Chandrakant Krishnarao Pradhan and Another

Vs

The Collector of Customs, Bombay and Others

Petitions Nos. 80, 80A, 81 and 116 to 213 of 1960

(P. B. Gajendragadkar, M. Hidayatullah, J. C. Shah, K. Subha Rao, Raghuvar Dayal, JJ)

11.08.1961

JUDGMENT

HIDAYATULLAH, J. -

These writ petitions raise identical questions, and a common argument was addressed to the Court in all of them. Petitions Nos. 80 and 80A of 1960 have been filed by two petitioners. One petitioner holds a 'permanent' licence and the other, a 'temporary' licence renewable trienially, to work as Dalals at New Customs House, Bombay. In the other petitions also petitioners Nos. 1 to 50 hold permanent licences, and petitioners Nos. 51 to 99 hold temporary but renewable licences. Some of the permanent licences were issued in 1936, and some of the temporary licences were issued as far back as 1944. These licences, whether permanent or temporary, were issued under section 202 of the Sea Customs Act, 1978, prior to its amendment by the Sea Customs (Amendment) Act, 1955 (Act 21 of 1955). They were issued after a brief enquiry and subject to the fulfilment by the applicant of the following conditions :

> " (1) He must produce at least 2 certificates of character each from a Justice of Peace or other persons of known respectability.
>
> (2) he must certify that he has not been convicted of any criminal offence.
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> (3) He must declare that he will have no claim to any accommodation in the Custom House.
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> (4) He must also give a security of Rs. 2000 in cash or Government paper having an equivalent market value and execute a Bond for Rs. 2000 on a fifteen rupees Stamp Paper in the attached form. "

In 1955, by the amending Act, section 202 was substituted by another section. The section now reads :

> "202. (1) With effect from such date as the Central Government may, by notification in the Official Gazette specify, no person shall act as an agent for the transaction of any business relating to the entrance or clearance of any vessel or the import or export of goods or baggage in any Custom-house unless such person holds a licence granted in this behalf in accordance with the rules made under sub-section (2).
>
> (2) The Chief Customs-authority may make rules for the purpose of carrying out the

provisions of this section and in particular such rules may provide for -

(a) the authority by which a licence may be granted under this section and the period of validity of any such licence;

(b) the form of the licence and the fees payable therefore;

(c) the qualifications of persons who may apply for a licence;

(d) the restrictions and conditions (including the furnishing of a security by the licencee) for his faithful behaviour as regards the custom-house regulations and officers) subject to which a licence may be granted;

(e) the circumstances in which a licence may be suspended or revoked; and

(f) the appeals, if any, against an order of suspension or revocation of a licence, and the period within which such appeals shall be filed. "

As a result of the enactment of this section, the original licence, whether permanent or temporary, would have become ineffective after the date to be specified by the Central Government. It became necessary for the petitioners and others to apply for licences granted in accordance with the rules framed under sub-section (2). These rules were framed, and public notices were issued inviting applications; but the dates were postponed till the rules were published in the Gazette on May 14, 1960. It is not necessary to refer to the prior history of these rules and to the many representations that were made, as they are not relevant. On June 18, 1960, a public notice (No. 87) was issued fixing June 25, 1960 as the last date for making applications for the new licences, and the persons affected were informed that the operation of the new licences under the rules would commence on July 14, 1960. On June 27, 1960, Writ Petitions Nos. 80 and 80A of 1960 were filed, followed by Writ Petitions Nos. 81 and 116 to 213 of 1960 filed on July 12, 1960. An ex-parte ad interim stay of the revocation of the existing licences was obtained from this Court, and subsequently, the respondents undertook to issue to the petitioners special temporary licences renewable yearly till the disposal of these petitions.

Prior to the Custom House Agents Licensing Rules, 1960, there were four classes of Agents. They were (1) Clearing Agents, (2) Dalals, (3) Muccadams and (4) Baggage Clearing Agents. According to the petitioners, there were 100 licensed Clearing Agents, 200 licensed Dalals, 270 Muccadams and about 15 Baggage Clearing Agents. The duties and functions of these four classes of agents were different. Whether these distinctions were always maintained and whether they grew out of regulations or usage is hardly necessary to enquiry. By the Rules of 1960, these classes were merged into one, and all licensed agents were placed on an equal footing. In other words, there is to be hereafter one class of agents.

