

Jayantilal K. Katakia and Another

Vs

P. Govindan Nair and Another

Civil Appeals Nos. 1141-1143 and 1256-1258 of 1970

(A.C. Gupta, D.A. Desai JJ)

05.02.1981

JUDGMENT

GUPTA J. -

1. These six appeals by special leave arise out of two orders dated February 25, 1970 and March 18, 1970 passed by the Central Government in revision under Section 131 of the Customs Act, 1962 (hereinafter referred to as 'the Act'). By order made on February 25, 1970 the Central Government disposed of three revision applications preferred against three orders passed by the Central Board of Excise and Customs, New Delhi 1963 in appeal from certain orders of the Collectors of Customs at Calcutta and Bombay. Civil Appeals 1141-1143 of 1970 arise out of the Government of India's decisions dated February 25, 1970. Civil Appeals 1256-1258 of 1970 are from the Government of India's order dated March 18, 1970 disposing of these revision cases which arose out of three appeals decided by the board on November 11, 1968, February 13 and March 13, 1969 preferred against certain orders passed by the Collector of Customs, Bombay. In each of the cases giving rise to the appeals before us the Collector of Customs had made an order under Section III(d) of the Act which provides for a fine to be imposed in addition, in several other cases the Collector has passed an order in lieu of confiscation. The Board made an order in all these cases allowing the goods to be redeemed on payment of fine in lieu of confiscation. The board also remitted the personal penalties imposed by the Collector.

2. The facts found by the customs authorities on the evidence in the cases covered by Government of India's order dated February 25, 1970 are these. Under the Cotton Textiles Export Incentive Scheme Exporters of cotton fabric and yarn were entitled to get import licenses for the import of any or all of the following four items :

#(i) Non-viscose staple fibre,(ii) Viscose rayon yarn,(iii) Synthetic yarn, and(iv) Polynosic viscose staple fibre.##

A number of such import licences were issued to various textile mills, hereinafter referred to as the licence mills; some of the licences were issued for the importation of non-viscose staple fibre only, the others were valid for the importation of all the four varieties. The licensee mills entered into agreements of sale with a private limited company named M/s. Dhanraj Mills Private Limited who are represented in these transactions by another concern, M/s. Madhusudan Gordhandas & Co. of Bombay. The agreements were for sale of non-viscose staple fibre of Dhanraj Mills to be imported against the said licences subject to permission being granted by the Textile Commissioner. It was also agreed that the margin of profit would be paid in advance to the licensee mills and that the c. i. f. value would be directly paid by the purchasers to the concerned bank when documents were

received from the foreign suppliers. It was further agreed that other charges such as import duty, clearing charges and other incidental charges including demurrage would be paid by the purchasers to the parties concerned. It was stipulated that the letters of credit would be open by the purchasers through their bankers. The licensee mills were not to be held responsible for any delay in the transmission or presentation of shipping documents nor for any demurrage or damage to the material. Dhanraj Mills had in the meantime written to the licensee mills asking them to obtain all necessary instructions from Madhusudan Gordhandas and also authorised Madhusudan Gordhandas to stand guarantee for payment of bills drawn against the letters of credit opened through their bankers and the bank charges. Pursuant to this arrangement the licensee mills handed over to Madhusudan Gordhandas both customs and exchange control copies of the licences, Blank applications signed by the licensee mills for opening letters of credit, declaration forms for customs clearance and letters authorising the Bank of Tokyo Ltd. to hand over documents to Madhusudan Gordhandas against payment. The arrangement between Madhusudan Gordhandas and Dhanraj Mills set out in three irrevocable contracts and an irrevocable power of attorney was given by Dhanraj Mills to Madhusudan Gordhandas. Madhusudan Gordhandas agreed to purchase through Dhanraj Mills non-viscose staple fibre of the value of rupees seventy to seventy-five lakhs c. e. f. from the various licensee mills. Thereafter Madhusudan Gordhandas through their sister concern, M/s. Universal Import Export Agency, applied on different dates to the Joint Chief Controller of Imports and Exports, Bombay, for amendment of the licences which were originally issued for one variety only, to include all the four varieties. The amendments were allowed and all the licences became valid for the import of all the four varieties including synthetic yarn. Madhusudan Gordhandas thereafter placed indents for synthetic yarn in the name of the licensee mills and in the applications for letters of credit the goods were described by them as synthetic yarn. On presentation of these applications letters of credit were opened by the Bank of Tokyo Ltd. in the name of the licensee mills for the import of synthetic yarn. On arrival of the consignments of synthetic yarn Madhusudan Gordhandas instructed their clearing agents to present bills of entry in the name of the licensee mills to the customs authorities for clearance of the goods. For some consignments it appears, the bills of entry were filed in the name of Bank of Tokyo Ltd. The documents including the bills of lading which were in the name of the licensee mills were received by the Bank of Tokyo, but before they could be retired on payment of the C. i. f. value by Madhusudan Gordhandas, the customs authorities initiated proceedings against them. The margin of profit had already been paid to the licensee mills by Madhusudan Gordhandas but the remaining payments such as duty, clearing charges, the c. i. f. value of the goods etc. were yet to be paid by Madhusudan Gordhandas to the concerned authorities. The licensee mills disclaimed any interest in the goods imported. These are broadly the facts found by the authorities concerning the above cases; there are of course some points of difference in some of these cases but they are of a minor character and not of any consequence for the present purpose.

