MYSORE HIGH COURT

Ganeshmul Channilal Gandhi

Vs

Collector of Central Excise

Writ Petns. Nos. 58 and 59 of 1964

(A.R. Somnath Iyer and Ahmed Ali Khan, JJ.)

30.03.1966

JUDGMENT

A.R. Somnath Iyer, J.

1. These two Writ Petitions arise out of proceedings commenced under the Customs Act, 1962 (Central Act 52 of 1962).

2. On February 21, 1963, a Central Excise Officer seized from the two petitioners 49 pieces of gold at the H.A.L. Airport on their arrival from Bombay to Bangalore. He seized from Ganeshmul Chunnilal Gandhi who is the petitioner in W.P. 58 of 1964, 34 pieces weighing 3.772 Kgs. and from Manikchand who is the petitioner in W. P. 59 of 1964, 15 pieces of gold weighing 3.863 Kgs. This seizure was made under Section 110(1) of the Customs Act which will be referred to as 'the Act' and it is stated that the seizure was made as there was reason to believe that the goods were liable to confiscation under the Act.

3. Under Section 110(2) the goods seized under Sub-Section (1) of that section should be returned to the person from whose possession they were seized if no notice under Clause (a) of Section 124 was issued to him within six months of the seizure of the goods. But there is a proviso to that sub-section which authorizes the Collector of Customs to extend that period of six months by it further period not exceeding six months on sufficient cause being shown.

4. On September 19, 1963 a communication was dispatched by the Collector of Customs to both the petitioners which purported to be an order of extension made under the proviso to Section 110(2) of the Act extending the period within which the notice required under Section 110(2) could be issued, till February 20, 1961. This notice was followed up by a show cause notice issued under Section 124(a) bearing the date December 19, 1963.

5. These writ petitions were presented on January 9, 1964 in which we are asked by the petitioners to quash the order by which the Collector of Customs extended the period within which the show cause notice could be issued till February 20, 1964, and also the show cause notice issued on December 19, 1963 and to issue a writ of prohibition restraining the Collector of

Customs from proceeding with the proposed enquiry. We are also asked to issue a Writ of Mandamus directing the return of the Gold to the petitioners.

6. Many submissions were made to us during the course of the arguments and the first of them was that the seizure under Section 110(1) of the gold of which the petitioners were in possession, was itself an illegal seizure, since, that seizure was not made in the reasonable belief that the cold which was seized was liable to confiscation under the provisions of the Act. It is seen from the show cause notice issued on December 19, 1963 under Section 124(a) that the assertion made on behalf of the respondents was that there was reason to believe that the gold had been imported into India without a permit from the Reserve Bank of India, as required by the Foreign Exchange Regulation Act and so the gold was liable to confiscation under Section 111(d) of the Customs Act.

7. The argument maintained was that the reasonable belief which should precede the seizure must be an antecedent belief based upon grounds justifying the entertainment of that belief, which should be mentioned in the show cause notice which was eventually issued under Section 124(a) of the Act and we were asked to say that since there is no material on record produced by the respondents justifying the view that the officer who seized the gold had reason to believe that the gold was liable to confiscation under the provisions of the Act and the show cause notice did not itself set out the grounds which constituted the foundation for that belief, the seizure was not one made under the provisions of the Act.

8. There is hardly any doubt that before the proper officer to whom Section 110 (1) refers could make a seizure under Section 110(1), ha should have reason to believe that the goods which he proposed to seize are liable to confiscation under the Act. But it is equally clear that the belief which he should form in his mind is a subjective belief on grounds which he need not disclose and which are not subject to judicial review. Moreover, in none of these two writ petitions do the petitioners state that the officer who seized the gold had no reason to believe that the goods were liable to confiscation or that the belief was an unreasonable belief. We cannot, therefore, accede to the argument that the seizure was an illegal seizure.

9. The next submission made to us was that in any event the petitioners are entitled to the return of the gold after the expiry of six months from the date when the gold was seized. In support of this submission more than one argument was presented. The first was that the order made by the Collector of Customs under die proviso to Section 110(2) extending the period within which a notice under Section 124 (a) could be issued, was not really made on August 18, 1963 which is the date it bears, but was made after the period of six months referred to in Section 110(2) had expired. It was urged that the Collector made an order of extension after the expiry of that period of six months, and antedated it so as to make it appear that the extension was made during the currency of the period of six months to which Section 110(2) refers. In support of this submission, our attention was firstly asked to the fact that the communication by which the order of extension was communicated to the petitioners, was posted only on September 19, 1963. It was submitted that if really the extension had been ordered on August 18, 1963 as it purports to have been done, there was an inexplicable delay over a period of a month and a day in the communication of that order to the petitioners.

