BOMBAY HIGH COURT

Manahem S. Yeshoova

Vs.

Union of India

Suit No. 237 of 1954

(K.K. Desai, J.)

26.02.1959

JUDGMENT

K.K. Desai, J.

1. This is a suit filed for challenging the validity of certain orders passed under the provisions of the Foreign Exchange Regulation Act and the Sea Customs Act and for recovering back 310 tolas of gold confiscated in accordance with these orders. The plaintiff also seeks to recover in the alternative the value of gold viz., Rs. 30,790/- and interest at the rate of 6 per cent p. a. The plaintiffs case is as follows :

2. The plaintiff was proceeding from Aden to Colombo and "S. S. City of Durham" by which the plaintiff was travelling arrived at Bombay on 30-11-1950. On that date the plaintiff for the purpose of visiting the City of Bombay was passing through the Blue Gate of the Alexandra Docks and was questioned by officer of customs. The plaintiff informed the officer that he was carrying gold which was in his cabin. The plaintiff was asked to take the officer to the plaintiff's cabin. The plaintiff produced gold weighing 310 tolas in his cabin and the same was seized. Ultimately by the impugned order dated 29-12-1950 one M. E. Rahaman the then Collector of Customs found that the condition of the Reserve Bank of India Notification No. 62/48-R. B. of 25-8-1948 had not been fulfilled in the case of the plaintiff and that the gold must be held to have been brought into India in contravention of the provisions of the aforesaid Notification. He also found that the gold was not shown in the ship's manifest as for through transit nor was it kept with the purser or captain of the ship. The Collector of Customs ordered confiscation of the gold under Section 167(8) of the Sea Customs Act and further ordered that the gold should be allowed to be redeemed on payment of Rs. 30,790/- subject to production of permit from the Reserve Bank of India.

3. The aforesaid order dated 29-12-1950 was duly served on the plaintiff. A copy of that order is

annexed as Ex. E to the plaint. The plaintiff was informed that an appeal against the order lay to the Central Board of Revenue, New Delhi. The plaintiff went in appeal against the order dated 29-12-1950 to the Central Board of Revenue. That appeal was Customs Appeal No. 976 of 1951. By its order dated 22-10-1951 the Central Board of Revenue held that it saw "no reason to interfere with the order passed by the Collector of Customs, Bombay". In the result in my view the order of confiscation with the right of redemption as made by the Collector of Customs stood confirmed and became the order of the Central Board of Revenue.

4. As against those orders the plaintiff filed a Revision Application under the Sea Customs Act before the Government of India and by an order in Revision made on 24-6-1953 it was held that "The Government of India sees no reason to interfere with the order in appeal passed by the Central Board of Revenue".

5. The plaintiff (declared on 4-12-1953 and) filed on 18-12-1953 in this Court Mis. Petition No. S42 of 1953 under Article 226 of the Constitution challenging all the aforesaid three orders as being invalid on the ground that the plaintiff had not imported and was not importing these 310 tolas of. gold into India and that the finding against the plaintiff by the Customs Collector and the Central Board of Revenue and the Government of India that he had contravened the notification of the Reserve Bank of India as already mentioned in the order of the Customs Collector was contrary to law and untenable. The Plaintiff also contended that "show cause" notice was not served on him and he had not been given a proper hearing and the orders were vitiated by violation of rules of natural justice. On December 10th, 1953 Tendolkar J. dismissed that petition after considering all the contentions raised by the plaintiff in that petition.

6. By his advocate's letter dated December 14th, 1953 the plaintiff served a notice under section 80 of the Code of Civil Procedure in connection with this suit on the Union of India and the Collector of Customs and ultimately on February 24th, 1954 the plaintiff filed this suit once again to challenge the aforesaid orders.

7. By their written statement the defendants have raised contentions technical as well as on merits. The defendants contend that the order of the Collector of Customs was not contrary to the provisions of law or against the principles of natural Justice or without giving any opportunity to the plaintiff to be heard or without obtaining any explanation from the plaintiff or without taking into consideration the rules of natural justice. Customs authorities had information that the plaintiff who was travelling by "S. S. City of Durham" intended to smuggle gold into India; and as a result of watch kept had found the Gold under circumstances proving that it was illegally imported into India.

8. After issues were raised at the request of the Counsel for the plaintiff and the defendants issues Nos. 3, 4, 5 and 6 were directed to be tried as preliminary issues. These issues run as follows :

3. Whether this Hon'ble Court has jurisdiction to entertain and try this suit?
4. Whether the suit is barred by the rule of *res judicata* as stated in para 7 of the written statement :
5. Whether the suit against the Second Defendant in his official name is maintainable?
6. Whether the plaint discloses any cause of action against the defendants or any of them?

9. In support of his contentions on issues Nos. 3 and 6 Mr. Joshi for the defendants relied upon the provisions of Sections 188 and 182 of the Sea Customs Act and the decision of the Privy Council in *Secy. of State v. Mask and Co*[1]*.,* wherein the true effect of the provisions of these sections has been considered. Section 188 of the Sea Customs Act provides

> "any person deeming himself aggrieved by any decision or order passed by an officer of Customs under this Act may within three months from the date of such decision or order, appeal therefrom to the Chief Customs Authority x x x ."
> "Such authority or officer may thereupon make such further enquiry and pass such order as he thinks fit, confirming, altering or annulling the decision or order appealed against, xx xx ".
> "Every order passed in appeal under this section shall, subject to the power of revision conferred by Section 191 be final."

10. Mr. Joshi has contended that having regard to the provisions in Section 188 of the Act, the order of the Central Board of Revenue must be held to be final except when it is found to be patently arbitrary or perverse or where it is found that fundamental principles of natural justice have been violated in the proceedings wherein the orders were made. In that connection he has relied upon the observations of the Privy Council that :

> "The exclusion of the jurisdiction of the civil Courts is not to be readily inferred but such exclusion must either be explicitly expressed or clearly implied. Even if jurisdiction is so excluded, the civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.
> "An order passed in appeal under Section 188 of the Sea Customs Act excludes the jurisdiction of the civil Courts to entertain a challenge of the merits of that decision."

11. Now, therefore the only question which this Court can consider with reference to the validity of the orders passed by the Customs Collector and the Central Board of Revenue must relate to non-compliance with the provisions of the Act and/or non-conformity with or violation of the fundamental principles of judicial procedure. In that connection I have carefully scanned through all the averments in the plaint. In my view there is no allegation made in the plaint that either the Collector of Customs or the Central Board of Revenue had no power to make the order which they made. The plaint contains recitals of certain facts. The plaintiff has mentioned that the gold

represented the plaintiffs life savings and that the plaintiff was a passenger from Aden to Colombo and in transit to Colombo was entitled to carry gold with him under the notification of the Reserve Bank of India No. F.E.R.A. 62/48 dated 25th August 1948. The reasons why the orders passed by the Customs Collector or the Central Board of Revenue are contended to be invalid are that a 'show cause notice' was not served on the plaintiff and that a hearing was not given to the plaintiff. A civil Court would have jurisdiction to consider the validity of decision and orders made under the provisions of Section 182 or Section 188 of the Sea Customs Act on the grounds which have been summarized in the Privy Council decision, viz., that the provisions of the Act had not been complied with or that the Tribunal had not acted in conformity with the fundamental principles of judicial procedure. The aforesaid contentions of the plaintiff regarding conduct of the proceedings would require to be examined by Court as the same involve violation of fundamental principles of judicial procedure. I cannot accept the contention of Mr. Joshi that the plaint does not disclose any cause of action of any kind against the defendants, or that in this case the Court has no jurisdiction by reason of the provisions of Section 188 of the Sea Customs Act.

12. As regards the question of jurisdiction, Mr. Joshi has relied upon the provisions of Cl. XII of the Letters Patent; He has pointed out that the Union of India which is the 1st defendant does not carry On business nor reside in Bombay. He has also pointed out that it is absolutely essential for the plaintiff to challenge the order made in appeal by the Central Board of Revenue and that admittedly that order was made by the Central Board of Revenue at Delhi. The Central Board of Revenue functions also at Delhi. The cause of action of the plaintiff must arise if not wholly in part in any event at Delhi. Mr. Joshi has further pointed out that the order in revision was made by the Government of India at Delhi. The plaintiff has admittedly not obtained any leave under Cl. XII of the Letters Patent.

13. Mr. Joshi says that since a material part of the cause of action arose outside Bombay, this Court could not have jurisdiction without plaintiff having obtained leave under Cl. XII of the Letters Patent in the first instance.

14. Mr. Solomon has in that connection contended that the confiscated gold must be held to have remained with the Collector of Customs in Bombay. As the order of the Central Board of Revenue was that it saw "no reason to interfere with the order passed by the Collector of Customs, Bombay" and the order in revision was also that "the Government of India saw no reason to interfere with the order in appeal passed by the Central Board of Revenue," it was not necessary for the plaintiff to challenge the order in appeal and the order in revision and that the effective and subsisting order was the order of the Collector of Customs which was made in Bombay. Mr. Solomon therefore contends that the whole of the cause of action has arisen in Bombay. Mr. Solomon also contends that the 2nd defendant resides and works his office at Bombay. He says that I accordingly should hold that this Court has jurisdiction to try this suit irrespective of the plaintiff having not obtained leave under Cl. XII of the Letters Patent. His

contention is that it was unnecessary for the plaintiff to obtain leave under Cl. XII of the Letters Patent.

15. Now, in my view it is well settled that where the Statute provides for an appeal and an appeal is filed, the subsisting and effective order must be held to be the order and/or decision of the appellate Court and not of the first Court or the trial Court. In this connection the language of Section 188 of the Sea Customs Act is very material. It provides that

> "such authority or officer (which refers to the appellate authority) may thereupon make such further enquiry and pass such order as he thinks fit, confirming, altering or annulling the decision or order appealed against."

It cannot be denied that substantive right of appeal was available to the plaintiff and was exercised by the plaintiff. The plaintiff desired and wanted to challenge the decision of the Collector of Customs and the ultimate decision which governed the rights of the plaintiff is the decision of the Central Board of Revenue. In fact as soon as the plaintiff filed his appeal all the contentions of the plaintiff were before the Central Board of Revenue to be decided by the Central Board of Revenue. The wording of the order made by the Central Board of Revenue viz., that "it saw no reason to interfere with the order passed by the Collector of Customs, