. 168 should be construed as referring only to the vessel or cart or other conveyance used for the removal of the goods from the place where, it was landed or to the place where it was sent for export in contravention of the provisions of the Act. Obviously S. 168 cannot be read in this restricted manner. It must cover both the vessel or other means of conveyance used for the carriage of the goods liable for confiscation and also cart or other means of conveyance used in the removal of such goods. Under the provisions of the Sea Customs Act, removal of goods liable to confiscation must include, as in this case, not only the boat used for carrying the goods but also any cart or other conveyance used for the transport of the goods liable to be confiscated. I do not find any substance in this Contention.

(14) The next argument of Mr. Cassim was that the order of confiscation of the boat is an unnecessarily deterrent punishment for a trivial offence and he complained that the collector had not taken note of the mitigating circumstances in this case, viz., that no part had been declared in the neighbourhood of Muyaltheevu and Vedalai for transport of goods from Muyaltheevu to the mainland. It is apparent that the contravention complained of would assume a different significance if the Collector was satisfied that on previous occasions such transport was done after obtaining a special permit by the lessee of Muyaltheevu. If that were the practice in vogue for a number of years even the Collector must have known that and the Collector would be justified in assuming that the contravention was wilful or mala fide. The fact that no part in the neighbourhood of Vedalai had been declared to be a port for coastal trade is a question which the Collector ought to have taken into account in assessing the degree of culpability involved in the contravention.

It cannot, therefore, be said that the facts of the case have been examined by the Collector with a view to find out if the contravention was carried out with either knowledge or intention which would amount to culpable knowledge or culpable intention involving the heavy penalty of confiscation of the boat. The failure of the officer to take note of those circumstances which are in the nature of mitigating circumstances certainly renders the penalty of confiscation imposed by the officer the result of an error apparent on the face of the order.

(15) The same view has been taken by a learned Judge of the Calcutta High Court in *Everett Orient Line Incorporated Vs. Jasjit Singh and Others*, . There the additional Collector of Customs passed an order of confiscation of a steamer, under S. 167(12-A) of the Sea Customs Act without taking into consideration the factors bearing upon the knowledge or intention of the owner in contravening the provisions of the Act. The learned Judge held that such a defect in the order was an error apparent on the face of the record and the High Court had jurisdiction in quashing such an order on this ground. I respectfully agree with this view, and, in this case, the order of confiscation of the boat is liable to be quashed on that ground.

(16) In the result the petition is allowed in part and a writ of certiorari will issue

quashing that part of the order imposing a penalty of Rs. 500/- on the petitioner under S. 167(8) of the Sea Customs Act, and, confiscating the boat under S. 168 of the Act,. There will be no order as to costs.

DF/I/D.V.C.

(17) Order accordingly.