

wSeth Durgaprasad Etc.

Vs

H. R. Gomes

Civil Appeals Nos. 677 to 680 of 1965

(CJI P.B. Gajendragadkar, K.N. Wanchoo, M. Hidayatullah, V. Ramaswami-I, R. Satyanarayan Raju JJ)

09.12.1965

JUDGMENT

RAMASWAMI, J. -

These appeals are brought by a certificate from the judgment of the High Court of Judicature at Bombay (Nagpur Bench) dated February 25, 1964 in Special Civil Applications nos. 437, 448, 459 and 490 of 1963 wherein the respective appellants challenged the search and seizures carried out by the respondents at the residential-cum-business premises of the appellants in exercise of the power derived from Rule 126L(2) of the Defence of India (Amendment) Rules 1963 (hereinafter called the 'Gold Control Rules') and ss. 105 and 110 of the Customs Act 1962 (hereinafter called the 'Customs Act').

Civil Appeal No. 678 of 1965 :

This appeal arises out of Special Civil Application no. 490 of 1963 which relates to the search and seizure of the premises of Sri Durga Prasad on August 19, 1963 and August 20, 1963. The authorisation was granted by the 1st respondent - Assistant Collector of Customs and Central Excise, Nagpur - to the second Respondent - Superintendent of Customs and Central Excise - on August 19, 1963 to search the appellant's premises "Shreeram Bhawan" and to seize and take possession of all gold, gold ornaments etc. which were believed to have been kept in contravention of Gold Control Rules and also account books and documents. The authorisation was granted under Rule 126L(2) of the Defence of India (Amendment) Rules 1963 and reads as follows :

"To

Shri S. H. Joshi'

Superintendent of Customs

and Central Excise, Nagpur.

Whereas information has been laid before me and on due inquiry thereupon I have been led to believe that the premises/vaults/lockers specified below and said to be in possession and control of Shri R. B. Shri Ram Durga Prasad are used for storage of Gold/Gold ornaments in contravention of the provisions of the Gold Control Rules,

Details of premises/vaults/lockers to be searched.

Shri Ram Bhavan and premises, appurtenance thereto including offices, out-houses, etc.
Ramdaspath, Nagpur.

This is to authorise and require you to enter the said premises with such assistance as shall be required, and to use, if necessary, reasonable force for that purpose, and to search every part of the said premises and to seize and take possession of all gold/gold ornaments along with the receptacle, container or covering thereof which you may reasonably believe to be kept in contravention of the Gold Control Rules and also of such books of accounts, return or any other documents, as you may reasonably believe to be connected with any contravention of Gold Control Rules, and forthwith report to this office regarding the seizure made, returning this order, with an endorsement certifying what you had done under it immediately upon its execution.

Give under my hand and seal of this office this Nineteenth day of August 1963.

#Seal of Office. Sd. Krishan Dev, 19-8-63, Assistant Collector of Customs and
Central Excise, Nagpur.###

Having taken possession of the documents, respondent no. 2 retained those documents at Nagpur for about 8 days. Thereafter the documents were sent to Delhi temporarily for proper translation by the Departmental Hindi Officer. While the documents were at Delhi, the 3rd respondent viz., the Collector of Customs Nagpur,, made an order of seizure under s. 110(3) of the Customs Act. The order of seizure dated September 6, 1963 states :

"Whereas information has been received that the undermentioned documents are in the custody of Shri S. H. Joshi, Superintendent of Central Excise, Nagpur :

1. Nagpur ki Juni Rokad Bahi Hisab Bahi Shri Nagpur ki 24-7-58 to 28-10-59 (in Hindi) pages 1 to 96;
2. Shri Rokad Bahi Nagpur (in Hindi) pages 1 to 27;
3. Rokad-Bhuramalji Agrawal (in Hindi) pages 1 to 78;
4. Shri Khata Bahi Bhai Bhuramalji Agrawal Samvat 2000-2001, 2005-2006 (in Hindi) pages 1 to 53;
5. Partners Shrix Du Group Hisab Bahi - upto 3-5-59 (in Hindi) pages 1 to 45;
6. Shri Khata Bahi-Bhai Bhuramalji Agrawal - Samvat 2006-7 to 2012 (in Hindi) pages 1 to 57;
7. Hisab (bahi)-Partners-G x F Group upto 3-5-59 (in Hindi) pages 1 to 20;
8. Om. - p. Ankada Bahi (in Hindi) pages 1 to 25;
9. Ankada (Bahi) Bombay Nagpur (in Hindi) pages 1 to 10;
10. Shri Jaipur Ki Hisab Bahi (in Hindi) pages 1 to 101; (loose papers) and 1 to 39 (regular pages);

11. C.N.A. 1956-58 (A/c Book in English) pages 1 to 101;

12. Account Book similar to no. 11 above (in English) back cardboard cover missing pages 1 to 129;

13. June Shan Jakhiramji Bhagwandasji pages 1 to 2 loose pages. Pages 1 to 71 regular pages; 3-11-56 to 2-5-59; - Total thirteen exercise book type account books;

14. Eight bunches of loose sheets stitched together containing sheets as detailed below :

Bunch no. 1 containing sheets 5 : Bunch no. 2 containing sheets 6 : Bunch no. 3 containing sheets 4 : Bunch no. 4 containing sheets 5 : Bunch no. 5 containing sheets 4 : Bunch no. 6 containing sheets 2; Bunch no. 7 containing sheets 2 : Bunch no. 8 containing sheets 3;

15. Loose papers 25 sheets (including small chits) recovered from Shriram Bhawan, Nagpur and whereas I am of the opinion that the said documents are useful for and relevant to the proceedings under Customs Act 1962 (Act 52 of 1962) I, Shri Tilak Raj, the Collector of Central Excise, having been empowered as Collector of Customs under Notification no. GSR 214 dated 1-2-1963 of the Government of India in this behalf in exercise of the said powers hereby order that the aforesaid documents shall be seized."

Respondent no. 3 made a second order of seizure dated September 11, 1963 with regard to the same documents. Respondent no. 3 has explained that he had to make the second order of seizure dated September 11, 1963 because he was, at first, under the impression that the documents were under the custody of respondent no. 2, but later on he learnt that respondent no. 2 had already made over the documents to the custody of Sri Krishan Dev, assistant Collector of Central Excise, Nagpur.

It is contended by Mr. Pathak on behalf of the appellants that the order of search and seizure dated August 19, 1963 was illegal because the Excise authorities had no power to seize documents under Rule 126L(2) of the Defence of India (Amendment) Rules 1963 which states :

"126L. Power of entry, search, seizure, to obtain information and to take samples. -

(1).....

(2) Any person authorised by the Central Government by writing in this behalf may -

(a) enter and search any premises, not being a refinery or establishment referred to in sub-rule (1), vaults, lockers or any other place whether above or below ground;

(b) seize any gold in respect of which he suspects that any provision of this Part has been, or is being, or is about to be contravened, along with the package, covering or receptacle, if any, in which such gold is found and thereafter take all measures necessary for their safe custody.

.....

It is contended for the appellants that the Rule only gives authority to seize any gold in respect of which there is suspicion of contravention of the Gold Control rules along with the package, covering or receptacle, but there is no provision in the Rule for search or seizure of any documents. On behalf of the respondents the Solicitor-General relied upon the provisions of Rule 156 which is to the following effect :

"156. Powers to give effect to rules, orders, etc. -

(1) Any authority, officer or person who is empowered by or in pursuance of the Defence of India Ordinance, 1962, or any of these Rules to make any order, or to exercise any other power may, in addition to any other action prescribed by or under these Rules, take, or cause to be taken, such steps and use, or cause to be used, such force as may, in the opinion of such authority, officer or person, be reasonably necessary for securing compliance with, or for preventing or rectifying any contravention of, such order, or for the effective exercise of such power.

(2) Where in respect of any of the provisions of these Rules there is no authority, officer or person empowered to take action under sub-rule (1), the Central or the State Government may take, or cause to be taken, such steps and use, or cause to be used, such force as may, in the opinion of that Government be reasonably necessary for securing compliance with, or preventing or rectifying any breach of, such provision.

(3) For the avoidance of doubt, it is hereby declared that the power to take steps under sub-rule (1) or under sub-rule (2) includes the power to enter upon any land or other property whatsoever."

It was submitted that the Superintendent of Customs and Central Excise was an officer empowered by the Central Government to exercise the power under Rule 126L(2) and under Rule 156 the Superintendent had the additional power to take or cause to be taken such steps as may be reasonably necessary for the effective exercise of such power. The argument was stressed that under Rule 156 the Superintendent had the power to seize documents for the purpose of investigating whether the gold which was seized was gold in respect of which any provision of Part XIA had been contravened. We do not think there is any justification for this argument. The power granted to the authority empowered under Rule 156 is an ancillary or incidental power for making effective seizure of suspected gold. In other words, the power granted under Rule 156 is the power to take such action as may be necessary for seizing the gold and does not include the power of seizure of documents which is not an ancillary but an independent power. The view that we have taken is borne out by the Seventh Amendment of the Defence of India Rules made on June 24, 1963. Before the amendment, Rule 126L read as follows :

"126L. Power of entry, search, seizure, to obtain information and to take samples. -

(1) Any person authorised by the Board by writing in this behalf may -

(a) enter and search any refinery of which the refiner, or the establishment of a dealer who, is licensed under this Part;

(b) seize any gold in respect of which he suspects that any provision of this Part has been, or is being, or is about to be, contravened, along with the package, covering or

receptacle, if any, in which such gold is found and thereafter take all measures necessary for their safe custody.

(2) Any person authorised by the Central Government by writing in this behalf may -

(a) enter and search any premises, not being a refinery or establishment referred to in sub-rule (1), vaults, lockers or any other place whether above or below ground;

(b) seize any gold in respect of which he suspects that any provision of this Part has been, or is being, or is about to be contravened, along with the package, covering or receptacle, if any, in which such gold is found and thereafter take all measures necessary for their safe custody.

....."

After the Seventh Amendment the following clause was inserted after cl. (b) in sub-r. (1) :

"(c) seize any books of account, return or any other document relating to any gold in respect of which he suspects that any provision of this Part has been, or is being, or is about to be, contravened and thereafter take all measures necessary for their safe custody."

By the same amendment the following sub-rule was inserted after sub-rule (2) :

"(3) Any officer authorised by the Board by writing in this behalf may search any person if that officer has reason to believe that such person has secreted about his person -

(a) any gold in respect of which such officer suspects that any provision of this Part has been, or is being, or is about to be, contravened,

(b) any document relating to such gold."

It is important to notice that Rule 126L(2) has not been amended by the Seventh Amendment and there is no provision in this sub-rule for such a seizure of any document. We are, therefore, of the opinion that respondent no. 1 had no authority under Rule 126L(2) of the Defence of India Rules to order respondent no. 2 to seize and take possession of the documents in the premises of the appellant.

The appellants will not however be entitled to the relief of grant of a writ, because we are of the opinion that there is a valid order of seizure of the same documents on September 11, 1963 by the Collector of Customs under s. 110(3) of the Customs Act. Section 110 of the Customs Act states :

"110. (1) If the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods :

Provided that where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer.

(2) Where any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of section 124 within six months of the seizure of the goods, they shall be returned to the person from whose possession they were seized :

Provided that the aforesaid period of six months may, on sufficient cause being shown, be extended by the Collector of Customs for a period not exceeding six months.

(3) The proper officer may seize any documents or things which, in his opinion, will be useful for, or relevant to, any proceeding under this Act.

(4) The person from whose custody any documents are seized under sub-section (3) shall be entitled to make copies thereof or take extracts therefrom in the presence of an officer of customs."

On this aspect of the case it was, firstly, submitted by the appellant that the Collector of Customs was not a "proper officer" within the meaning of the Act and so he had no authority to seize documents from the possession of the Superintendent or the Assistant Collector, Central Excise. Reference was made to s. 2(34) of the Customs Act which states :

"2. (34) 'proper officer', in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by Board or the Collector of Customs;"

On behalf of the respondents the Solicitor-General relied upon s. 5(2) of the Customs Act which states that "an officer of customs may exercise the powers and discharge the duties conferred or imposed under this Act on any other officer of customs who is subordinate to him". Mr. Pathak, however, submitted that s. 5(2) has no application to this case because there is a difference between the "functions" on the one hand and "powers and duties" referred to in s. 5(2) of the Customs Act on the other. We do not think it is necessary to go into this point because we are of the view that, in any event, the Collector of Customs would be a "proper officer" in relation to the functions to be performed by the Act, because as a matter of principle the Collector of Customs who had assigned the powers of a "proper officer" to the subordinate officer must himself be deemed to have the powers of a "proper officer" under s. 110(3) of the Customs Act. We accordingly reject the contention of Mr. Pathak on this point.

It was next submitted on behalf of the appellant that on both the dates - September 6, 1963 and September 11, 1963 - the documents were not in physical possession of respondent no. 2 and there could not be a valid seizure of documents as contemplated by s. 110(3) of the Customs Act. It is the admitted position that when seizure orders were passed by the Collector of Customs on September 6, 1963 and September 11, 1963 the documents were not in Nagpur or within territorial jurisdiction of respondent no. 3. But we do not accept the argument of the appellant that the power of seizure must necessarily involve, in every case, the act of physical possession of the person who had a right to seize the articles. It is true that the documents had been sent to Delhi by respondent no. 2 for a limited purpose and for a limited period. But though the documents were sent to Delhi, respondent no. 2 was still in legal possession of the documents, for he had the right to control the use of the documents and to exclude persons who should or should not have access to the documents. The legal position is that at Delhi the documents were in possession of a bailee for the limited purpose of examination and translation of the documents but the legal possession was still with respondent no.

2. The law on this point has been correctly stated by Mellish, L.J. in *Ancona. v. Rogers* ([1876], 1 Ex. D. 285, at 292.) as follows :

" there is no doubt that a bailor, who has delivered goods to a bailee to keep them on account of the bailor, may still treat the goods as being in his own possession, and can maintain trespass against a wrong-doer who interferes with them. It was argued, however, that this was a mere legal or constructive possession of the goods, and that in the Bills of Sale Act, the word 'possession' was used in a popular sense, and meant actual or manual possession. We do not agree with this argument. It seems to us that goods which have been delivered to a bailee to keep for the bailor, such as a gentleman's plate delivered to his banker, or his furniture warehoused at the Pantechnicon, would, in a popular sense, as well as in a legal sense, be said to be still in his possession."

This passage was approved by Lord Porter in *United States of America v. Dollfus Mieg et Compagnie S.A. and Bank of England* ([1952] 1 All. E.R. 572.) and it was held in that case that where a bailor can at any moment demand the return of the object bailed, he still has legal possession.

It follows, therefore in this case, that the Collector, by his order of seizure dated September 6, 1963 or September 11, 1963, could transfer the legal possession of the documents to himself. The legal effect of the order of seizure made by the Collector was the transfer of the legal possession of the documents from respondent no. 2 or respondent no. 1 to the Collector. Such a change of possession need not necessarily involve a physical transfer of possession if it was possible at that stage, but as a matter of law on and from the date of seizure the Collector exercised the full incidents of possession over the documents. The fact that the documents were retained at Delhi for a specific purpose will not affect the legality of the order of seizure and there was, in law, transfer of possession in respect of these documents from respondents nos. 1 and 2 to respondent no. 3.

On behalf of the appellants Mr. Pathak referred to the decision of this Court in *Gian Chand v. The State of Punjab* ([1962] Supp. 1 S.C.R. 364.). In that case, the question debated was whether the presumption under s. 178A of the Sea Customs Act, 1878 would arise in respect of an article which was originally seized by the police and handed over to the authorities of the Customs Department and was actually with one of them when it was seized. In this context, this Court observed at page 373 of the Report :

"A 'seizure' under the authority of law does involve a deprivation of possession and not merely of custody and so when the police officer seized the goods, the accused lost possession which vested in the police. When that possession is transferred, by virtue of the provisions contained in s. 180 to the Customs authorities, there is no fresh seizure under the Sea Customs Act. It would, therefore, follow that, having regard to the circumstances in which the gold came into the possession of the Customs authorities, the terms of s. 178A which requires a seizure under the Act were not satisfied and consequently that provision cannot be availed of to throw the burden of proving that the gold was not smuggled, on the accused."

The ratio of that case is of no assistance to the appellants, for the question at issue in that case was in regard to burden of proof under s. 178A of the Sea Customs Act and whether the presumption under that section would arise in the special circumstances of the case. Mr. Pathak also referred to

the decision of the Queen's Bench in *Vinter v. Hind* ((1882) 10 Q.B. 63.) in which the respondent, a butcher, exposed for sale part of a cow which had died of disease, and sold the meat to a customer, who took it home for food, and some days afterwards was requested by the appellant, an inspector of nuisances, to hand it over to him, and it was condemned by a justice as unfit for the food of man. It was held by the Queen's Bench in these circumstances that the meat was not "so seized" and condemned as is prescribed by ss. 116, 117, of the Public Health Act, 1875, and therefore the respondent was not liable, as the person to whom the same "did belong at the time of the exposure for sale," to a penalty under s. 117. The decision of this case is of no help to the appellants because the actual decision turned upon the language of ss. 116 and 117 of the Public Health Act, 1875 and the respondent was held not liable to the penalty because he was not the person to whom the meat "did belong at the time of exposure for sale."

It was then contended on behalf of the appellants that there is no material to show that the documents seized were relevant or useful to the proceeding under the Customs Act and in the absence of such material seizure of the documents must be held to be illegal. We do not think there is any warrant for this argument. The orders of the Collector dated September 6, 1963 and September 11, 1963 both state that the Collector was of opinion "that the documents were useful for and relevant to the proceedings under the Customs Act, 1962". Respondent no. 2 has also stated in para 3 of his return that information was received from a reliable source that the appellant had considerable quantity of hoarded gold which had not been declared by him under Rule 126 I of the Defence of India (Amendment) Rules, 1963, and for this purpose a raid was made for search of gold and gold ornaments. Respondent no. 2 has further stated as follows :

"During this search, I also came across certain documents and records which indicated that the petitioner had acquired considerable quantity of gold which was far in excess of the quantity of gold declared by the petitioner and his family members in the declarations submitted by them under Rule 126 I of the Defence of India (Amendment) Rules, 1963. In addition, I also found documents indicating that the petitioner had resorted to dealings constituting breach of the Customs Regulations and the Regulations under the Foreign Exchange Regulation Act punishable under the Sea Customs Act, 1878 and/or the Customs Act, 1962., The documents, note-books and files which I came across also indicated that the petitioner had resorted to under-invoicing of export of mineral ores to the extent of millions of rupees, large-scale purchase of gold to the tune of lakhs of rupees, unauthorised sale of Foreign Exchange involving lakhs of dollars (U.S.) to parties of whom some are persons known to be directly or indirectly involved in smuggling activities."

We accordingly hold that there is sufficient material to support the information of the Collector of Customs under s. 110(3) of the Customs Act that the documents would be useful or relevant to the proceedings under the Act and the argument of Mr. Pathak on this aspect of the case must be rejected.

For the reasons expressed, we hold that the High Court was right in saying that the appellant had made out no case for grant of a writ. This appeal accordingly fails and must be dismissed with costs.

Civil Appeal No. 677 of 1965 :

This appeal arises out of Special Civil Application no. 437 of 1963 relating to the search of the premises of the appellant - Durga Prasad at Tumsar and Nagpur on the basis of an authorisation

dated September 24, 1963 issued by the Assistant Collector of Customs, Raipur to the Superintendent of Central Excise at Nagpur under s. 105 of the Customs Act which reads as follows :

"Shri H. R. Gomes,
Superintendent (Prev.) H. Qrs.,
Central Excise, Nagpur.

