

State of West Bengal

Vs

Motilal Kanoria

Criminal Appeal No. 108 of 1964

(CJI P. B. Gajendragadkar, K. N. Wanchoo, M. Hidayatullah, J. C. Shah, S. M. Sikri JJ)

15.03.1966

JUDGMENT

HIDAYATULLAH, J.-

This is an appeal by certificate under Art 134(1)(c) of the Constitution against the judgment of the High Court of Calcutta dated September 4, 1963 by which the conviction of the respondent Motilal Kanoria under s. 5 of the Imports and Exports (Control) Act, 1947 and the sentence of fine of Rs. 200/- (in default simple imprisonment for one month) imposed by the Presidency Magistrate, 6th Court, Calcutta, were set aside and an acquittal was entered. The facts of the case are not in controversy and may therefore be stated briefly. Motilal Kanoria was a director of Lachminarayan Jute Manufacturing Co. Ltd., Calcutta. The Company was managed by a firm of the name of Mukhram Lachminarayan and Motilal Kanoria was one of the partners of the firm. The Company and the Managing Agents has a common address in Calcutta. Motilal Kanoria used to sign on behalf of the Managing Agents and also generally to deal with the affairs of the Company. All transactions in this case were by Motilal Kanoria and he had signed the documents to which reference will be made presently.

In February 1955 the Government of India approved of the proposal of the Company to manufacture hackle and combing pins and sanctioned the import of plant and machinery for the purpose. The Company was permitted to apply to the Chief Controller of Imports, New Delhi for a licence. The letter of Government is Ex. 2 dated February 4, 1955. On February 11, 1955 the Company applied to the Chief Controller of Imports, New Delhi, on the proper application form, for an import licence. In that application the Company stated that the machinery was to be installed or used at their Mills at Konnaggar, Eastern Railways (Ex. 1). On May 26, 1955 a licence was issued (Ex. 3). The licence read as follows :-

"This licence is issued subject to the conditions to the goods licensed as detailed in the Policy Book for the current licensing period and any public notices that may be issued in this behalf from time to time.

LICENCE NO. 035925

Counterfoil

Not available for foreign exchange unless authorised by Reserve Bank of India.

IMPORT TRADE CONTROL

(Valid For All India Ports)

(Not transferable except under a letter of authority from the authority who issued the licences or from any Import Trade Controller).

Messrs. Shree Luchminarain Jute Manufacturing Co. Ltd., of 59, Netaji Subhas Road, Calcutta-1 are hereby authorised to Import the goods of which particulars are given below :-

# 1. Country from which consigned : West Germany. 2. Quantity & Description Machinery as per list of goods : attached for the manufacture of Hackling & Combing pins. 3. Approximate value C.I.F. Rs. 1,88,000/- (Rupees One Lakh and Eighty eight thousand only) 4. Period of shipment : Revalidated upto 31st May 1957. 5. Name & Address of manufacturer M/s. Schunacher Metal Shipper or Suppliers : Works Aktiengesellschaft, Aachen, Germany. 6. Limiting factor for Purpose of clearing through Customs : Value 7. Name of actual user in India Self.##

This licence is granted under Government of India, late Commerce Department Notification No. 23 ITC/43 dated the 1st July 1943 as continued in force by the Imports and Exports (Control) Act 1947 18 of 1947) and subject to the rules and orders issued thereunder. This licence is also without prejudice to the applications of any other prohibitions or regulations affecting the importation of the goods which may be in force at the time of their arrival.

# Sd. Illegible Section Officer 26-5-55for Chief Controller of Imports and Exports.26-5-1955.Issued from file No. L. IV/49 (11) CG/55.(Space for Endorsements by Import Trade Control Authorities)##

This licence is issued with an initial validity period of one year from the date of issue. It will be revalidated at or before the end of the said period of one year, for a further period of two years, provided satisfactory evidence is produced that the order for the goods has been accepted by the foreign suppliers and a firm contract is made within the initial period of one year. In no case, however, will the validity period extend beyond three years from the date of issue."

