

Agrawal Trading Corporation & Others

Vs

Assistant Collector of Customs, Calcutta & Others

Civil Appeal No. 357 of 1967

(K. S. Hegde, P. Jagmohan Reddy, D. G. Palekar JJ)

17.01.1972

JUDGEMENT

JAGANMOHAN REDDY, J. -

1. This is an appeal by certificate under Article 133(1)(b) of the Constitution against the judgment of the Calcutta High Court which dismissed an appeal from an order of the single judge of that court discharging a rule granted by it to the appellants calling on the respondents, the Collector of Customs and others, to show cause why certain orders passed under various sections of the Sea Customs Act and the Foreign Exchange Regulation Act should not be quashed and why a written complaint made by the respondents under the Foreign Exchange Regulation Act and the case pending in the court of the Presidency Magistrate, Calcutta, should not be stayed.

2. The appellant is a registered partnership firm carrying on business of importers, exporters, commission agents, brokers and general merchants. It consists of two partners, Girdhari Lal Gupta and Pooran Mal Jain. On the 25th October, 1958, the cashier of the appellant, Bhagwandeo Tiwari, handed over a consignment of wooden cases to the Swiss Airways at Dum Dum Airport for being sent by air freight to Hongkong. According to the consignment note, the consignment was being sent by one Ramghawan Singh of Karnani Mansions, Park Street, Calcutta, who in fact was a fictitious person. The shipping bill showed that the consignment purported to contain rassogolla, achar, papad and dried vegetables and it was being sent to one Iswar Lal 41, Wyndham St. Hongkong, who is also alleged to be a fictitious person. After the consignment was accepted and when the Customs examined it for clearance on 25th October, 1958, before its onward despatch to Hongkong, there was found concealed in a specially made secret cavity on the battens nailed to the inner sides of the case, Indian currency notes of Rs. 51,000. An investigation was set on foot and on 22nd January, 1959, a search warrant was issued by the Presidency Magistrate, pursuant to which the customs officers caused a search to be made of the office of the firm and the residences of the appellant's partners. In the course of search, account books and other documents were seized. This investigation revealed that the cashier, Bhagwandeo Tiwari, had signed the consignment note as Ramchandra which, as the subsequent writings showed, were in his hand. Even the consignment note appears to have been typed on the typewriter of the appellant-firm. It was further alleged that from a comparison of the consignment note with a letter admittedly sent out by the appellant firm and signed by one of its partners, Girdhari Lal Gupta, it became evident that the slip seized from the office of the appellant firm had contained entries, to show that Bhagwandeo Tiwari was the person who actually transported and booked the offending consignment in question and that he made an entry of Rs. 123.73 being the air freight paid for its transport to Hongkong which was the exact amount shown on the consignment note. Bhagwandeo Tiwari, it was said, had in fact admitted that the account slip was in his handwriting, and that the expenses and charges shown therein were also

found in the books of account of the appellant firm. In view of this evidence, the customs authorities served a notice on the appellant-firm on April 2, 1959, by which after setting out in detail the aforesaid facts and after pointing out that the exportation of Indian currency out of India was in contravention of section 8(2) of the Foreign Exchange Regulation Act, 1947, read with the Reserve Bank of India Notification dated February 27, 1951, as specified therein, it was asked to show cause and to produce within four days of the receipt of the notice the permit, if any, of the Reserve Bank of India, for export of the Indian currency and if it did not do so, it would be liable for prosecution under section 23(1) read with section 8(2) of the Foreign Exchange Regulation Act. On April 13, 1959, the appellant-firm replied to the notice denying that the firm had anything to do with the despatch of the box containing currency notes; that it was not aware of any person by the name of Ramghawan Singh or Ishwar Lal, or that Bhagwandeo Tiwari had ever despatched the consignment in question or visited any air office in connection therewith. It may be mentioned en passant that in the High Court, in the reply affidavit affirmed on January 11, 1960, to the affidavit in opposition, Girdhari Lal Gupta, one of the partners of the firm, went even to the extent of denying that Bhagwandeo Tiwari was the cashier of the firm, notwithstanding the fact that in the earlier reply to the show cause notice as also in the writ petition, it was tacitly assumed that he was the cashier.

