SUPREME COURT OF INDIA

Padam Kumar Agarwalla

Vs.

Additional Collector of Customs, Calcutta

C.A.No.1556 of 1970

(K. S. Hegde and A. N. Grover, JJ.)

22.11.1971

JUDGEMENT

HEGDE, J.:-

1. This appeal by certificate arises from a writ petition filed by the appellant in the High Court of Calcutta.

2. The appellant is a citizen of Nepal. He carries on business in Nepal His business consists entirely in exporting rice, dal and other products from Nepal to other countries. He entered into a contract with a firm in Cairo on November 24, 1968 to export 250 M. T. of split lentils (masur dal), the shipment whereof was to be completed within three months from the date of opening of the letter of credit. That letter of credit was duly opened. Thereafter the appellant obtained an export licence from the Government of Nepal for exporting masur dal in accordance with the agreement entered into by him with the Cairo firm. A copy of this licence was sent to the Collector of Customs, Calcutta and the Border Customs Posts at Nepalgani and at Birgani. The dal in question was sent to Calcutta either through Rupadiah from Nepalganj or through Raxaul from Birganj. The concerned

invoices were verified and certified by the Nepal Customs Officers at Birgani and Nepalganj and by the Indian Customs Officers at Rupadiah and Raxaul. After the dal reached Calcutta and when it was about to be shipped, the appellant was served with a notice to show cause by the Assistant Collector of Customs as to why the entire consignment should not be confiscated and penal action taken against the appellant for having re-exported the dal that had been exported from India to Nepal, in contravention of the terms of the treaty entered into between India and Nepal in 1960 The appellant pleaded that the dal in question was not of Indian origin and further even if it is found to be a dal of Indian origin, by exporting the same, he had not contravened any of the terms of the trade and transit treaty entered into between India and Nepal in 1960.

3. The adjudicating officer rejected the contention of the appellant and came to the conclusion that the dal in question was of 'Indian origin. He further came to the conclusion that by exporting the same, the appellant contravened the terms of the treaty between India and Nepal. He accordingly ordered confiscation of the dal sought to be exported to Cairo. The dal seized was kept in the custody of Port Commissioners of Calcutta. The appellant challenged the legality of the order passed by the Customs authorities by means of a writ petition in the High Court of Calcutta. That writ petition was allowed by a single judge of the High Court. He came to the conclusion that on the material on record, the conclusion that the dal in question was of Indian origin is a wholly unsustainable conclusion. He also accepted the contention of the appellant that re-exporting of any dal exported from India to Nepal, does not amount to a contravention of the treaty referred to earlier. In the result he allowed the writ petition of the appellant and made the rule issued absolute. He quashed the order passed by the adjudicating officer by issuing a writ of certiorari and further issued a writ in the nature of mandamus directing the respondent to forthwith release 250 M .T. masur dal of the appellant which was the subject matter of the impugned order of confiscation.

4. As against that order, the Customs authorities went up in appeal to the appellate bench of the Calcutta High Court.

5. The appeal was heard by a bench consisting of Mitra and Sen JJ. Mitra J. differing from the conclusions reached by the learned single judge came to the conclusion that the adjudicating officer's conclusion that the dal in question was of Indian origin is a sustainable conclusion and further by attempting to export that dal to Cairo, the appellant contravened the terms of the treaty entered into between Indian and Nepal. As a result of those conclusions he allowed the appeal and dismissed the writ petition. Sen J., agreed with the conclusion reached by the learned single judge that the dal is not proved to be of Indian origin and that by exporting the same from Nepal, the appellant had not contravened the terms of the treaty between Indian and Nepal; but all the same he agreed with the order made by Mitra J. dismissing the writ petition on the ground that as the Port Commissioners had a lien over the dal in question, no writ of mandamus could be issued as prayed for by the appellant. It is not clear from his judgment why he did not agree with the learned single judge in quashing the order of the adjudicating officer.

6. Primarily two questions arise for decision viz. (1) whether on the material before the adjudicating officer any reasonable person could have come to the conclusion that the dal in question was of Indian origin and (2) assuming that the dal was of Indian origin, did the appellant contravene the terms of the treaty between Indian and Nepal. As, in our opinion, the conclusions reached by the learned single judge on these points are correct and that reached by Mitra J. are unsustainable, we refrain from going to the larger question whether the contravention of the provisions of a treaty entered into between two High Contracting Parties can itself be made a ground for taking penal action against the contravenr.

