State of Bombay (Now Gujarat)

Vs

Memon Mahomed Haji Hasam

Civil Appeal No. 215 of 1961

(R. S. Bachawat, J. M. Shelat, V. Bhargava JJ)

05.05.1967

JUDGMENT

SHELAT, J.

In 1947 and prior thereto the respondent carried on business as an exporter of fish in the State of Junagadh in the name and style of Ayub Iqbal and Company. In 1947 the Customs authorities of the State of Junagadh seized two motor trucks, a station wagon and other goods belonging to the respondent on the grounds, (a) that the respondent had not paid import duties on the said trucks, (b) that they were used for smuggling goods in the State and (c) that some of the goods were smuggled goods. The action was taken under the Junagadh State Sea Customs Act, II of S. Y. 1998 then in vogue in the State. The respondent filed an appeal against this order to the Home Member of the State as provided in the said Act. Pending the appeal, the State of Junagadh merged in the United States of Saurashtra which ultimately was converted into the State of Saurashtra. The State of Saurashtra thereafter merged with the former State of Bombay and on bifurcation of the Bombay State became part of the State of Gujarat. In the meantime the appeal was transferred to the Revenue Tribunal which was constituted by the State of Saurashtra and which was the competent forum to hear such appeals. On February 6, 1952, the Revenue Tribunal set aside the said order of confiscation of the Customs authority and directed the return of the said vehicles to the respondent. On March 13, 1952, the respondent applied for the return of the said vehicles but was informed that they had been disposed of under an order of a Magistrate passed under s. 523 of the Code of Criminal Procedure and that the sale proceeds viz., Rs. 2213/8/-were handed over to a creditor of the respondent under an attachment order passed in his favour. On February 5, 1954, the respondent filed the present suit for the return of the said vehicles or in the alternative for their value viz., Rs. 31786/8/-on the ground that pursuant to the said order of the Tribunal, which in the absence of any proceedings against it had become final, the State Government was bound to hand over the said vehicles. In its written statement the State Government denied the respondent's claim and took up diverse pleas. It is not necessary to go into the details of these pleas except to say that the State Government did not raise any contention therein that it was not liable for any tortious act committed in respect of the said goods and vehicles by any one of its servants. On these pleadings the trial court raised various issues. No issue with regard to the absence of liability for the tortious act of any servant of the Government was or could be raised in the aforesaid state of pleadings. The evidence led by the State and in particular of the police officer Trambaklal Naranji showed (a) that the said vehicles were seized in 1947 by the Customs Officer of the State of Junagadh, (b) that somehow they were kept in an open space opposite to the police station at Veraval, (c) that they remained totally uncared for from 1947 to October, 1951 with the result that the greater part of the machinery of the vehicles, tyres and even some wheels were pilfered away leaving only the skeletons of the vehicles, (d) that no entries were made in any of the registers maintained at the police station to

show as to how these vehicles came to be kept in the said open space or whether the customs authority had handed over the said vehicles to the police for safe custody, (e) that in October, 1951, witness Trambaklal who was then incharge of the police station reported to his superior officers the fact of these vehicles lying in the said open space as uncared and unclaimed vehicles, (f) that on October 3, 1951, directions were given to him to apply to the Magistrate for disposal of the said vehicles as unclaimed property under s. 523, (g) that on October 21, 1951, the police recorded a Panchanama as regards the condition of the said vehicles, and (h) that on October 29, 1951 pursuant to the said directions, the police officer made an application which mentioned the fact that these vehicles were seized by the Port Commissioner in 1947 from Memon Mahomed Haji Hasam of Veraval, the respondent. It is clear that in spite of the police authorities being aware that the said vehicles were seized from the respondent, his name having been mentioned in the said application, no notice was served upon him of the said application which, as aforesaid, was made on the footing that the said vehicles were unclaimed property. The only notice which was issued by the Magistrate was a public notice which was ordered to be raised at a public place. Clearly, the respondent was right when he said that he was not aware of the said proceedings or the order passed by the Magistrate therein. It appears from the Rojkam of the Magistrate's court that on February 5, 1952, the said vehicles were auctioned in the condition in which they were and only Rs. 2,000 and odd were realised from that auction.