Whereas information has been laid before me of the suspected commission of the offence under section 11 read with section 111 of the Customs Act 1962 (52 of 1962) and it has been made to appear that the production of contraband goods and documents relating thereto are essential to the enquiry about to be made in the suspected offence.

This is to authorise and require you to search for the said articles and documents in the shop/office/godowns/residential premises/conveyance/packages belonging to or on the person of Shri Durgaprasad Saraf Tumsar and if found, to produce the same forthwith before the undersigned returning this authority letter with an endorsement certifying what you have done under it immediately upon its execution.

Given under my hand and the seal of this office, this 24th day of September, 1963.

#Seal of the Integrated Divisional Office, Central Excise, Raipur. Sd. (R. N. Sen),
Assistant Collector, Customs & Central Excise : I.D.O. Raipur : M.P.###

It is contended on behalf of the appellant that the authorisation is not legally valid since there is no averment by the Assistant Collector that the documents were "secreted". Section 105 of the Customs Act states :

"105. (1) If the Assistant Collector of Customs, or in any area adjoining the land frontier or the coast of India an officer of customs specially empowered by name in this behalf by the Board, has reason to believe that any goods liable to confiscation, or any documents or things which in his opinion will be useful for or relevant to any proceeding under this Act, are secreted in any place, he may authorise any officer of customs to search or may himself search for such goods, documents or things.

(2) The provisions of the Code of Criminal Procedure, 1898, relating to searches shall, so far as may be, apply to searches under this section subject to the modification that sub-section (5) of section 165 of the said Code shall have effect as if for the word "Magistrate", wherever it occurs, the words "Collector of Customs" were substituted."

According to the appellant the power of seizure under s. 105 of the Customs Act cannot be exercised unless the Assistant Collector had reason to believe that the documents were secreted. It was argued that the word "secreted" is used in s. 105 in the sense of being hidden or concealed and unless the officer had reason to believe that any document was so concealed or hidden, a search could not be made for such a document. We are unable to accept the submission of the appellant as correct. In our opinion, the word "secreted" must be understood in the context in which the word is used in the section. In that context, it means 'documents which are kept not in the normal or usual

place with a view to conceal them' or it may even mean 'documents or things which are likely to be secreted'; In other words, documents or things which a person is likely to keep out of the way or to put in a place where the officer of law cannot find it. It is in this sense that the word 'secreted' must be understood as it is used in s. 105 of the Customs Act. In this connection reference was made by the Solicitor-General to the affidavits of the Superintendent of Central Excise dated October 28, 1963. Para 6 states that "Some of the documents were recovered from the living apartments and safe of the petitioner and also from the drawers of the tables and cabinets utilised by his sons and a search was made for documents which may have been secreted in the premises".

It was further submitted on behalf of the appellant that the power of search under s. 105 of the Customs Act cannot be exercised unless the authorisation specifies a document for which search is to be made. In other words, it is contended that the power of search under s. 105 of the Customs Act is not of general character. We do not accept this argument as correct. The object of grant of power under s. 105 is not search for a particular document but of documents or things which may be useful or necessary for proceedings either pending or contemplated under the Customs Act. At that stage it is not possible for the officer to predict or even to know in advance what documents could be found in the search and which of them may be useful or necessary for the proceedings. It is only after the search is made and documents found therein are scrutinised that their relevance or utility can be determined. To require, therefore, a specification or description of the documents in advance is to misapprehend the purpose for which the power is granted for effecting a search under s. 105 of the Customs Act. We are, therefore, of opinion that the power of search granted under s. 105 of the Customs Act is a power of general search. But it is essential that before this power is exercised, the preliminary conditions required by the section must be strictly satisfied - that is, officer concerned must have reason to believe that any documents or things, which in his opinion are relevant for any proceeding under the Act, are secreted in the place searched. We have already mentioned the reasons for holding that this condition has been satisfied in the present case.

For the reasons expressed, we hold that the appellant has made out no case for the grant of a writ and this appeal must be dismissed with costs.

Appeals dismissed.

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