10. Now the petitioners received the copy of the order by which the Collector of Customs

extended the period, on September 20, 1983 is one case and on September 21, 1963 in the other. After the receipt of these communications, the petitioners caused letters to be addressed to the Headquarters Assistant Collector in the Customs Department by their Advocate on October 27, 1963. Those letters alluded to the notice issued by the Collector intimating the petitioners that time for the issue of notice under Section 110(2) had been extended and what was next said was that a certain Mr. Gujar who was the Deputy Superintendent of Excise had visited each of the petitioners on September 14, 1963 at about 2 P.M. in their shops and had taken each of the petitioners to a restaurant known as the Udipi Sri Krishna Bhavan in Balepet, Bangalore, where he made an attempt to secure their signatures in acknowledgment of having served the Collector's order purporting to extend the time for investigation of the matter, but that each of the petitioners had declined to sign any such acknowledgment without, in the first instance, taking legal advice.

11. Our attention was next asked to the reply sent by the Headquarters Assistant on November 7, 1963 in which he stated that the matter to which the Advocate's letters referred was under consideration.

12. The argument presented was that on September 147 1963, Mr. Gujar, the Deputy Superintendent had attempted to inveigle the petitioners into affixing their signatures by way of acknowledgment of the notice issued by the Collector intimating the petitioners that time had been extended. It was said that since the period of six months prescribed by Section 110 (2) had expired and since the Collector had not exercised the power under the proviso to that sub-section for extending the time, the Deputy Superintendent wished to create evidence that time had been extended before the expiry of six months through the acknowledgment which he unsuccessfully attempted to secure from the petitioners. The submission made to us was that on the failure of that artifice, the Collector of Customs made an order sometime after September 14, 1963, extending the time for the issue of the notice under Section 124(a) but antedated his orders so as to make it appear that they had been made on August 18, 1963.

13. The first infirmity in the argument that the Collector antedated his orders consisted of the fact that in the notices which were sent to the petitioners through their - Advocate in October 1963, there was no suggestion that the notices which they received respectively on September 20 and September 21, 1963, were antedated notices. Those notices bore the data August 18, 1963. Although they were posted on September 19, 1963; they were received by the petitioners on September 20, 1963 in the one case and on September 21, 1963, in the other.

14. The Advocate's letters were addressed more than a month after the receipt of those notices, but nevertheless, beyond stating that the Deputy Superintendent made an attempt to secure acknowledgments from the petitioners in a restaurant, the petitioners did not allege that the Collector himself had antedated his orders. The allegation that he inserted fictitious dates on his orders was made for the first time in the affidavits produced by the petitioners in which it was stated that the notices served on the petitioners and the orders made by the Collector were antedated.

15. In an affidavit produced on behalf of the respondents of which the dependent is the Superintendent of Central Excise in Bangalore, the allegation that Mr. Gujar made an unsuccessful bid to concoct evidence in the form of an acknowledgment for service of the notice

and also the allegation that the Collector of Customs antedated his order were both repudiated.

16. We are not impressed by the argument that Mr. Gujar did not produce a counter-affidavit or by the submission that the Collector of Customs did not produce one either. We were informed by Mr. Keshava Iyengar appearing for the respondents that when the stage arrived for the production of counter-affidavits, neither Mr. Gujar nor Mr. Mukherji who was the Collector of Customs, was in Bangalore by reason of their having been transferred to some distant place, and it was explained to us that that was the reason why the Superintendent who was quite conversant and familiar with the facts of the case swore to' the affidavit produced on behalf of the respondents.

17. It is now well settled that the usual thing to do when an allegation is made against a particular officer, it is for him to produce an affidavit that that allegation is not true, if it is not true. It does not necessarily follow that, if no such affidavit is produced the allegation made against him must be accepted as true In a situation of that description it would be our duty to examine the probabilities with a view to decide whether the allegation is true or is not.