In the covering letter, which was sent when forwarding the licence the Chief Controller said inter alia, -

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(3). The licence is granted to you subject to the following conditions :-

(a) In case the project involves any capital issue and if such capital issue is not sanctioned the licence is liable to cancellation.

(b) That if any sanction to the project is necessary under the laws of the Central, Provincial or a State Government the same should be obtained and the position reported to this office by the licensee; in the absence of such sanction being received the licence is liable to cancellation.

4. The licence is liable to cancellation if particulars as to progress of time in accordance with the detailed instructions contained in the accompanying slip are not furnished.

5. The Government do not guarantee for supply of raw materials required for manufacture of goods.

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On June 19, 1956 the Company asked for "revalidation" of the licence and the licence was extended to May 31, 1957. This extension is mentioned in the licence above reproduced at No. 4. On December 13, 1956 the Company entered into an agreement (Ex. 25) with Shalimar Wood Products (P) Ltd. of Calcutta for the sale of the machinery imported by the Company. The sale, it is submitted, was at invoice price and there was no profit. On the arrival of the machinery in February of the following year the Company authorised Shalimar Wood Products to receive the shipping documents from the Company's bankers and to clear it from the Docks. The plant and machinery were then cleared by the Agents of the Shalimar Wood Products and the latter took them with a view to installing them in their own factory.

On July 30, 1958 the Company wrote a letter (Ex. 7) to the Chief Controller of Imports informing him that owing to the death of their director of Sawal Ram Kanoria who was interested in the production of the said pins the Company was compelled to sell the imported plant and machinery to Shalimar Wood Products. (P) Ltd., Calcutta and asked for the approval of the transaction. The Chief Controller of Imports in reply pointed out that permission ought to have been obtained before the transfer and that the Company had apparently committed a contravention of the import licence. A report was made to the police for investigation and later a complaint under s. 5 of the Import and Exports (Control) Act, 1947 was filed in the Court of the Chief Presidency Magistrate, Calcutta, by the Deputy Chief Controller of Imports and Exports. Lachminarain Jute Manufacturing Company was named as the accused "represented by Shri Motilal Kanoria". In paragraph 2 of the complaint the Company was stated to be the accused but in later paragraphs of the complaint Motilal Kanoria was named as the accused. In the prayer it was requested that the court should summon "accused Motilal Kanoria representing the Company and the Managing Agents" to answer the charge of a breach of the conditions of the licence which constituted an offence under s. 5 of the Imports and Exports (Control) Act, 1947 read with clause (5) of the Imports (Control) Order No. 17 of 1955, dated December 17, 1955. Motilal Kanoria appeared at the trial, was questioned as an accused, pleaded not guilty and stood the trial. He does not appear to have objected to being arraigned as an accused person - a point he took later in the High Court and has taken before us. The prosecution examined a large number of witnesses and filed documents to prove the above facts none of which is now denied. The Presidency Magistrate, 6th Court, Calcutta, convicted Kanoria under s. 5 of the Imports and Exports (Control) Act, 1947 for contravention of clause (5) of the Imports (Control) Order, 1955 and sentenced him to a fine of Rs. 200/- or simple imprisonment for one month. On revision the High Court acquitted him but certified the case as fit for appeal to this Court and the present appeal is the result.

As the Prosecution is in respect of an offence under s. 5 of the Imports and Exports (Control) Act, 1947, we shall begin by examining what the ingredients of that offence are. Under the scheme of that Act there is a power to prohibit or restrict imports and by s. 3 the Central Government is enabled to make provision, by order published in the Official Gazette, for prohibiting, restricting or otherwise controlling them. Section 5 prescribes penalty for contravention of an order. The section,

as amended by Act 4 1960, is set down here.