Though the petitioners holding 'permanent' licences and the petitioners holding 'temporary' licences with a term to run out have relied upon the fact that their licences are still valid, there was no serious attempt to deny that under section 202(1) they would be rendered ineffective after the date to be fixed by Government. The 'permanent' licences also are not in a favourable position in this regard. If the first sub-section requires that fresh licences to work as Custom House Agents be obtained, the distinction between permanent and temporary licences ceases to be material. No part of section 202 was challenged as being void or ultra vires. In these petitions, only the Rules are challenged as in breach of the fundamental rights under Articles 14 and 19 of the Constitution and

also as being in excess of the rule-making power conferred by sub-section (2) of section 202. Form 'C' prescribed under the Rules for taking security from the approved agents is also questioned as being in excess of the power to make rules and contrary, in certain respects, to the Sea Customs Act itself. It may be mentioned that the petitioners in all the Writ Petitions are Dalals; but at the hearing, certain Clearing Agents obtained permission to intervene, and were also heard.

Since the Sea Customs Act, in general and section 202, in particular were not challenged in the petitions, we must start with the premise that the authority to insist on fresh licences under the Rules in the case of all the operators was properly exercised. The first question to consider is whether the Rules, speaking generally, were validly framed and the next question to consider is whether any of the Rules individually challenged, goes beyond the Sea Customs Act, or offends against the Constitution.

In questioning the Rules generally, the petitioners submit that these Rules could only be framed for the purpose of carrying out the purposes of section 202 [vide sub-section (1)], or to provide for the matters mentioned in clauses (a) to (f) of section 202(2). Some of the Rules it is submitted, go beyond the general purpose of the section, which is to license agents and the special topics mentioned there, and seek to further some of the purposes of other parts of the Act. Mention in this connection is made specially of Form 'C' prescribed by the Rules, under which the agents personally and the security furnished by them have been made liable for short collection of Customs duty, etc. The question whether the agents are liable, in any event, for such short collection under section 39 is a question, which will have to be examined on merits separately, but for repelling the argument in its present from, it is sufficient to say that it is robbed of all its force by section 9 of the Sea Customs Act. Under section 202(2), the Chief Customs-authority is empowered to make rules for the purposes of that section. That purpose is the licensing of agents and the regulation of their conduct and functions. But the Chief Customs-authority is also empowered by section 9 to make rules consistent with the Sea Customs Act "generally to carry out the provisions of this Act". The power to make rules under section 202 is not the only power which the Chief Customs-authority can exercise, and it is only too clear that power can also be derived from section 9, if there be need. Thus, if it is necessary that the agents must carry out certain provisions of the Act, a rule can be made in the exercise of the two powers together. Though the impugned Rules are headed as framed under section 202 of the Sea Customs Act, they cannot be questioned, if they carry out not only the special purposes of section 202 but also certain other purposes of the Act, because the two powers will concur to sustain them. It is only when a rule or rules are pointed out, which subserve neither the special purpose of the section nor the general purposes of the Act that they can be successfully questioned. In short, therefore, the petitioners' case on the individual Rules alone remains to consider.

The first contention is that under the impugned Rules, the number of licences to be granted at the Customs House can be limited by the Customs-collector, and that applications can only be made, if the Customs-collector publishes a notice inviting application. This restriction, it is contended, is unconstitutional, as it interferes with the right of all the petitioners to carry on their profession or a vocation freely as contemplated by Article 19. The Rules bearing upon these matters are rr. 4 and 8. The latter Rule says that the number of licences to be granted would be fixed by the Customs-collector, having regard to the volume of import and export business transacted through the Customs House, and the number is capable of being revised from time to time. The former empowers the Customs- collector to invite applications, as and when he considers it necessary. It cannot be said that the Rules are not designed to advance public interest, because even a professions or trade has sometimes to be limited in the public interest. When we pointed out to Mr. Gupte that this kind of

limitation on the number of persons allowed to hold licences is common, as, for example, porters in a railway station, taxicab drivers and so on, he stated that at least during the transitional period, the old operators might have been given licences on production of proof that they held licences previously. The argument is really not one based upon the interests of the public but upon the interests of the present holders of the licences. Public interests in the context must override private interests. It cannot be said that all the present operators are equally desirable, and if their number exceeds the requirement of the Customs House, it is obvious that some retrenchment in their numbers may legitimately be made. Every one has an equal chance of applying for the existing vacancies, but he must stand in competition with the others. There is no limitation on the number of applications that can be made, and thus, every operator will get a chance to have his case examined. It is to be expected that the most experienced and the most efficient will get preference, and no claim can be made on behalf of the incompetent and the inefficient that they should receive equal treatment. Once the number is limited to the requirements of the business, it is manifest that the Customs-collector will invite applications only, as and when occasion demands. These Rules, in our opinion, cannot be said to offend against the Constitution.