7. In order to establish that the dal in question was of Indian origin, the customs authorities examined three witnesses. All of them frankly conceded that it was not possible for them to say definitely that the dal in question was of Indian origin. They deposed that they were unable to distinguish between Indian dal and the Nepalese dal. Hence the adjudicating officer could not rely on any oral evidence for reaching the conclusion that the dal was of Indian origin. He solely relied on a booklet published by the National Trading Co. of Nepal's total exportable surplus of dal was about 500 M. T. On the basis of that information the adjudicating officer jumped to the conclusion that as more than 500 M. T. of Nepalese dal had been exported from Nepal in 1968 by various exporters the dal exported by the appellant should be considered as being of Indian origin. These conclusions are without any basis. From the material on record, it is clear that Nepal was both exporting and importing dal to and from India. Hence the fact that the exportable surplus of Nepal was only 500 M. T. is not a positive proof to show that if more than 500 M. T. dal was exported dal must be of Indian origin. The dal imported from Indian might have been consumed and Nepalese dal might have been exported. That apart, there is no material on the basis of which one could reasonably come to the conclusion that 250 M. T. dal which the appellant was seeking to export to Cairo was not Nepalese dal. In our opinion, there was absolutely no basis for the conclusion of the adjudicating officer that the dal in question was of Indian origin.

8. Now coming to the terms of the treaty between India and Nepal, it is a treaty for trade and transit. In this treaty, reliance was placed by the customs authorities only on Art, 1 which relates to trade and not transit. That Article reads:

"The Contracting Parties shall promote the expansion of mutual trade in goods originating in the two countries and shall to this end endeavour to make available to each other commodities which one country needs from the other. The Contracting parties shall further take care to avoid to the maximum extent practicable diversion of commercial traffic or deflection of trade."

9. This article deals with trade policy. It does not prohibit the re-exportation of goods imported by Nepal from India. We fail to see how this clause could afford a basis for coming to the conclusion that the treaty has prohibited the re-exportation of the goods imported to Nepal from India Art. 7 of the treaty provides:

"Goods intended for import into or export from the territories of either Contracting Party from or to a third country shall be accorded freedom of transit through the territories of the other party. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit, destination or ownership of goods.'

10. This Article clearly provided that in the matter of transit, the contracting parties should not show any distinction based on the place of origin of the goods in transit. This clause runs counter to the argument advanced on behalf of the customs authorities. Reliance was placed on behalf of the customs authorities on the letters exchanged between the Ministry of commerce and industry, Nepal and the Indian Ambassador to Nepal for proving that the High Contracting Parties had agreed not to re-export goods imported by their country from other country. In this connection reliance was placed on paragraph 3 of the letter written by the Nepalese Government to the Indian Ambassador on September 11, 1960. That part of the letter reads:

"In regard to clause (e) of Article III, it is understood that either Party may in agreement take measures, if that becomes necessary, to secure a balance in mutual payments, to prevent the smuggling of their currencies from or to third countries to prevent the re-entry into its territory of goods passed in transit or to prevent the re-export of goods passed in transit or to prevent the re-export of goods exported to the territory of the other."

11. This part of the letter does not show that Nepal had undertaken no to re-export the goods imported from India. It merely contemplates that if it becomes necessary -

(1) to secure a balance in mutual payments:

(2) to prevent the smuggling of their currencies from or to third countries:

(3) to prevent the re-entry into its territory of goods in transit and

(4) to prevent the re-export of goods exported to the territory of the other.

The High Contracting Parties may take appropriate measures by mutual agreement.

12. The customs authorities have not placed any material before the court to show that the governments concerned have taken any measure for the purpose mentioned above. Hence there is no basis for coming to the conclusion that any of the terms of the treaty or even the assurances given by means of letters exchanged between them had been contravened.

13. In the result, it is clear that the order of the adjudicating officer was without the authority of law and was wholly invalid. We accordingly allow this appeal, quash the order of the customs authorities confiscating the dal in question.

14. Now coming to the question of issuing a writ of mandamus directing the respondents or any of them to deliver possession of the seized dal, we would have found no difficulty in issuing the mandamus asked for if the seized goods had been in the possession of the customs authorities. But admittedly those goods are in the possession of the Port Commissioners.

In law they have a lien over the goods for the rent and other charges due to them. Some-one has to pay those charges before taking possession of the goods. Consequently we cannot issue a writ of mandamus to the Port Commissioners to deliver the goods in question or can we issue a writ to the other respondents to deliver possession of those goods as they are not in possession of the same. This is undoubtedly a hard case. The appellant has been unlawfully deprived of the possession of his valuable goods because of the illegal action of the customs authorities and thereby he could not fulfil the terms of his contract with the Cairo firm as a result of which he must have suffered considerable loss In addition, he cannot now take possession of the goods which were seized from him without paying the charges due to the Port Commissioners. We were given to understand that the charges due to the Port Commissioners amount to more than the value of the goods themselves. It is only fair and just that the customs authorities who are responsible for this situation should bear the burden; but in this writ petition we cannot give any relief in that regard. We can only leave the matter to the good sense of the customs authorities to take the appropriate steps and avoid possible further litigation.

15. In the result we allow this appeal in part and quash the order made by the adjudicating officer but we decline to grant the writ of mandamus asked for. Respondents 1 to 7 in the writ petition shall pay the costs of the appellant in this Court as well as in the High Court.

Appeal partly allowed.