3. Apart from the criminal prosecutions that were launched against the partners, in the penalty proceedings which were initiated by the aforesaid show cause notice, the firm was held to be knowingly concerned in the offence, and, accordingly, a fine of Rs. 1,000 was imposed on it under section 167(3) of the Sea Customs Act with a further personal liability of Rs. 1,000 under section 167(37) of the said Act. It was further fined Rs. 51,000 under section 167(8) of the Act read with section 23(1) of the Foreign Exchange Regulation Act. Apart from these fines, the currency notes of Rs. 51,000/- which were seized were confiscated.

4. This order was challenged before the single judge of the Calcutta High Court who as already stated, had issued a rule but later discharged it. Against that order an appeal was held but that also was dismissed. On the four points that were urged in that appeal, the first three have been reiterated before us on behalf of the appellant viz. :

(1) Currency notes are not "goods" and therefore the provisions of section 167 (3), (8) and (37) of the Sea Customs Act are not attracted;

(2) A "firm" is not a legal entity and therefore it cannot be a "person" within the meaning of any of the above provisions of law;

(3) Even if a firm be a person within the meaning of the said provisions no penalty can be imposed on the firm or any of its members unless it appears from the evidence that the members of the firm had consciously taken any steps to violate the provisions of law; even so only the particular member against whom there is evidence of guilt can be held liable.

(5) Before dealing with the above contentions it will be necessary to consider the relevant provisions of the Foreign Exchange Regulation Act as also those under the Sea Customs Act. Sections 8(1), 23(1)(a), (b), (1A), 23A, 23B and 23C of the Foreign Exchange Regulation Act and sections 19, 167 (3), (8) and (37) of the Sea Customs Act are relevant for the purpose of this appeal. These are given below :

"8. (1) The Central Government may, by notification in the Official Gazette, order

that, subject to such exemptions, if any, as may be contained in the notification, no person shall, except with the general or special permission of the Reserve Bank and on payment of the fee, if any, prescribed bring or send into India any gold or silver or any currency notes or bank notes or coin whether Indian or Foreign.

Explanation :- The bringing or sending into any port or place in India, on any such article as aforesaid intended to be taken out of India without being removed from the ship or conveyance in which it is being carried shall nonetheless be deemed to be a bringing, or as the case may be sending, into India of that article for the purpose of this section.

23. (1) If any person contravenes the provisions of section 4, section 5, section 9, section 10, sub-section (2) of section 12, section 17, sec. 18A or section 18B or of any rule, direction or order made thereunder, he shall -

(a) be liable to such penalty not exceeding three times the value of the foreign exchange in respect of which the contravention has taken place, or five thousand rupees, whichever is more, as may be adjudged by the Director of Enforcement in the manner hereinafter provided, or

(b) upon conviction by a court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.

(1A) Whoever contravenes -

(a) any of the provisions of this Act or of any rule, direction or order made thereunder, other than those referred to in sub-section (1) of this section and sec. 19 shall, upon conviction by a court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both;

(b) any direction of order made under Section 19 shall, upon conviction by a court, be punishable with fine which may extend to two thousand rupees.

23A. Without prejudice to the provisions of section 23 or to any other provision contained in this Act, the restrictions imposed by or under sub-section (1) and (2) of section 8, sub-section (1) of section 12 and clause (a) of sub-section (1) of section 13 shall be deemed to have been imposed under section 19 of the Sea Customs Act, 1878 (8 of 1878) and all the provisions of that Act shall have effect accordingly except that section 183 thereof shall have effect as if for the word 'shall' therein the word 'may' were substituted.

23B. Whoever attempts to contravene any of the provisions of this Act or of any rule, direction or order made thereunder shall be deemed to have contravened that provision, rule, direction or order, as the case may be.

23C. (1) If the person committing a contravention is a company, every person who, at the time of contravention was committed, was incharge of, and was responsible to, the company, for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Provided that nothing contained in this sub-section shall render any such person liable to punishment, if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

(2) Notwithstanding anything contained in sub-section (1), where a contravention under this Act has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation. - For the purposes of this section, - (a) 'company' means any body corporate and includes a firm or other association of individuals; and

(b) 'director' in relation to a firm 'means a partner in the firm.' Sea Customs Act :

"19. The Central Government may, from time to time, by notification in the Official Gazette, prohibit or restrict the bringing or taking by sea or by land goods of any specified description into or out of India across any customs frontier as defined by the Central Government.