The next contention is about rr. 6(a), (b) and (c), which require the applicant to furnish to the Customs-collector satisfactory evidence as to his respectability, reliability and financial status, and that he would be in a position to muster sufficient clientele and business in the event of his being granted the licence. The applicant has also to furnish an income-tax clearance certificate. These conditions are challenged as being unreasonable restrictions upon the right to carry on a profession or avocation. Serious attempt was not made to establish that the condition about respectability and reliability was unconstitutional. It was, however, pointed out that evidence about financial status created a class barrier between the rich and the poor and only the rich were to be preferred. By the words "financial status" is not meant that the applicant must be a wealthy person; what in required is that he should not be financially embarrassed, and proof that he is in easy circumstances. It is obvious that the agents under the Act deal with vast sums of money and valuable articles, and it may be necessary to scrutinise the financial position of the applicant to find out whether or not he would be exposed to temptations. A person heavily indebted or insolvent cannot be trusted in the same way as a person who is not so embarrassed, and an enquiry into financial status is so much in the public interest, that we cannot say that the condition must necessarily be unreasonable. Similarly, the argument that new entrants would find it difficult to assure that they would have sufficient clientele and business and would thus be discriminated against, is not correct. The Customs House is not a place where persons can be allowed to learn a profession or to take a chance. The movement of goods, the due performance, of the duties and functions under the Sea Customs Act and observance of the regulations are not easy matters for a person, who is not sufficiently experienced and who has not got the backing of a certain amount of business and the experience which such business affords. It may be necessary for a person to apprentice himself for some time to get to know the importers and exporters, and to prove to the Customs-authority that by reason of his apprenticeship and his business connections he would be in a position to handle the work in the Customs House from the moment he is licensed. The Rule is designed to avoid entry into the Customs House premises of persons who, being there, are unable to do business, and merely add to the number of persons present.

The last condition is the production of an income-tax clearance certificate. The petitioners rely upon a decision of the Madras High Court reported in K. Raman and Co. v. State of Madras (A. I. R. 1953 Mad. 8A). In that case, it was held that the fact that a person was in arrears of income-tax was not germane to the issue of a licence under the Yarn Dealers Control Order, and that the insistence on the production of an income-tax clearance certificate was extraneous to the carrying on of the

business. The position of an agent who handles other persons' moneys and goods is different from that of a dealer who deals with goods on his own behalf. As part of an enquiry into an applicant's respectability, reliability and financial status, an enquiry can also be made to see whether he has discharged his debts to the State. If a person is liable to income-tax and pays it punctually, he would have no difficulty in proving it. If, however, for some good reason the payment has been delayed, there would be nothing to prevent him from proving it. The insistences upon the production of the certificate is, in our opinion, connected with the enquiry into his respectability and financial status to find out if he can be trusted with other persons' money and goods.

The next Rule which is questioned is rule 9, which provides for an examination of the applicant. This examination follows a scrutiny of the application under the other Rules, and embraces questions on various subjects. The duties of the agents require them to handle goods, and the examination is designed to find out whether a candidate knows the elements of the law relating to the arrival, entry and clearance of vessels and goods. Objection is not raised to the examination as a whole but only to clause (p) of rule 9(2) under which a candidate is supposed to know the procedure in the matter of refund of claims, appeals and revision petitions under the Sea Customs Act. It is contended that these are matters in which an agent is not interested as an agent, but are matters for the owner and the Customs- authorities to know. It is true that the curriculum for the examination is somewhat extensive; but it is also clear that what is expected of the candidate is knowledge, not necessarily exhaustive but sufficient, of the laws relating to the arrival, entry and clearance of vessels and goods. We do not think that it is wrong for the authorities to insist upon at least a working knowledge of the laws applicable to the kind of work the agents are required to do. When licences are issued under other laws, a candidate is sometimes required to answer questions relating to the law under which the licence is issued. One well-known example is the questioning of a candidate about the rules of the road when he is issued a licence to drive a mechanically-propelled vehicle. These Rules advance efficiency, and the additional knowledge about refunds, appeals and revisions under the Act may be necessary where an agent handles goods of a principal, who is himself not present to file appeals or revisions or to claim refunds. The Rule, in our opinion, is perfectly valid.

