

(1987) 01 CAL CK 0003
In the Calcutta High Court
Case No : Criminal Appeal No. 393 of 1978

Union of India (UOI)

APPELLANT

Vs

S.H. Mumtazuddin and Others

RESPONDENT

Date of Decision : 28-01-1987

Acts Referred:

Customs Act, 1962 — Section 105, 135

Citation : (1988) 16 ECC 152

Hon'ble Judges : Gobinda Chandra Chatterjee, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

1. This appeal is directed against a Judgment and Order of acquittal passed by Shri S. Pratihar, Metropolitan Magistrate, Fourth Court, Calcutta in Case No. C/2125 of 1977.

2. What happened in that case was that one Mirajuddin (accused-respondent No. 3) and his son Ferozuddin (accused-respondent No. 4) were found sitting within their shop at 4, Radhabazar Street, Calcutta on 7-1-1974. The place was visited by Sri Debabrata Ghosh, Inspector of Customs & Central Excise being assisted by Sri Bimal Kumar Banerjee (P.S. 4), Inspector of Customs & Central Excise. P.W. 6 Sri D.N. Ghose, another Inspector of Customs and P.W. 7 Sri M.R. Roy, still another Inspector were all there at that time and place to witness the search. In the presence of all these persons a cardboard box containing 88 pieces of foreign-made wrist-watches were found out at that place and on that very date accused Mirajuddin gave a written statement wherein he stated in clear terms that he had no conscious knowledge of the contents of that cardboard box, that the box was kept there by a third person whom he did not know and that third person had suddenly entered into the shop and seeing the police personnel had left the shop abruptly after keeping that cardboard box over there in front of his table. The learned trial Court believed this defence case adumbrated in Ext. 7 (written statement given by Mirajuddin) by characterising the same as "probable and

reasonable".

3. The trial Court also interpreted Section 105 of the Customs Act in favour of the accused persons by saying explicitly that the letter of authorisation (Ext. 4) ought not to have been issued by the Assistant Collector of Customs, Sri Mukhopadhaya inasmuch as he had no "reasons to believe" for issuing such authentication. The trial Court observed so because Sri Mukhopadhaya was never examined by the prosecution. Also the trial Court found that there was no suitable materials on the record to justify Sri Mukhopadhaya to form a reasonable belief in respect of the intended search. The trial Court also found that there was no material whatsoever on the record to prove that those 88 pieces of watches were of foreign origin. Upon the grounds aforesaid, the trial Court acquitted Mirajuddin and his son. The other respondents are S.H. Mumtazuddin, a firm having its office at the self-same premises, viz., 4, Radhabazar Street, and M/s. Angora Watches, another company having its shop over there. Mumtazuddin has figured as accused-respondents No. 1 and M/s. Angora Watches as accused-respondent No. 2.

4. At the time of hearing of this appeal it was given out first by the accused-respondent Ferozuddin that his father Mirajuddin is dead. This fact was subsequently confirmed by Mr. Sanyal, the learned Counsel appearing for the appellant. As proceeding against a dead person is a nullity in criminal law, the order of acquittal is redundant so far as Mirajuddin is concerned.

5. Mr. Sanyal appearing for the appellant invites my attention to the relevant portion of Ext. 4 (the letter of authorisation) which stands as follows:

Whereas an information has been laid before me that certain...restricted and dutiable goods of foreign origin...have been illegally imported from foreign territory and have been secretly stored in shop premises of M/s. Angora watch Co., of 4, Radhabazar Street, Cal. 1....

Mr. Sanyal has also invited my attention to the case of R.S. Seth Gopikrishan Agarwal Vs. R.N. Sen, Assistant Collector of Customs and Others, . Mr. Sanyal argues that the Supreme Court case is an authority for the proposition that in the letter of authorisation, giving of sufficient particulars of the documents is not a necessity for in that case "they will be known only after the search is made. Doubtless he has to indicate broadly the nature of the documents and the goods in regard to which the officer authorised by him should make a search for without that his mandate cannot be obeyed". The authorisation issued by the Assistant Collector of Customs in this case clearly mentions that on information received it appeared that the accused persons were in possession of contraband goods and documents relating thereto. It also described the office and the residential premises wherein those goods and documents would be found.

6. Mr. Dastoor appearing on behalf of the accused-respondent Nos. 3 and 4 retorted by saying that the premises described in Ext. 4 (the letter of authorisation) is the most unusual feature of the present case such that a line of