167. The offences mentioned in the first column of the following schedule shall be punishable to the extent mentioned in the third column of the same with reference to such offences respectively :-

#----- Offences Section of Penalties
this Act to offence has reference 1 2 3-----
-----3. If any person ship or land General such person goods, or aid in the shipment shall be or landing of goods, or liable to a knowingly keep or conceal, penalty not or knowingly permit or exceeding procure to be kept or one concealed, any goods shipped thousand or landed, or intended to be rupees. shipped or landed, contrary to provisions of this Act; or if any person be found to have 11 been on board of any vessel liable to confiscation on account of the commission of an offence under (No. 4) of this section, while such vessel is within any bay, river, creak or arm of the sea which is not a port for the shipment and landing of goods.8. If any goods, the importation 18 & 19 such goods or exportation on which is for shall be the time being prohibited or liable to restricted by or under Chapter confiscation IV of this Act, be imported into & any person or exported from India contrary concerned in to such prohibition or any such of restriction; or fence shall if any attempt be made so to be liable import or export any such goods; to a penalty or not exceeding three times the value of the goods or not exceeding one thousand rupees. if any such goods be found in any package produced to any officer of Customs as containing no such goods; or if any such goods, or any dutiable goods, be found either or after landing or shipment to have been concealed in any manner on board of any vessel within the limits of any port in India; or if any goods, the exportation of which is prohibited or restricted as aforesaid, be brought to any wharf in order to be put on board of any vessel for exportation contrary to such prohibition or restriction.37. if it be found, when any goods 86 & 137 such are entered at, or brought to be packages, passed

through, a custom house, together either for importation or with the exportation, that - whole of the goods contained therein shall be liable to confiscation, and every person (a) the packages in which they concerned in are contained differ widely any such from the description given in offence the bill of entry or application shall be liable for passing them; or to a penalty not exceeding one thousand rupees. (b) the contents thereof have been wrongly described in such bill or application as regards the denominations, characters, or conditions according to which such goods are chargeable with duty or are being imported or exported; or (c) the contents of such packages have been mis-stated in regard to sort, quality, quantity or value; or (d) goods not stated in the bill-of-entry or application have been concealed in, or mixed with, the articles specified therein, or have apparently been packed so as to deceive the officers of Customs, and such circumstance is not accounted for to the satisfaction of the Customs-Collector."##

6. A perusal of these provisions would show that no gold silver or any currency notes or bank notes or coin, whether Indian or foreign, can be sent to or brought into India, nor can any gold, precious stones or Indian currency or foreign exchange other than foreign exchange obtained from an authorised dealer can be sent out of India without the general or special permission of the Reserve Bank of India. These restrictions by virtue of sec. 23A of the Foreign Exchange Regulation Act are deemed to have been imposed under sec. 19 of the Sea Customs Act and all the provisions of the latter Act shall have effect accordingly except that section 183 thereof shall have effect as if for the word "shall" therein the word "may" were substituted. What section 23A does is to incorporate by reference the provisions of the Sea Customs Act by deeming the restrictions under section 8 of the Foreign Exchange Regulation Act to be prohibitions and restrictions under section 19 of the Sea Customs Act. The contention is that since section 19 restricts the bringing or taking by sea or by land goods of any specified description into or out of India, these restrictions are not applicable to the bringing in or taking out the currency notes which are not goods within the meaning of that section, and, therefore, the appellant is not guilty of any contravention of section 19 of the Sea Customs Act and cannot be subjected to the penal provisions of the said Act. This argument, in our view, is misconceived, because, firstly it is a well-accepted legislative practice to incorporate by reference, if the legislature so chooses, the provisions of some other Act in so far as they are relevant for the purposes of and in furtherance of the scheme and objects of that Act and, secondly that merely because the restrictions specified in section 8 of the Foreign Exchange Regulation Act are deemed to be prohibitions and restrictions under sec. 19 of the Sea Customs Act. Those prohibitions and restrictions are not necessarily confined to goods alone but must be deemed for the purposes of the Foreign Exchange Regulation Act to include therein restrictions in respect of the articles specified in section 8 thereof, including currency notes as well. The High Court thought that there is no definition of goods in the General Clauses Act and that contained in the Sales of Goods Act which excludes money is inapplicable in as much as that Act was a much later statute than the Sea Customs Act. It is, however, unnecessary to consider this aspect because even if the currency notes are not goods, the restrictions prescribed in section 8 of the Foreign Exchange Regulation Act cannot be nullified by section 23A thereof which incorporates section 19 of the Sea Customs Act. We cannot attribute to the Legislature the intention to obliterate a provision by another provision of the same Act. On the other hand, we construe it as furthering the object of the Act which is to restrict the import into or export out of India of currency notes and to punish contraventions of such restrictions.