Rule 10 is the next subject of attack. It provides that the Customs-collector shall reject an application for the grant of a licence (a) if the candidate fails to pass the examination, or (b) the number of vacancies do not justify the grant of such licence, or (c) the applicant is not otherwise considered suitable. Objection is taken to clause (c). It is said to confer a very wide discretion on the Customs-collector, and reference is made to sub-rule (2), in which it is provided that no appeal shall lie from the order of the Customs-collector rejecting an application. It is further pointed out that in July, 1960, the Rules were amended by the addition of rule 25, under which an appeal is to lie to the Chief Customs-authority against every order of the Customs-collector - (i) rejecting an application for the renewal of a licence granted under these Rules; (ii) rejecting a fresh application made in accordance with rule 17; and (iii) refusing the grant or renewal of a special temporary licence under rule 24. It is argued that even though an appeal has been provided for these matters, no appeal has been provided for the rejection under rule 10(1) (c). No doubt, other reasons may exist for rejecting the application of a candidate, as for example, when he is found to be a leper or an epileptic; but one would expect that an order of this kind would be backed by reasons to be recorded in writing. It must be remembered that there is first a scrutiny of the application and an enquiry into the respectability, reliability and financial status of the candidate. Then follows an examination. If a candidate satisfies all the above conditions, there would hardly be any ground left for rejecting his application, except probably his physical unfitness to do the work. The Rule which is framed is so general that it leaves to the discretion of the Customs-collector to reject a candidate for a trumpery

reason (which he need not state), even though the candidate may be otherwise suitable. In our opinion, if a candidate is found fit under the other Rules and has successfully passed the examination, he should only be rejected under a rule which requires the Customs- collector to state his reasons for the rejection, and the rules must provide for an appeal against that order, as they do in the other cases. As the Rule stands, it cannot be considered to be a reasonable restriction upon the right of the successful candidate to carry on his avocation.

The next Rule which is questioned is rule 11, which enjoins the payment of a fee of Rs. 50 both for a fresh application as well as renewal of the licence. In so far as the fee for the grant of a licence in the first instance is concerned, it cannot be said that the charge is exorbitant. It is not disputed that a fee is an amount collected to reimburse the Government for the expenses of licensing. It must reasonably be measured against the cost which may be entailed in the process of granting licences. In the initial stage, the Customs- authorities have to scrutinise applications, subject the candidates to an examination, and provide them with licences to carry on their work. A fee of Rs. 50 initially may not be considered unreasonable, regard being had to the services involved. The same, however, cannot be said in the case of renewals. It is pointed out in the petition that formerly the charge was only 50 nP. It is averred in the petition that all that the licensing authority does, is to make an endorsement on the licence that it is renewed for a further period. It has been ruled in this Court that under the guise of a fee there must not be an attempt to raise revenue for the general funds of the State. In our opinion, a renewal fee of Rs. 50 does not entail services which can be reasonably said to measure against the charge. It may be pointed out that, though this averment was made in the petition, no attempt was made by the answering respondents to traverse it. In our judgment the renewal fee of Rs. 50 ceases to be a fee, and is, in its nature, a tax to raise revenue. Such an impost cannot be justified as a fee, and we accordingly, hold that this charge is improper. It would, however, be open to the Government to frame a rule in which the renewal fee to be charged is reasonable in the circumstances.

The next objection is to sub-rule (g) and sub-rule (k) of Rs. 15. Sub-rule (g) requires a Custom House Agent to pay over to Government all sums received for payment and to account to his client for monies in his hands. Sub-rule (k) requires him to maintain accounts in such form and manner as may be directed from time to time by the Customs- collector, and submit them for inspection to the Customs-collector, or an officer authorised by him. No exception can be taken to sub-rule (g), which only states what must be regarded as an inevitable obligation on the part of the agent. Sub-rule (k) is said to be excessive control on the part of the Customs-authorities of the way in which the agent may keep his own account. The licensing of an agent creates an assurance in the minds of the prospective clients, and the Rule is designed to ensure that the monies which the agents handle are properly accounted for. In our opinion, these Rules are salutary, and further the control over the agents, who stand in a fiduciary capacity both in regard to their own clients and the Government.

Rule, 17, which enjoins upon a firm which acts as a licensee to report to the Customs collector as early as possible and, in any event, within a period of three days of a change in the constitution of the firm, is next challenged. It is said that the period of three days is too short; but it must be remembered that a large number of transactions may go through without the licensing authority being aware that the constitution of a firm has changed. The Rule is designed to bring promptly to the notice of the Customs-collector the change in the constitution of the firm, so that he may be in a position to decide for himself whether the licence in the changed circumstances would be allowed to operate or be suspended or revoked. In our judgment, this Rule cannot be questioned.

Mr. Porus Mehta who argued the case on behalf of the Clearing Agents, stated that the newly

constituted firm is required to make a fresh application which is to be dealt with in accordance with the provisions of rr. 6 to 13. According to him, every change in the constitution of the firm requires the firm to go through the entire process of scrutiny and examination, which he terms unnecessary. The rule is designed to ensure that the new members of firm answer the requirements which have been laid down is Rules 6 to 13, and these requirements may be necessary, if new entrants come in. It is to be noticed that pending the disposal of the application, the Customs- collector is authorised by the rule in his discretion to allow the existing firm to carry on the business of Custom House Agents. This softens the rigour of the rule, because the work of the agents in proper cases would not be hampered, and the application would stand over for disposal to a later date.