18. Now in this case we should not merely on the ground that neither Mr. Gujar nor Mr. Mukherji swore to an affidavit repudiating the allegations made against them, straightway come to the conclusion that those allegations are true. It is our duty to examine and scrutinise all the surrounding circumstances and probabilities and the other materials which are before us for the purpose of deciding whether the allegations made against them could be accepted.

19-20. It seems to us that when we examine the probabilities and the surrounding circumstances in that way, we do not feel persuaded to say that the allegation made against Mr. Gujar is true or is likely to be true. (Later His Lordship discussed probabilities and surrounding circumstances).

21. Turning now to the charge that the Collector of Customs had antedated his order which he made under the proviso to Section 110(2), it appears to us that this charge is equally groundless. As already observed when the notices were issued on behalf of the petitioners by their learned advocate on October 27, 1963, which were themselves issued after inordinate delay, nothing was stated about any such antedating having been made by the Collector.That allegation was for the first time made in the writ petitions which were presented on January 9, 1964.

22. Mr. Keshava Iyengar, the learned Government Pleader, has produced before us the original order made by the Collector and we find that the Collector, when he made his order affixing his signature to it, also mentioned the date on which he made his order. That data is August 18, 1963.

23. The mere fact that a copy of that order was not dispatched to the petitioners until September 19, 1963 could not, in our opinion, constitute a ground for our believing the allegation that the order must have been made after the expiry of the period of six months specified in Section 110(2). It is true that that period of six months expired on August 21, 1963 since the seizure was made on February 21, 1963. But the submission that the dispatch of the order of extension was deferred until September 19, 1963 can justify the belief that the order of extension was made sometime after August 21, 1963, rests in our opinion, upon extremely slender foundation.

24. In the context of the submission made by Mr. Venkataranga Iyengar appearing for the petitioners that Mr. Mukherji who was the Collector who made the order of extension did not himself swear to an affidavit that he did not antedate the order, we should remember the observations made by the Supreme Court in *Rowjee v. State of Andhra Pradesh*[1], That was a case in which there was an allegation of mala fides against the Chief Minister of Andhra Pradesh, and an argument was constructed that, since he did not repudiate through an affidavit those allegations of mala fides against him, the allegations should be accepted as true. In discussing the effect of such non-repudiation on the part of the person against whom mala fides and improper motives are alleged, the Supreme Court said this :-

> "It is, no doubt, true that allegations of mala fides and of improper motives on the part of those in power are frequently made and their frequency has increased in recent times. It is also somewhat unfortunate that allegations of this nature which have no foundation in fact, are made in several of the cases which have come up before this and other Courts, and it is found that they have been made merely with a view to cause prejudice or in the hope that whether they have basis in fact or not some of it at least might stick. Consequently it has become the duty of the Court to scrutinize these allegations with care so as to avoid being in any manner influenced by them, in cases where they have no foundation in fact. In the task which is thus cast on the Courts, it would conduce to a more satisfactory disposal and consideration of them, if those against whom allegations are made came forward to place before the Court either their denials or their version of the matter, so that the Court may be in a position to judge as to whether the onus that lies upon those who make allegations of mala fides on the part of authorities of the status of those with which this appeal is concerned, have discharged their burden of proving it. In the absence of such affidavits or of materials placed before the Court by these authorities, me Court is left to judge of (sic) the veracity of the allegations merely on tests of probability with nothing move substantial by way of answer. This is precisely the situation in which we find ourselves in the present case". (pp. 969 and 970)

[1] AIR 1964 SC 962

25. What is clear from these observations made by the Supreme Court is that, although it is both necessary and proper on the part of the person against whom an allegation of mala fides is made to deny the allegation or to state his own version of the matter, the fact that he does not do so does not necessarily lead to the conclusion that the allegation is true. What the Court has to do is to judge the "veracity of the allegations" on tests of probability.

26. In another part of their judgment their Lordships made it clear that even if a person against whom an allegation of mala fides is made does not himself produce an affidavit repudiating the truth of that allegation, such repudiation may emanate from someone who knows personally about the truth of those allegations. This is what the Supreme Court said in that context :-

> "There has been no denial by the Chief Minister nor an affidavit by any person who claims or can claim to know personally about the truth about these allegations. The Secretary to the Home Department one Mr. S.A. Iyengar has filed a counter-affidavit in

which the allegations we have set out earlier have been formally denied".