7. The second contention that because the firm is not a legal entity, it cannot be a person within the meaning of section 8 of the Foreign Exchange Regulation Act or of section 167 (3) (8) and (37) of

the Sea Customs Act, is equally untenable. There is, of course, no definition of "person", in either of these Acts but the definition in sec. 2(42) of the General Clauses Act, 1897, or sec. 2(3) of the Act of 1968 would be applicable to the said Act in both of which "person" has been defined as including any company or association or body of individuals whether incorporate or not. It is of course contended that definition does not apply to a firm which is not a natural person and has no legal existence, as such, clauses (3), (8) and (37) of section 167 of the Sea Customs Act are inapplicable to the appellant firm. In our view the explanation to section 23C clearly negatives this contention, in that a company for the purposes of that section is defined to mean any body corporate and includes a firm or other association of individuals and a director in relation to a firm means a partner in the firm. The High Court was clearly right in holding that once it is found that there has been a contravention of any of the provisions of the Foreign Exchange Regulation Act read with the Sea Customs Act by a firm, the partners of it who are incharge of its business or are responsible for the conduct of the same, cannot escape liability, unless it is proved by them that the contravention took place without their knowledge or they exercised all due diligence to prevent such contravention.

8. There is also no warrant for the third submission that unless it appears from the evidence that members of the firm had consciously taken any steps to violate the provisions of law and even then only the particular members against whom there is evidence of this court in *Radha Krishan Bhatia v. Union of India I*, that as the "person concerned" specified in section 167 (8) of the sea Customs Act is the person actually involved or engaged or mixed up in contravening the restrictions imposed under the Foreign Exchange Regulation Act or the Sea Customs Act, he must be the person who must be shown to be actually concerned. That was also a case under section 167 (8) of the Sea Customs Act where, in fact, a number of gold bars held to be smuggled were recovered from the person of the appellant. The single Bench of the Punjab High Court had allowed the writ petition of the appellanta on the ground that the Collector had not recorded a finding that the appellant was connected with the act of smuggling gold into the country. This finding was set aside on a Letters Patent Appeal and the writ petition was dismissed. This court held that the concern of the appellant in the commission of the offence must be at a stage prior to the completion of the offence of illegal importation of gold into the country. The mere finding of fact recorded by the Collector of Customs about smuggled gold being recovered from the person of the appellant was not sufficient to conclude that the appellant was concerned in the illegal importation of gold into the country and, therefore, liable for penalty under section 167(8) of the Act. What the order of the Collector of Customs must show is that he had considered the question of the person being concerned in the commission of offence of illegal importation of the goods. It should further indicate that the matters he had considered had a bearing on the question and the reasons for his arriving at that conclusion. This has really no bearing on the question before us because under sec. 23B even an attempt to contravene any of the provisions of the Act or of any rule, direction or order made thereunder shall be deemed to have contravened that provision, rule, direction or order, as the case may be. In respect of this every incident where the petitioners were prosecuted it was held by this court in *Girdharilal Gupta v. D. N. Mehta Assistant Collector of Customs* (1970 (2) SCC 530) that Girdhari Lal Gupta, one of the two partners and Bhagwandeo Tiwari, cashier, have been rightly convicted under the provisions of the Foreign Exchange Regulation Act for contravention of the restrictions imposed under section 8 (2) read with section 23(1A) of the Foreign Exchange Regulation Act. In that case it was contended that there is no evidence to show that the contravention took place with the knowledge of Girdhari Lal Gupta or that he did not exercise the diligence to prevent such contravention. That contention was negated because he had not only stated under section 342 that he alone looks after the affairs of the firm but it had been found that there were entries in his accounts books, It is true that the relevant provisions of the Sea Customs Act are penal in character