Rule 19 which also enjoins the maintenance and inspection of accounts by a firm was criticised in the same manner as was rule 15, and for the reasons which we have given, we hold it to be conducive to the proper control of the financial activities of a firm as licensee.

Rule 22 deals with the cancellation of the licence for failure of the agent to comply with any conditions of the bond executed by him under the Rules, for failure to comply with any of the provisions of the Rules and for misconduct on his part which, in the opinion of the Customs-collector, renders him unfit to transact business in the Customs House. It is contended that the rules are so exhaustive and numerous that no agent would ever be able to keep out of the operation of that Rule, and that he would be perpetually exposed to the penalty of suspension or revocation of his licence. Rules are made for compliance and not for breach, and even though strict, they are all designed to ensure efficient and proper working on the part of the agents. A rule insisting upon such compliance with the other rules on pain of penalty cannot be said to be outside the rule making power of the Customs-authorities. Every order of suspension or revocation is subject to appeal, and there is thus room for interference if the Customs-collector acts arbitrarily or perversely. In our opinion, with the existence of an appeal, the rigour of the rule, if any, is taken away except in those flagrant cases, where suspension or revocation of the licence would be merited.

Lastly, it is contended that the Rules control a licensed agent in a manner which makes him an 'unpaid servant' of the Customs-authorities. This is one way of looking at the matter. The right way to look at it is that a profession is being regulated, and the profession is one in which an agent deals with the property of another and by the law is deemed to be owner of the property. A person in such a high fiduciary position must, of necessity, be subjected to strict control, and the licensing authority in holding him forth to the prospective principals as a reliable and trustworthy person must see that persons acting on the faith of the assurance of the licence are in no way damnified. The Rules, therefore, subserve a very salutary and necessary principle, and, in our judgment, are designed to advance public interest and cannot be questioned, unless a person wishes to act dishonestly and wants to avoid control. It is well-known that many underhand practices are common at Customs Houses, and the Customs-authorities have to be vigilant in preventing them. They must, therefore, see that they do not license the wrong type of persons; and in the interests of the Revenue and more so, in the interests of persons who employ licensed agents, these Rules have been framed. Looking at the Rules generally, we are of opinion that though they are strict, they are absolutely necessary, and their strictness would be felt only by persons, who are not otherwise honest.

The main argument in the case is upon rule 12 read with Form 'C', which is the bond which every applicant has to execute in favour of the President of India, and it enforcement against the applicant under certain circumstances. Under rule 12, it is provided that before a licence is granted under the Rules, the Customs-collector shall require the applicant to enter into a bond in Form 'C' for the due observance of these Rules and the conditions of his licence and also to furnish a security of Rs.

3,000 in cash or securities and a solvent surety for a sum of Rs. 2,000. The surety is required to execute a separate bond in Form 'D'. A proviso added to the Rule says that the security may be increased or decreased by the Customs-collector at any time, should he consider it necessary to do so, having regard to the volume and type of the business which the applicant will transact as Custom House Agent. It may be mentioned here that the four classes of agents which had grown in the past have now been fused into one, and an agent under the Rules may not confine his activities to those of any one or more of the four classes previously existing. Objection, however, is taken to the basic figure of the security and particularly, the cash security of Rs. 3,000, which are innovations under the present Rules. Reference is made to the provisions of Form 'C', in which it is provided as follows :

> "It is also agreed and declared that the President of India may apply the above sum of Rs. .... in making good wholly or in part any short collection of duty or other charges in respect of any transactions made by the said.... on behalf of importers in the event of such sums remaining unpaid, even after issue of demands under section 39 of the Sea Customs Act".

The petitioners contend that the increased security, particularly, in cash, puts an unreasonable restriction upon the right to carry on the profession or avocation. They point to the fact that in the past a security of Rs. 2,000 had been considered adequate, and from 1937 onwards, that security alone was demanded. They also contend that as Dalals they are only required to present the shipping bills and the assessment or appraisement of the customs duty is the function of the Customs Officer. If any mistakes are made, due to an error on the part of the Customs-authority, or even due to a wrong declaration of the real value of the goods by the importer, the collection of duty should be made from the owner of the goods and not from them. They also contend that this is the meaning and intent of section 39, which, in terms, makes the owner of the goods liable to make up for the short collections and puts no responsibility on the agents. They further contend that the last clause of the bond, quoted earlier, makes the agent liable for payment of the balance of the duty before any attempt is made to recover it from the owner or importer.