But the Supreme Court thought that what Mr. Iyengar said was merely hearsay.
27-28. (After further discussing probabilities and surrounding circumstances. His Lordship proceeded.)

29. In regard to the delay in the despatch of the order made by the Collector, it would be enough to say that it is not improbable that, although the Collector made his order on August 18, 1963, there was some delay in the office in the despatch of the notice on the part of those whose duty it was to so despatch. We do not feel disposed to think that that delay would be of any consequence. We do not find it easy to believe that a person like the Collector of Customs, occupying the comparatively high position which he did, entrusted with serious responsibilities and duties confided to him by the Customs Act, would have resorted to the oblique method of antedating the order, for doing which it is not stated there was really am explicable desire. In our opinion, we should repel the accusation of antedating as unfounded.

30. It was next stated that even so the order of extension which was made by the Collector in his office without hearing the petitioners on the question as to whether there was sufficient cause for extension was opposed to the intendment of the Act and the rules of natural justice. It was also stated that beyond stating that there was sufficient cause for extension, the Collector did not say what that sufficient cause was.

31. We take the view that, the power created by the proviso to Section 110(2) by the exercise of which the Collector could extend me period for service of the notice, could be exercised by the Collector without hearing the persons from whom the goods were seized. That power is an administrative power, through the exercise of which all that the Collector does is to extend the period during which the investigation should be completed before the commencement of the proceedings in which the question has to be decided whether the goods have to be confiscated or not. At that stage what the Collector has to do is to apply his mind to the question whether there was any special difficulty which constituted an impediment to the completion of the investigation within the period of six months to which Section 110(2) refers and exercise his discretion in favour of its extension if he was satisfied that there was any such justification for non-completion of the investigation. It would surely be a very unusual and inconvenient thing for the Collector at that stage to call upon the person from whom the goods were seized to show cause why the delay should not be condoned or to reveal to him the difficulties which were encountered during the investigation and which were responsible for its non-completion within the prescribed period. Disclosure of these grounds to the person from whom the goods were seized would be against public interest and would be utterly detrimental to the completion of the investigation. We therefore take the view that the petitioners had no right to be heard at the stage when the Collector ordered the extension.

32. We do not also think that it was the duty of the Collector to state in his order the grounds for such extension. For the same reasons for which we took the view that the petitioners have no right to be heard, we also reach the conclusion that, in the order of extension, the Collector need not specify what exactly were the reasons which prompted the view that time should be extended. Their disclosure all that stage, besides being improper, is harmful to the investigation

which remains to be completed.

33. We now turn to the next submission made by Mr. Venkataranga Iyengar that the power created by the proviso to Section 110 (2) by the exercise of which the Collector could extend the period of time within which a notice under Section 124(a) could be served on the person from whom the goods were seized, amounts to an unreasonable restriction on the exercise of the fundamental right guaranteed by Article 19(1)(g) of the Constitution, which is a right to acquire, hold and dispose of the property That right of course is subject to the imposition of a reasonable restriction which could be imposed under Article 19(5) in the interests of the general public or for the protection of the interests of any scheduled tribe.

34. It was said that although the provision contained in Section 110(2) which makes available to the authorities a period of six months for service of notice under Section 124(a), cannot be regarded as imposing an unreasonable restriction on the fundamental right, the power created by the Collector to extend that period of six months by a further period of six months involves the imposition of an unreasonable restriction which could not be justified on the ground that it is necessary in the interests of the general public.

35. The argument maintained was that the petitioners became entitled to the return of the gold which was seized from them after the expiry of the period of six months prescribed by Section 110(2), and that although a deprivation of the right to be in possession of the gold during the first period of six months allowed for the issue of a notice could not be said to be unreasonable, the further deprivation during another period of six months which is possible under the proviso to that sub-section is attributable to the imposition of an unreasonable restriction. We were asked to say that it would be unreasonable for any authority functioning under the Customs Act to defer investigation over a period longer than six months, and that it was unreasonable on the part of Parliament to make it possible for him to spread over the investigation over a further period of six months with the assistance of an order made by the Collector under the proviso.

36. In fudging the reasonableness or otherwise of the restriction to which Article 19(5) refers we should be guided by well known tests which have been formulated in a long line of decisions. Our decision should rest upon factors such as the purpose of the law, the mischief sought to be averted or prevented by it and the commensurateness or otherwise of the restriction imposed in the context of these two factors.