"5. If any person contravenes or attempts to contravene, or abets a contravention of, any order made or deemed to have been made under this act or any condition of a licence granted under any such order, he shall, without prejudice to any confiscation or penalty to which he may be liable under the provisions of the Sea Customs Act, 1878, as applied by sub-section (2) of Section 3, be punishable with imprisonment for a term which may extend to one year, or with fine, or with both."

(The words underlined were introduced in 1960).

The complaint in this case was filed after this amendment. Different orders at different times were passed by the Central Government under s. 3 and a word may be said about the orders of 1943 and 1948, although on the date of the transfer of machinery (December 13, 1956) only the order of 1955 was in force.

The first order was made under sub-rule (3) of rule 84 of the Defence of India Rules in force in 1943 (Notification No. 23 I.T.C./43 dated 1st July, 1943). That order was general and there was no provision authorising the imposition of conditions in the licence, the breach of which would be deemed to be a breach of the order. In 1948 another order was issued under s. 3 (Notification No. 2 I.T.C. dated 6th March, 1948). It provided for imposition of conditions but the provisions of the order did not indicate that any particular condition would be deemed to be included in a licence if not expressly included. The provisions of that order may be read here :

"In exercise of the powers conferred by sub-section (1) and sub-section (3) of section 3 of the Imports and Exports (Control) Act, 1947 (18 of 1947), the Central Government is pleased to make the following order namely :-

(a) Any officer issuing a licence under clauses (viii) to (xiv) of the notification of the Government of India in the Late Department of Commerce No. 23 I.T.C./43, dated the 1st July, 1943, may issue the same subject one or more of the conditions below :

(i) that the goods covered by the licence shall not be disposed of or otherwise dealt with without the written permission of the licensing authority or any person duly authorised by it;

(ii) that the goods covered by the licence on importation shall not be sold or distributed at a price more than that which may be specified in any directions attached to the licence;

(iii) that the applicant for a licence shall execute a bond for complying with the terms subject to which a licence may be granted;

(iv) that the licence shall not be transferable except in accordance with the permission of the licensing authority or a person duly authorised by it;

(v) that such other conditions may be imposed which the licensing authority considers to be expedient from the administrative point of view and which are not inconsistent with the provisions of the said Act.

(b) Where a licensee is found to have contravened the order or the terms and conditions embodied in or accompanying a licence, the appropriate licensing authority or the Chief Controller of Imports may notify him that, without prejudice to any such penalty to which he may be liable to under the Imports and Exports (Control) Act, 1947 (18 of 1947), or any other enactment for the time being in force he shall either permanently or for a specified period be refused any further licence for Import of goods."

By this order the licensing authority was given the power to include conditions in a licence.

On December 7, 1955 an order was issued (Notification No. 17/55 dated December 7, 1955). It consolidated all the rules in one place and by clause 12 read with Schedule IV repealed the earlier two orders and some others but while effecting this repeal it added a saving clause -

"Provided that anything done or any action taken, including any appointment made or licence issued under any of the aforesaid Orders, shall be deemed to have been done or taken under the corresponding provision of this Order."

The order of 1955 also included several new provisions regarding conditions which may be introduced in licences and others which would be deemed to be so introduced. Conditions relevant here may be noticed.

#### "5. Conditions of Licence.

(1) The licensing authority issuing a licence under this Order may issue the same subject to one or more of the conditions stated below :-

(i) that the goods covered by the licence shall not be disposed of, or otherwise dealt with, without the written permission of the licensing authority or any person duly authorised by it;

(ii) that the goods covered by the licence on importation shall not be sold or distributed at a price exceeding that which may be specified in any directions attached to the licence;

(iii) that the applicant for a licence shall execute a bond for complying with the terms subject to which a licence may be granted.

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(3) It shall be deemed to be a condition of every such licence, that :

(i) no person shall transfer and no person shall acquire by transfer any licence issued by the licensing authority except under and in accordance with the written permission of the authority which granted the licence or of any other person empowered in this behalf by such authority.