The last point need not detain us long, because it is raised on the existence of the word "even" in the clause "even after issue of demands under section 39 of the Sea Customs Act". The word "even" does not mean that the agent's security can be touched before the notice is given. It rather indicates that the security would be utilised to make up the deficit only when a notice is given and if even after notice there is no compliance. This would indicate that before the security is so utilised, a notice must go to the agent or his principal, and the bond makes the notice a sine qua non of an action to recoup the deficit duty from the security amount.

The larger question whether the agent can be made responsible for the short collection of duty under section 39 may be deferred for the moment. Previous to the promulgation of the Rules, there were, as already stated, four classes of Agents, and their duties, by custom and usage, were also different. It is now contemplated to make a single class of agents and also to restrict the number of such agents. It is quite clear, therefore, that the amount of business which would be done by the agents who are licensed, would grow significantly. Also, each agent would be entitled to do all kinds of businesses which were handled separately. This justifies the demand for increased security, and it should be noticed that there is room for the reduction of the duty in individual cases, if the amount of business which the agent would carry on, would be small. Similarly, there is provision for demanding increased security from a person who does or is expected to do a much larger amount of business as an agent. There is thus no room for a proper adjustment of the amount of security to be

obtained from each individual licensed agent, commensurate with the volume and type of business which he will transact. We do not, therefore, consider that rule 12 is defective on this ground.

Before we deal with section 39, it is necessary to review certain other sections of the Sea Customs Act. Under the Sea Customs Act, it is not obligatory upon a principal to appoint a licensed agent. An importer or exporter, as the case may be, can also appoint any person with the approval of the Customs-collector as his agent, who need not be a licensed agent. (R. 3). The Rules are meant to control action of agents, particularly the licensed agents. Under the Act, the position of an agent, whether licensed or not, is indicated in section 4, which reads :

> "When any person is expressly or impliedly authorized by the owner of any goods to be his agent in respect of such goods for all or any of the purposes of this Act, and such authorization is approved by the Customs-collector, such person shall, for such purposes be deemed to be the owner of such goods".

One of the duties of the owner of the goods is to make a declaration of the real value of the goods in a bill of entry or shipping bill. Under section 29, on the importation into, or exportation from, any customs-port of any goods, whether liable to duty or not, the owner of such goods must, in his bill of entry or shipping bill as the case may be, state the real value, quantity and description of such goods to the best of his knowledge and belief, and must subscribe a declaration of the truth of such statement at the foot of such bill. Under the same section, the Customs-collector may require the production of invoices, broker's note, policy of insurance or other document to satisfy himself about the real value, quantity or description of such goods. The Customs-Collector is also authorized to inspect the goods for the same purpose. Under sections 29A and 29B, there may be an assessment of duty prior to the examination of the goods and a provisional assessment of duty and its payment even prior to the production of the documents above mentioned or the inspection of the goods. Section 30 of the Act defines "real value" and that is the value on which the assessment of the goods takes place. That section is not dependent upon the declaration of the owner, but defines "real value" in terms of a formula which, on its application determines the real value, apart from any declaration. Section 31 provides for the examination of ad valorem goods, and if the real value of such goods is correctly stated in the bill of entry or shipping bill, the goods are assessed in accordance therewith. Section 32 provides for the procedure, if it appears that such goods are properly chargeable with a higher rate or amount of duty than that to which they were subject according to the value stated in the bill of entry or shipping bill. The Officer may then detain the goods and collect the proper duty. Sections 33, 34A and 35 deal with abatement allowed or disallowed under certain circumstances. Sections 36, 37 and 38 deal with the alteration of import and export duties or tariff valuations. When the proper duty has been paid according to the checks and inspections, if any, the goods are allowed to be cleared.

Section 39, as the marginal note shows correctly, deals with payment of duties not levied, short-levied or erroneously refunded. The first sub-section provides as follows :

> " (1) When customs-duties or charges have not been levied or have been short-levied through inadvertence, error, or collusion or misconstruction on the part of the Officers of Customs, or through mis-statement as to real value, quantity or description on the part of the owner,
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> or when any such duty or charge, after having been levied, or has been, owing to any such cause, erroneously refunded,

> the person chargeable with the duty or charge which has not been levied or which has been so short-levied or to whom such refund has erroneously been made, shall pay the duty or charge or the deficiency or repay the amount paid to him in excess, on a notice of demand being issued to him within three months from the relevant date as defined in sub-section (2); and the Customs-collector may refuse to pass any goods belonging to such person until the said duties or charges to the said deficiency or excess be paid or repaid".