37. Mr. Government Pleader has also asked us to say that we should also take into consideration the status of the authority who is the repository of the power to perform the act which is challenged as an unreasonable restriction, the availability of remedies by way of appeal or otherwise and also the nature or the power and its ambit.

38. Now the purpose of the Customs Act among others is the prevention of smuggling and the punishment of the smuggler. The seizure of the goods believed to have been smuggled is authorised by Section 110(1), if there be reasons for believing that they have been smuggled. Section 124(a) directs that such seizure should be followed up by the issue of a notice to the person from whom the goods were seized informing him of the grounds on which it was proposed to confiscate the goods. Clause (b) of that section makes it imperative for the authority conducting the enquiry into that matter to afford an opportunity to that person of making a

representation against such confiscation or the imposition of a penalty Section 110(2) provides that where goods are seized under Sub-Section (1) of that section, the notice enjoined by Section 124(4) should be given within six months from the date of the seizure of the goods, and that if not, the goods shall be returned to the persons from whom they were seized. But the proviso to that sub-section confers authority on the Collector of Customs to extend the period for service of men notice, by a further period not exceeding six months.

39. It is common knowledge that a smuggling operation is carried on by persons who possess special skill and the operation is generally accompanied by artful ingenuity and deception besides being inordinately subtle. Although it may be possible for an officer to have reasons to think that the goods in the possession of a person have been smuggled and so he might make a seizure of those goods, having entertained that belief the collection of evidence and the material upon which the charge of smuggling is to be established is an arduous and difficult process, since what the investigating authority has to do is to unravel the process by which the smuggling operation was carried out and bring home to the smuggler the charge of smuggling. Unlike other offences, the offence of smuggling is hard to detect and harder still to establish. It is committed clandestinely and by persons who have acquired special proficiency in the art of smuggling. The investigation may sometimes become protracted by reason of the many impediments and obstacles which the investigating authority may encounter during the process of investigation and it may happen that the investigation of a real and true smuggling offence may not be completed within a period of six months.
40. So it is that Section 110(2) provides that in a case where the completion of the investigation is not found possible within a period of six months by reason of any special difficulties, the period for the investigation may be extended suitably, but not beyond a further period of six months. The rule is that the investigation should be completed within six months and that the service of notice under Section 124 should be made before that period, but there is an exception to that rule to which the proviso refers.

41. The Collector of Customs is the authority to decide whether a case is one which falls within the proviso and whether he should therefore extend the period of investigation. This authority has to consider all the circumstances and the attendant facts to form a judgment in his own mind whether there was sufficient cause, for non-service of the notice within the first six months. Parliament has confided to him the, power to extend the time over a further period not exceeding six months in a special case for exceptional reasons, such as non-completion of the investigation or the inability to gather all the materials and evidence supporting the charge, so that the purpose of the Act may not be defeated by efflux of the first period of six months to which Sub-Section (2) refers.

42. The impugned proviso makes it clear that the Collector of Customs cannot extend the time beyond a further period of six months. He has also the discretion to limit the extension of the time to a period less than six months.

43. These being the features of the proviso, and having regard to its purpose and the circumstances in which it was the legislative intent that the Collector should exercise his power and also the fact that the power is entrusted to a sufficiently high authority such as the Collector of Customs who is enjoined to exercise this power only en bit being satisfied that there is sufficient cause for such extension, we lean to the view that the proviso is not liable to be

denounced as producing an unreasonable restriction on the fundamental right of the petitioners. In our opinion the proviso is a perfectly constitutional provision above the reproach of invalidity.

44. We do agree that the extension made by the Collector invites the criticism that he exercised his power without the application of his mind to the question whether there was sufficient cause for extension. His order makes it clear that he was of the view that there was sufficient cause, and, that statement in the order is what induces the belief in our minds that he did consider the question whether he should exercise the power or not and came to the conclusion that he should, having been satisfied that there was sufficient cause for its exercise.

45. In the view that we take, it is not necessary for us to examine the correctness or otherwise of the postulate whether, from an order made by the Collector under the proviso to Section 110(2), an appeal lies under Section 128, or a revision petition under Section 131.

46. We dismiss these writ petitions. The petitioners must pay the costs of these writ petitions to the opposite side. Advocate's fee Rupees one hundred (Rs. 100/-), one set.
Petitions dismissed.