and the burden of proof is on the Customs authorities to bring home the guilty to the person alleged to have committed particular offence under the said Act by adducing satisfactory evidence. But that is not to say that the absence of direct evidence to connect a person with the offence will not attract the penal provisions to establish the guilt in a criminal proceeding of the type which the customs authorities have to take. The evidence of the kind which has been adduced in this case would be sufficient to lead to the conclusion that the partner of the firm was interested in or involved in attempting to export Indian Currency notes out of India. As observed by this court in *Thomas Dana v. State of Punjab*, (1959 (Suppt) 1 S.C.R. 274 289) while dealing with section 167 of the Sea Customs Act that - All criminal offences are offences but all offences in the sense of infringement of a law are not criminal offences. Likewise, the other expressions have been used in their generic sense and not as they are understood in the Indian Penal Code or other laws relating to criminal they are understood in the Indian Penal Code or other laws relating to criminal offences .. Out of more than 81 entries in the schedule to section 167, it is only about a dozen entries, which contemplate prosecution in the criminal sense, the remaining entries contemplate penalties other than punishments for a criminal offence.

9. In *Additional Collector of Customs v. Sita Ram Agarwals* Civil Appeal No. 492/62 decided on 14-9-62 (SC) to the High Court has referred, while dismissing the appeal from the judgment of the Calcutta High Court, this court had stated that "the High Court was right when it observed that if any one is interested or consciously takes any step whatever to promote the object of illegally bringing bullion into the country, then even if no physical connection is established between him and the thing brought, he will be guilty." In that case, the respondent, Sita Ram Agarwal, who was seen moving in the company of one Bholu Nath Gupta on the western pavement of Jatindra Mohan Avenue, Calcutta, had proceeded in the direction of a taxi which had come to the place where they were, and on a signal being flashed, a Chinese national alighted therefrom, shook hands with the respondent after which all the three boarded the taxi. A police constable who was on the spot raised an alarm and secured the respondent and his companion with the help of the members of the public. All of them were taken to the police station for the purpose of interrogation but the Chinese national tried to get away and started to run. He was chased and eventually secured. Before his apprehension, however, he was seen to drop three packets which were found to contain 23 bars of illicit gold. The respondent was charged as a person concerned in the offence of attempting to import contraband gold under section 167 (8) of the Sea Customs Act. The High Court, while holding that there was no evidence to establish that he was in conscious relation with the gold, observed; "in order that a person may be said to be so concerned, some facts have to be proved which will establish that he was in conscious relation with the gold in one or other of the several successive steps preceding its actual receipt into the country." In order that he was concerned in the offence, the High Court further pointed out that there need be no physical connection between the gold and the person charged and "if the offence did not relate to his being concerned in the importation of the gold, but related to his having something to do with smuggled gold, the position might have been different." The fact of the instant case clearly disclosed, as was observed by the High Court, "as a well laid plan." We have earlier stated that the currency notes were secreted in a cavity and were sought to be despatched out of the country in a package which ostensibly looked innocuous, containing eatables. The manner in which the attempt was made was to hoodwink the Customs Officials and escape their detection. Further, the consignor and the consignee were not shown as real persons but were fictitious so that even if the attempt to smuggle out of the country the currency notes was detected, the real persons could not be traced. The charges are expenses incurred in connection with the despatch found in the entries in the books of account of the firm were the same as those relating to

the offending package which was being despatched to Hongkong. The freight mentioned in the account slip is the exact amount which appears on the consignment note in respect of that offending package. The amount sought to be sent is half a lakh of rupees which can hardly be within the means of the cashier, leading to the inescapable inference that the firm through its partners was concerned in the attempt to transgress the restrictions under section 8 of the Foreign Exchange Regulation Act and liable to penal section by virtue of section 23A under the provisions of the Sea Customs Act. On these facts as established, the High Court came to the conclusion, and in our view rightly, that it was not unreasonable to infer that it was the firm which was interested in sending the currency notes out of India in a clandestine manner.

10. In this view, the appeal has no merits and it is dismissed with costs.

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