The second sub-section need not be quoted, because it does not bear upon the controversy.

The contention of the petitioners is that although in the first paragraph of section 39(1) the word "owner" may comprehend an agent who is deemed to be an owner, if authorised under the Act, the section does not use that word "owner" in the latter part, and speaks of "the person chargeable with the duty", meaning thereby a change over to the real owner of the goods in contradistinction to the agent. They urge that this is even more apparent from the words of the fourth paragraph of the first sub-section which authorises that Customs-collector to refuse to pass any goods belonging to "such person" which must mean the goods belonging to the real owner, who is properly chargeable with the duty. It is contended, therefore, that as the agent is not within the reach of section 39, the demand of duty from him cannot be made, and that the provisions of the bond by which the agent and his security are made liable, are beyond the provisions of section 39 and thus invalid.

One thing is clear that the Customs-authorities may have no dealing with the real owner of the goods where the agent has been authorised to deal with them for the purposes of the Sea Customs Act or any of its provisions. Section 4 clearly lays down a fiction, that if the agent is authorised by the real owner in respect of any of the matters in the Act, the Customs-authorities would deal with the agent as if he were the owner. The effect of the fiction is, therefore, to make an agent answerable to the Customs-authorities within the four corners of his authorisation. The fiction operates only within those limits. A agent may be authorised to declare the real value and to pay the customs duty or other charges. If an agent is authorised in this manner, under the fiction created by section 4 he would be regarded as the owner and would be dealt with as such, by the Customs-authorities.

It has already been pointed out that the real value, quantity and description of the goods have to be declared in the bill of entry or the shipping bill. A form was shown to us at the hearing in which the declaration has to be made either by the real owner or the agent. The form emphasis also that all responsibility for the declaration and for the payment of the proper duty and charges may be taken by an agent. Once an agent has made a declaration and has also been authorised to pay the duty etc., it is to him that the Customs-authorities would look for payment or additional payment, and it is to him that refunds would be made. The Customs-authorities would not deal with the real owner, and that is the scheme of the Act.

When section 39 says that where customs duties or charges have not been levied or have been short-levied through inadvertence, error, collusion or misconstruction on the part of the officers of Customs, or through mis-statement as to real vale, quantity or description on the part of the owner, it refers not only to the real owner, but also to an agent, if the latter can be deemed to be the owner. This is, indeed, conceded by the petitioners. The question then arises, what does the section mean when it speaks of "the person chargeable with the duty or charge which has not been levied or which has been so short-levied, or to whom such refund has erroneously been made" ? Obviously enough, the person to be charged, in so far as the Customs-authorities are concerned, is not the real owner but the agent, a fictional owner of the goods. If a 'fictional owner' can be read into the first part of

the section, there is no reason why the words, "the person chargeable with duty" cannot also be applied to him. In the circumstances in which the agent makes a declaration with authorisation from the real owner, the agent is the person chargeable with the duty. Otherwise, for the duty chargeable in the first instance the agent would be the person chargeable with the duty, and for any short payment he would cease to be such a person and the Customs-authorities would have to deal with the real owner, who made no declaration or payment. The words "the person chargeable with the duty... ", therefore, have advisedly been used not to exclude the agent but to describe in a neutral way the person from whom such a demand can be made. They are wide enough in their ambit to take in, not only the real owner but also a "deemed owner" under the Act. So far, there is no difficulty, and the objection of the learned counsel for the petitioners that a simpler method would have been to use the word "owner" in this part of the section, is without substance, because the legislature may express its meaning and intention in different ways.