The trial court found that the customs officer was competent to seize the said vehicles on a suspicion that a custom offence under the said Act had been committed. It held, however, that after the Tribunal had set aside his order and directed the return of the said property to the respondent it was the duty of the State Government to return the said property and on failure to do so the respondent had a cause of action and the suit was maintainable. On these findings, the trial court passed a decree against the State Government for Rs. 26797/8/-. The State Government thereupon filed an appeal in the High Court of Bombay at Rajkot taking a number of grounds in its memorandum of appeal. In the memorandum of appeal the State Government inter alia raised the following grounds :

> "The learned Civil Judge ought to have decided that the State is not liable for any acts tortious or otherwise of its servants and of the customs or the police authorities."

The High Court held that no such plea having been taken in its written statement nor any issue having been raised in the trial court, the State Government was not entitled to raise the contention for the first time in the appeal. The High Court confirmed the said decree except for a slight reduction in the decretal amount from Rs. 26797/8/-to Rs. 25532/10/-. The High Court found (1) that the said vehicles were sold on February 5, 1952 while the appeal before the Revenue Tribunal was still pending, (2) that the said vehicles were sold at the instance of the police officer under s. 523 on the footing that they were unclaimed property, (3) that such an assumption was wrong as the vehicles were lying with the authorities while the appeal was still pending and when the issue, whether the said vehicles were liable to confiscation, was to finally decided, (4) that the said vehicles could not be sold by auction because they were liable to be returned in the event of the Tribunal holding that the said seizure and confiscation were illegal and directing the vehicles to be returned to the owner. The High Court held (a) that the Junagadh Customs Act which applied to the instant case provided an appeal against an order of seizure and confiscation, (c) that there was an implied obligation to see that the said property was not tampered with during the pendency of the appeal in which the order of confiscation was under scrutiny, (d) that the breach of the said obligation gave a cause of action to the respondent, and (e) that the cause of action on which the said suit was grounded was the respondent's right to the return of the said property and that relief claimed on that cause of action was the return of the said property or in the alternative the value

thereof and not damages for any negligence either of the State Government or of any of its servants. It is against this judgment and decree of the High Court that this appeal by special leave is directed.

It is clear that both the trial court and the High Court concurrently found that the said vehicles were seized by the customs authority, that between 1947 and October, 1951 when they were disposed off they were lying uncared for in an open space, that they were disposed of at the instance of the Police as unclaimed property, that when they were sold most of the valuable parts were missing and lastly that they were sold while the appeal Mr. Dhebar's contention was that since they were seized by a competent officer the seizure was lawful and that the utmost that could be alleged in the circumstances was that one or the other servants of the State Government was guilty of negligence. He contended that the State Government was not liable for any tortious act of any of its servants.

Before we proceed to consider this contention it is necessary to examine some of the provisions of the said Act which both the parties conceded was the relevant law applicable to the present case. Section 150 lays down various offenses under the Act and the respective penalties therefor. Clause (8) of s. 150 provides that if any goods, the importation or exportation of which is for the time being prohibited or restricted by or under Chapter IV of this Act, be imported in to or exported from the Junagadh State contrary to such prohibition or restriction, or if any attempt is made so to import or export any such offence shall be liable to a penalty as set out therein. Section 160 provides that a thing liable to confiscation under this Act may be seized in any place by an officer of Customs or other person duly employed for the prevention of smuggling. Section 163 provides that when a thing is seized the officer making such seizure shall on demand of the person in charge of the goods so seized give him a statement in writing of the reasons for such seizure. Section 166 provides for adjudication of confiscation and penalties. Section 172 provides for an appeal from a subordinate Customs officer to the Chief Customs authority and s. 175 provides a revision by the Ruler of the Junagadh State. The power of revision under s. 175 includes the power to reverse or modify the decision or order in the exercise of His Highness's extraordinary revisional jurisdiction. It would appear from these provisions that the seizure of the said vehicles was carried out with jurisdiction and the order of confiscation was also made, apart from the question as to its merits, by a competent officer with jurisdiction. It is also possible to contend that as the said vehicles were sold pursuant to a judicial order no liability can be attached on the State Government for their disposal by public auction. But between their seizure and the auction there was a duty implicit from the provisions of the Act to take reasonable care of the property seized. This is so because the order of confiscation was not final and was subject to an appeal and a revision before the Home Member and later on before the Revenue Tribunal after Junagadh merged in the State of Saurashtra in 1948-49. The appellant-State was aware that the order of seizure and confiscation was not final being subject to an appeal and was liable to be set aside either in appeal or in revision. It was also aware that if the said order was set aside, the property would have to be returned to the owner thereof in the same state in which it was seized except as to normal depreciation. In spite of this clear position, while the appeal was still pending before the Revenue Tribunal and without waiting for its disposal, it allowed its police authorities to have it disposed of as unclaimed property. The State Government was fully aware, firstly, by reason of the pendency of the appeal and secondly because the application under s. 523 expressly mentioned the person from whom the said vehicles were seized, that the vehicles were and could not be said to be unclaimed property. In the circumstances, the State Government was during the pendency of the appeal under a statutory duty to take reasonable care of the said vehicles which on the said appeal being decided against it were liable to be returned to their owner.