(ii) that the goods for the import of which a licence is granted shall be the property of the licensee at the time of import and thereafter upto the time of the clearance through Customs.

(iii) the goods for the import of which a licence is granted shall be new goods unless otherwise stated in the licence.

(4) The licensee shall comply with all conditions imposed or deemed to be imposed under the clause."

Conditions 5(1)(i), (ii) and (iii) and 5(3)(i) are the same as conditions (a)(i) to (iv) of the 1948 Order but the 5(3)(ii) and (iii) and 5(4) are new. Conditions 5(3)(i), (ii) and (iii) become a part of every licence and further the licensee has to comply with all the conditions imposed or deemed to be imposed under clause 5. The effect of these clauses has to be considered in relation to the licence granted in this case but in this context the provisions of clause 7 are also relevant and the clause may be set down here.

"7. Amendment of Licence. -

The licensing authority may, of its own motion or on application by the licensee, amend any licence granted under this Order in such manner as may be necessary to make such licence conform to the provision of the Act or this Order or any other law for the time being in force or to rectify any errors or omissions in the licence; Provided that the licensing authority may, on the request by the licensee, amend the licence in any manner consistent with the Import Trade Control Regulations."

Much of the argument in this case is based on the dates of these notifications and of the amendment of the section 5 of the Act, considered in relation to the dates on which the several facts in this case took place. The Presidency Magistrate applied the Order of 1955 because the licence was "revalidated" on the June 27, 1956, and according to him, this was apparently done under powers derived from clause 7 of that Order. According to the Presidency Magistrate the Company had imported the plant and machinery for its own use (vide No. 7 of the licence) and this was an express condition of the licence. He also pointed out that the licence was expressly made subject to such restrictions as might be imposed from time to time and Order of 1955 imposed conditions which made the transfer of machinery an offence being a breach of subclause (3) clause (5) of the 1955 Order. The High Court held that Section 5 of the Act as it stood on December 13, 1956 when the alleged offence was committed, did not make breach of a condition of a licence an offence and, therefore, there was no offence. The Division Bench relied principally on the observations of Sen and Mitter, JJ. in *C.T.S. Pillai v. Lohia and Anr.* (A.I.R. 1957 Cal. 83) to the following effect :

"It is clear, therefore, that the section penalises only contravention of any order made or deemed to have been made under the Act. But the question is whether contravention of condition imposed by a licence issued under the Act or issued under a statutory order made under the Act is also an offence under section 5, Imports and Exports (Control) Act, 1947. Although license is granted under a statutory order made under the Act and the conditions may be imposed in the license under another statutory order made under the Act, it is difficult to hold that the license or the conditions in the license amount to an order made or deemed to be made under the Act. Notification No. 23 I.T.C./43 dated 1-7-1943 merely provides that no goods shall be imported except goods covered by special license issued by an authorised officer. Notification No. 2-I.T.C./48 dated 6-3-1948 authorises a licensing officer to impose one or more conditions prescribed in that order and a licensing officer, therefore, may impose a condition in the view of the provision of the Notification

No. 2-I.T.C./48. But if the licensee contravenes the condition imposed by the license it can hardly be said that he has contravened the order under this Act, that is, the Notification No. 2-I.T.C./48. The order No. 2-I.T.C./48 does not directly impose any duty but it gives power to the licensing officer to impose certain conditions. But the contravention of condition imposed by the licensing officer cannot prima facie be regarded as contravention of the notified order itself..... When there is a special license covering certain goods and there is a condition imposed in the special license it cannot be said that by breach of the condition imposed in the special license it cannot be said that by breach of the condition there has been any breach of Order 23-I.T.C./43 or of the subsequent Notification No. 2-I.T.C./48. It may be mentioned that the difficulty apparently was realised in Pakistan and therefore the Imports and Exports (Control) Act, 1947, was first amended by the ordinance and then by the Imports and Exports (Control) Act, 1950, of Pakistan. Section 3(2) of that Act provides that 'no goods of the specified description shall be imported or exported except in accordance with the conditions of a license to be issued by the Chief Controller or any other officer authorised in this behalf by the Central Government. The penal section, section 5, refers not only to contravention of an order or Rule made under the Act but also to the contravention of any condition imposed by the License..... It is clear that unless the penal section itself includes the contravention of a condition of the license as an offence, it is not possible to hold that the licensees by merely committing breach of a condition imposed by a license has committed the offence which consists in contravention of an order made or deemed to be made under this Act. In this view, therefore, although the reasons given by the learned Magistrate have not been considered by us as sound, it is clear that the prosecution of the opposite party under Section 5 of Import and Exports (Control) Act, 1947, must fail".