The critical argument, however, is on the fourth paragraph of section 39(1). There, it is provided that if the excess charge is not paid, "the Customs-collector may refuse to pass any goods belonging to 'such person' until the said duties or charges or the said deficiency or excess be paid or repaid". It is contended that an agent deals with numerous owners at the same time, and if this paragraph is applied literally, then the Customs-collector would be entitled to refuse to pass the goods belonging to other owners, handled by the same agent. This argument, in our opinion, does not represent the true state of the law. An agent, when he works for different owners with authorisation, undoubtedly becomes a fictional owner of the goods belonging to them; but he does not become a single owner is respect of the goods belonging to different clients. He becomes an owner quoad each client, and his ownership of the goods is diversified and is not one. The agent, therefore, stands in the shoes of several persons at the same time, and is himself a multitude of owners. It is only when short payment has been made is his capacity as one fictional owner, that he can be asked to pay that which he ought to have paid in the first instance. He is exposed to the penalty of having his goods detained in the same capacity as owner quoad his defaulting client, and the goods within his control for the same client will be detained until the duty has been paid. It is only the goods of the defaulting owner in respect of which he is also the deemed owner, that would suffer the penalty of detention but not the goods of a different owner, even though the agent may be authorised to deal on his behalf. It is in this way that the section must be read without contradiction in its several parts, because to read it as suggested by the petitioners, creates a contradiction between the first paragraph and the other paragraphs that follow. An authorised agent is an owner for all purposes of the Act (including payment of duty). If one were to say that in the other paragraphs of section 39(1) he is not included, then the fiction which is created by section 4 would cease to be worked out to its logical limits. Once it is held that the words "the person chargeable with the duty....... " are apt to describe not only the real owner but also his authorised agent (and there is no reason why there words should be restricted), the fourth paragraph falls in line with the others, and the ownership of the agent is, therefore, limited to one client at a time, and the goods of that client of which the agent is also the deemed owner, are exposed to the penalty of detention. It must be remembered that the Act makes the 'goods' liable to duty and the payment of duty by owners clears the goods. The law goes further, and says that other goods of the owner are also liable for any deficit, if the goods liable to duty are 'cleared' before the full duty has been paid.

The condition in the bond is limited by the operation of section 39 to the transactions of one constituent at a time, and the forfeiture of security is also limited to the constituent in default. The bond prescribes for recouping of the deficiency in the customs duty or charges from the security, even after notice is given. This notice must be given within three months from the relevant date as defined in the section. The limit of three months also applies to the agent as the deemed owner in

the same way as it does to the real owner. If no notice is given, then the bond, on its own terms, cannot be enforced. In our opinion, the contentions of the petitioners are not sustainable.

In the result, the petitions must fail except to the extent that we declare rule 10(c) to be an unreasonable restraint upon the right of the petitioners to carry on their avocation, and rule 11 when it prescribes a renewal fee of Rs. 50, invalid inasmuch as it has provided not for a fee but for a tax. Subject to this, the petitions are dismissed. The petitioners will pay the costs of the other side (one set only), as they have lost substantially.

SUBBA RAO, J. �

I have had the advantage of perusing the judgment prepared by my learned brother, Hidayatullah, J. I agree with him except in regard to rule 6(c) of the Custom Houses Agents Licensing Rules, 1960 (hereinafter called the Rules). Rule 6(c) says : "An applicant for a licence shall furnish an income-tax clearance certification. " The Rules were made to regulate the conduct of the clearing agents so that they may discharge their duties to the satisfaction of not only the Customs Authorities but also the public. In my view, the production of income-tax clearance certificate is extraneous to the issue of a licence to a customs house agent. How does the production of such a certificate improve the credentials of an applicant for selection as a customs house agent ? An applicant may be financially sound and also otherwise duly qualified; he may have discharged all his debts, and paid all his taxes except a small portion of his income-tax : he may not have paid the income-tax for good reasons. Yet, if he does not produce the income-tax clearance certificate, he is disqualified. What is the reasonable nexus between the production of such a certificate and a person's right to do business as a clearing agent ? There is none, except a remote and fanciful presumption that a man who pays the income-tax may also pay the dues payable to the Customs Authorities. In K. Raman & Co., Tellicherry v. State of Madras (A. I. R. 1953 Mad. 84), in the context of issue of a licence under the Yarn Dealers Control Order, as Judge of the Madras High Court, I have held,

> "The fact that a person is in arrears of income-tax is not germane to the issue of a licence under the Yarn Dealers Control Order. It is a circumstance extraneous to the petitioner's right to carry on his business. The Income-tax Act provides an adequate machinery for realising the arrears due from an assessee. I am of the view that the restriction imposed is unreasonable and is not in the interests of the general public. "

I still adhere to that view. Every taxing Act has a machinery for collecting the tax imposed by it, but the said rule, in effect and substance, provides for an additional machinery for collection of income-tax. I would, therefore, hold that the non-production of an income-tax clearance certificate is not germane to the issue of a licence under the said Rules. I would therefore strike out rule 6(c) of the Rules on the ground that it constitutes an unreasonable restriction on the right of an applicant to do business as customs house agent.

BY COURT :

In accordance with the opinion of the majority, the petitions must fail except to the extent that we declare rule 10(c) to be an unreasonable restraint upon the right of the petitioners to carry on their avocation, are rule 11, when it prescribes a renewal fee of Rs. 50 invalid inasmuch as it has provided not for a fee but for a tax. Subject to this, the petitioners are dismissed. The petitioners will pay the costs of the other side (one set only), as they have lost substantially.

Petitions dismissed except for slight modification.

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