3. We see no reason for not accepting as correct the facts as found by the customs authorities. On these facts the Collectors of Customs held that as the entire gamut of functions of the importers had been performed by Madhusudan Gordhandas, they were really the importers of the goods in question and that it could not be said that they were acting as the authorised representatives of the licensee mills because both the contracts for sale and the authorisations of the Textile Commissioner referred only to non-viscose staple fibre whereas the goods imported were synthetic yarn. The device of having the shipping documents in the name of the licensee mills, it was held, was adopted to suppress the name of the real importers. On appeal the Board also found that the agreements of sale specifically referred only to non-viscose staple fibre and not to all the four varieties. The Board further observed that even if the licensee mills had agreed to the sale of all the four varieties, it was

clear from the evidence that the licences were actually transferred by the licensee mills to Madhusudan Gordhandas who dealt with them in the manner they liked. The board held that having obtained the margin of profit on their licences, the licensee mills had lost all interest either in the licenses or in the goods to be imported against their licences, that it was only because the licensee mills had relinquished control on the licences that Madhusudan Gordhandas could get the licences amended without consulting them. The Board also had no doubt that Madhusudan Gordhandas were the real importers and owner of the goods. The Government of India in revision took the same view on the nature of the transactions. They overruled the contention raised on behalf of Madhusudan Gordhandas that it was only the import quota that was transferred and not the licences. The Board also held that the permission granted by the Textile Commissioner could not confer any protection or immunity from the operation of law and found that the documents Madhusudan Gordhandas eventually obtained from the Textile Commissioner were only usual authorisations for sale of the goods, obviously after import.

4. The facts of the case covered by the Government of India's order dated March 18, 1970 are similar except that the goods imported in these cases were staple fibres. The Board pointed out that this made no material difference because the main charge of trafficking in licences was clearly established. Here also the Board rejected the contention that the authorisations from the Textile Commissioner enabled Madhusudan Gordhandas to purchase and operate upon someone else's licences, that the documents purported merely to authorise the sale of the goods by the licensee mills after they had imported the goods themselves. As the sale of licences was prohibited under the law, there was no question of the Textile Commissioner having any authority to allow it nor had any such permission in fact been given by him.

5. On the facts found that view taken by the customs authorities and the Government of India cannot be questioned as improper or unjust. Our attention was drawn to a judgment of this Court in *Raj Kapoor v. Laxman* decided on December 14, 1979. Reliance was placed on the following observations in that judgment : (SCC p. 179 : SCC (Cri) p. 388, para 9)

Jurisprudentially viewed, an act may be an offence, definitionally speaking; but a forbidden act may not spell inevitable guilt if the law itself declares that in certain special circumstances it is not to be regarded as an offence. The chapter on General Exceptions operates in this province. Section 79 makes an offence a non-offence. When? Only when the offending act is actually justified by law or is *bona fide* believed by mistake of facts to be so justified. If, as here, the Board of Censors, acting within their jurisdiction and on an application made and pursued in good faith, sanctions the public exhibition, the producer and connected agencies do enter the statutory harbour and are protected because Section 79 exonerates them at least in view of their *bona fide* belief that the certificate is justificatory.

This was a case of an alleged offence under Section 292 of the India Penal Code and the court was considering the effect of a certificate granted by the Board of Censors under the Cinematograph Act. On the basis of the observations quoted above it was submitted that here also the Textile Commissioner having permitted the sale of goods and the licensing authority having granted amendment of the licences to include all the four items, the appellants should be held as protected. We have already referred to the nature of the documents obtained by Madhusudan Gordhandas from the Textile Commissioner and the circumstances leading to the amendment of the licences which make it plain that the offending act in these cases cannot be justified in any manner. *Raj Kapoor's* case can therefore be of no help to the appellants. We should also point out that in an earlier

judgment of this Court involving the same caused (Raj Kapoor v. state) and rendered by the same Bench considering the same contention it was held that in a trial for offences under section 292 and 293 of the Indian Penal Code, a certificate granted under the Cinematograph Act by the Board of Censors did not provide an irrebuttable defence to the accused.

6. It was further submitted before us on behalf of the appellants that they had been discriminated against in the matter of punishment awarded for the offence which would appear from the fact that the licensee mills who were equally guilty were let off with a much lighter penalty. On the material produced before us it seems there may be some basis for the grievance made. Of course the fine to be imposed in lieu of confiscation is in the discretion of the customs authorities, but it would be unfair if the punishments awarded respectively to the appellants and the licensee mills were glaringly disproportionate when as would appear from the facts summarised above, both were guilty of trafficking in licences. Accordingly, while affirming the decision of the Government of India on other points, we set aside the part of the impugned orders maintaining the fines levied by the Board and send the cases back to the Board to consider whether the fines imposed on M/s. Madhusudan Gordhandas are really disproportionate to the penalty imposed on the licensee mills and levy such fines as would appear just and proper to the Board on such consideration. The bank grantee furnished by the appellants for clearing the goods in question pursuant to the orders of this court will remain enforceable till the final disposal of these cases.

7. The appeals are allowed to the extent indicated above. There will no order as to costs.

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