The contention that the order of disposal was a judicial order or that the respondent could have it set aside would be beside the point. There being a statutory obligation under the Act to return the

property once the order of seizure and confiscation was held to be wrong, the respondent could rely on that obligation and claim the return of the said vehicles. On behalf of the respondent, the contention urged was that though the seizure might be lawful and under the authority of the Statute, the Government was from the time that the said goods were seized until the decision of the appeal, in a position of a bailee and was, therefore, bound to take reasonable care of the said vehicles. That no such reasonable care was taken and the vehicles remained totally uncared for is not in dispute. Mr. Dhebar's reply was that there was no bailment for can such bailment be inferred as s. 148 of the Contract Act requires that a bailment can arise only under a contract between the parties. That contention is not under a contact between the parties. That contention is not sustainable. Bailment is dealt with by the Contract Act only in cases where it arises from a contract but it is not correct to say that there cannot be a bailment without an enforceable contract. As stated in "Possession in the Common Law" by Pollock and Wright, p. 163, "Upon the whole, it is conceived that in general any person is to be considered as a bailee who otherwise than as a servant either receives possession of a thing from another upon an under standing with the other person either to keep and return or deliver to him the specific thing or to (convey and) apply the specific thing according to the directions antecedent or future of the other person". "Bailment is a relationship sui generis and unless it is sought to increase or diminish the burdens imposed upon the bailee by the very fact of the bailment, it is not necessary to incorporate it into the law of contract and to prove a consideration".

There can, therefore, be bailment and the relationship of a bailee in respect of specific property without there being an enforceable contract. Nor is consent indispensable for such a relationship to arise. A finder of goods of another has been held to be a bailee in certain circumstances.

On the facts of the present case, the State Government no doubt seized the said vehicles pursuant to the power under the Customs Act. But the power to seize and confiscate was dependent upon a customs offence having been committed or a suspicion that such offence had been committed. The order of the Customs Officer was not final as it was subject to an appeal and if the appellate authority found that there was not good ground for the exercise of that power, the property could no longer be retained and had under the Act to be returned to the owner. That being the position and the property being liable to be returned there was not only a statutory obligation to return but until the order of confiscation became final an implied obligation to preserve the property intact and for that purpose to take such care of it as a reasonable person in like circumstances is expected to take. Just as a finder of property has to return it when its owner is found and demands it, so the State Government was bound to return the said vehicles once it was found that the seizure and confiscation were not sustainable. There being thus a legal obligation to take reasonable care of it so as to enable the Government to return it in the same condition in which it was seized, the position of the State Government until the order became final would be that of a bailee. If that is the correct position once the Revenue Tribunal set aside the order of the Customs Officer and the Government became liable to return the goods the owner had the right either to demand the property seized or its value, if, in the meantime the State Government had precluded itself from returning the property either by its own act or that of its agents or servants. This was precisely the cause of action on which the respondent's suit was grounded. The fact that an order for its disposal was passed by a Magistrate would not in any way interfere with or wipe away the right of the owner to demand the return of the property or the obligation of the Government to return it. The order of disposal in any event was obtained on a false representation that the property was an unclaimed property. Even if the Government cannot be said to be in the position of a bailee, it was in any case bound to return the said property by reason of its statutory obligation or to pay its value if it had disabled itself from returning it either by its own act or by any act of its agents and servants. In these circumstances, it is difficult to appreciate how the contention that the State Government is not liable for any tortious act

of its servants can possibly arise. The decisions in State of Rajasthan v. Mst. Vidhyawati and Kasturilal Jain v. The State of U. P. to which Mr. Dhebar drew our attention have no relevance in view of the pleading of the parties and the cause of action on which the respondent's suit was based.

In our view, the High Court was right in confirming the decree passed by the trial court on the basis that there was an obligation on the State Government either to return the said vehicles or in the alternative to pay their value.

The appeal is dismissed with costs.

G. C. Appeal dismissed.

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