distinction must need be drawn before applying the principle enunciated in the Supreme Court case to the instant case with which we are concerned here. Mr. Dastoor draws my attention to the fact that originally premises No. 5 was inserted in Ext. 4 and subsequently the same was penned through and instead the figure "4" was introduced therein. Mr. Dastoor also invites my attention to the unusual feature of this case that Ext. 4 was written and signed not by the self-same person but by two different personalities altogether. Whereas Ext. 4 was filled up by P.W. 4, the same was signed towards the bottom abruptly in a different ink altogether by the Assistant Collector of Customs, Sri Mukhopadhaya. It is, therefore, self-evident from the document, continues Mr. Dastoor, that far from holding reasonable belief in his mind Sri Mukhopadhaya did not at all divert his attention subjectively or objectively to the facts of the case and that he signed the document routine wise in a careless manner thus ignoring and overlooking Section 105 of the Customs Act which requires the person in authority to apply his mind to the facts of each case. I concur in this view of the matter as expressed by Mr. Dastoor and I agree with the learned trial Court that Section 105 of the Customs Act was given a complete go-by by the prosecution. It is significant to note in this connection that Sri Mukhopadhaya was never examined as a witness by the prosecution and no reason was ascribed either for this non-examination. It may be also added that the officer who conducted the search was not examined of course on the ground that he was dead at the time the trial was going on. Be that as it may, one thing is clear. viz., that there is no material on the record to show that Sri Mukhopadhaya had any reasonable belief whatsoever to authorise another person to conduct the search in respect of the shop-room of the accused persons.

7. Mr. Dastoor has drawn my attention to the admitted fact that the alleged foreign-made 88 pieces of watches were lying not openly on the table within the shop-room but that the same were lying underneath a cardboard box such that the contents there of could not be seen by the shop-owner or anybody else. How could, asks Mr. Dastoor, the shopowner or his son know that the card board box contained foreign-made goods ? Mr. Dastoor has drawn my attention in this connection to the case of Assistant Collector of Customs v. Pratap Rao Sait and Anr. 1972 Cr LJ 1135 wherein it was held inter alia that conscious possession of contraband goods by the accused is an essential condition for constituting an offence u/s 135(b)(ii). It was also observed inter alia in that Kerala case that possession should be exclusive and that there should be also mens rea behind. Mr. Dastoor takes me through the evidence on record as adduced by the P.Ws. to show that the defence adopted by the accused on the spot after the search and seizure was complete was that the cardboard box was kept over there by an unknown person who had suddenly come to that shop and seeing the police personnel had left the same and that they could know nothing of it. Was this a very unusual thing ? was it utterly improbable for a third person to come in and then to suddenly depart by marking the police officers ? Mr. Dastoor argues forcibly by saying that there was no infirmity nor any unreasonableness in

accepting the defence case as reasonable and probable. Again and again I have asked Mr. Sanyal as to why the defence case should be discarded seeing specially that the cardboard box was lying in front of the table within the shop-room and that the contents thereof could not be deciphered from outside. I asked Mr. Sanyal to give a plausible explanation as to why and how licence for other imported watches could be shown and produced by the accused persons on the spot. Mr. Sanyal could not satisfy me regarding all these queries. Indeed, in all probability of the matter I do believe like the trial Court that the stray cardboard box lying over in front of the table was perhaps an article kept over there by a third person, for otherwise had it been the thing of the shopkeeper himself he would have kept it within an almirah or somewhere else in a concealed fashion.

8. At one stage of his argument Mr. Sanyal went so far as to suggest that the case should be remanded back to the trial Court seeing that their prayer for examination of an expert was turned down by the Court without any reason whatsoever. Mr. Dastoor in reply points out that the seizure had taken place as early as on 7-1-1974 and that thereafter long 41/2 years elapsed and that it is only on 26-7-1978 that the prosecution could come forward with a prayer for production of an expert for examination of the articles. In this connection Mr. Dastoor has taken me through the evidence adduced by the prosecution witnesses. None of these witnesses, it appears, was an expert for the proposition of law that the watches recovered were all foreign-made. More than 14 years have already passed since that seizure was made. In the facts and circumstances of the case, therefore, I do not think that a remand order would meet the ends of Justice in this case.

9. Mr. Dastoor has also taken me through the evidence adduced on the record to show that whatever evidence is there on the record is against the father and not against the son. The evidence is that the cardboard box was lying by the side of the father Mirajuddin and that the son was within the shop but not by the side thereof. I have already indicated before that the father is no more alive. Therefore, it would not serve any purpose to remand this case back to the trial Court, there being no iota of evidence on the record against the son.

10. Mr. Dastoor also points out to certain infirmities in respect of drawing-up of the charges by the learned trial Court. Although the contents of the charges are alike and identical, goes on Mr. Dastoor there was hardly any justification for drawing up 3 separate charges individually against each of the 4 accused. The drawing up of the charges in that fashion would hardly justify the proposition that the watches were found from the conscious and exclusive possession of all the accused at the same time. The father, according to Mr. Dastoor, could be at best possessing those watches consciously and exclusively but his son also could not be bracketed along with him for the self-same offence. Mr. Dastoor is right in his submission and I see no point in drawing up the charges in the fashion as done by the learned Trial Court.

11. I have considered the facts and circumstances of the case broadly and to my

mind it appears that the judgment and order of acquittal passed by the learned trial court was just and proper such that the same should not be set aside by this Court of appeal seeing that there is neither any infirmity nor any irrationality therein.

12. In the result, the appeal is dismissed. The judgment and order of acquittal passed by the trial court is confirmed.