These observations were referred to by the majority decision of this Court in East India Commercial Co. Ltd., Calcutta v. Collector of Customs, Calcutta ((1963) 3 S.C.R. 338 at 356, 369, 372) in the following words :-

"..... The Criminal Revision (No. 1124 of 1953) came up before a division Bench of the Calcutta High Court, consisting of Mitter and Sen JJ., and the learned Judges, by their judgment date March 3, 1955, dismissed the revision holding that there had been no contravention of the order made or deemed to be made under the Act. The learned Judges construed Section 5 of the Act and held that the said section penalised only a contravention of an order made or deemed to have been made under the said Act, but did not penalise the contravention of the conditions of licence issued under the Act or issued under a statutory order made under that Act, and dismissed the revision.

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It will be seen from this order that it does not provide for a condition in the licence that subsequent to the import the goods should not be sold. Condition (v) of cl. (a) only empowers the licensing authority to impose a condition from an administrative point of view. It cannot be suggested that the condition, with which we are now concerned, is a condition imposed from an administrative point of view, but it is a condition which affects the rights of parties.

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It follows from the above that the infringement of a condition in the licence not to sell the goods imported to third parties is not an infringement of the order .....

The Division Bench considered that the earlier Calcutta case was approved. Following the above observations the learned Judges applied them to this case. They noted that the breach of a condition became an offence only after the 17th of March, 1960 when Act 4 of 1960 was passed and as it could not be an offence before, even if the Order of 1955 deemed certain conditions to be a part of the licence, their breach was not an offence. They distinguished the decision of the Bombay High Court in *State v. Abdul Aziz* (A.I.R. 1962 Bom. 24) on the ground that the licence in that case was granted on January 2, 1956, that is to say, after the coming into force of the Order of 1955. The Division Bench therefore held that no offence was committed. Adverting also to the fact that there was confusion as to which of the two - the Company or Motilal Kanoria - was the accused the learned Judges held that the Presidency Magistrate was further wrong in convicting Kanoria although the prosecution was really against the Company.

The questions that arise in this case are really two and they are :

- (a) whether by disposing of the plant and machinery without permission an offence was committed; and
- (b) if so, by whom ?

In our judgment both these questions must be answered in favour of the State of West Bengal. It was overlooked in the High Court that under the proviso to clause 12 of the Order of 1955 the licence, although granted before that order was brought into force, came under its terms. The words of that proviso refer to 'a licence issued' under any of the earlier orders as something done or action taken under the corresponding provision of 1955 Order. The corresponding conditions were those we have extracted from the Order of 1955 and set down earlier. By the terms of the licence (items No. 7) the licensee undertook to use the goods himself. He further bound himself by "any other prohibitions or regulations affecting the importation of the goods which may be in force at the time of their arrival" and not to transfer the licence "except under a letter of authority from the authority who issued the licence or from any Import Trade Controller". The goods arrived long after the Order of 1955 came into force. By the operation of the revalidation under clause 7 and the conditions of the licence, even as they were, the provisions of the Order of 1955 were attracted. As clauses 5(3) and (4) became a part of the licence, their breach was a breach of the Order and an offence was, therefore, committed.

It was decided in *Abdul Aziz v. State of Maharashtra* ((1964) 1 S.C.R. 830) (on appeal from the case sub. nom. *State v. Abdul Aziz* of the Bombay High Court) that if the licence was issued under the Order of 1955, the provisions of sub-cl. (4) of cl. 5 made it obligatory upon the licensee to comply with all the conditions imposed or deemed to be imposed under clause 5 and that the contravention of any condition of a licence amounted to the contravention of the provision of sub-cl. (4) of cl. 5 of the Order and consequently to the contravention of the order made under the Imports and Exports (Control) Act and therefore the licensee became liable to the penalty under Section 5 of the Act. The only distinction between *Abdul Aziz's* case and this lies in the fact that the licence in the former was given after, and in this case before, coming into force of Order of 1955. But this

distinction loses significance when the provisions of clause 12 of the Order of 1955 are read in conjunction with the licence itself. Between them they bring into operation clause 5 of the Order of 1955 and the result reached by this Court in Abdul Aziz's case obtains here also. The fact that the licence was revalidated presumably under clause 7 of the Order of 1955 further fortifies the above conclusion. The submission of Mr. D. N. Mukherji that this extension was under the last paragraph of the licence is not the whole of the matter. A power might have been reserved by that paragraph but it could only be exercised by the licensing authority after December 7, 1955 by virtue of the Order of 1955 because all previous orders were repealed. There was thus an offence under Section 5 of the Imports and Exports (Control) Act for the breach of clause 5 of the Order of 1955. Mr. D. N. Mukherji seeks to distinguish between the transference of the licence and that of the machinery. This argument is not acceptable to us. The licence created its own conditions that the goods would be used by the licensee and the transfer of goods in circumstances is tantamount to transfer of the licence. It would be refining matters too finely to distinguish between the transfer of the licence and the transfer of the goods. Even if a distinction can be drawn the licence was for the actual use of the licensee. When the goods were sold condition No. 7 was broken and so would be a breach of the 1955 Order which had come into force.

The final question is whether Kanoria can be said to have committed any offence and whether he was prosecuted at all. The section as amended in 1960 makes the abetment of contravention an offence. If the amendment applied because the prosecution was after the amendment (a point we need not decide) Kanoria would be definitely guilty at least of abetment. In our opinion it is not necessary to decide this point because Kanoria is guilty as a principal offender and the section as it originally stood, must apply to him. The section said "if any person contravenes any order made or deemed to have been made"..... "he shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both." The question is whether Kanoria was such a person. Kanoria was responsible for the issuance of the licence and for the transfer of the goods covered by the licence. He wrote every document connected with these two matters. He was, therefore, responsible principally along with the Company. In fact the Company could not have committed the offence of contravention if Kanoria had not acted as he did. Abetment, of which the section now speaks, is an act of a different kind. The act of Kanoria was not abetting any one else but one which by itself led to the contravention of the Order of 1955 and he was, therefore, liable principally. The complaint no doubt was not clear as to who was really meant to be prosecuted but it described Kanoria as an accused. Under the Explanation to Section 537 of the Code of Criminal Procedure no error, omission or irregularity in the complaint should have led to a reversal of the finding that Kanoria was guilty unless there was a failure of justice. The objection that he was not named as an accused throughout the complaint and that he was thus not an accused could have been raised at the trial but it was not. On the contrary Kanoria entered a plea of not guilty on his own behalf and also stood examination as an accused. It is obvious that he was regarded as the accused and he understood his own position. The objection could not be entertained in revision in the High Court as it was belated and the defect, if any, had not occasioned a failure of justice. This ground also has no force.

For the above reasons we are satisfied that the High Court erred in interfering with the conviction of the respondent. We accordingly allow the appeal, set aside the acquittal ordered by the High Court and restore the conviction under Section 5 of the Imports and Exports (Control) Act, recorded by the Presidency Magistrate together with the fine of Rs. 200 or simple imprisonment for one month.

Appeal allowed.

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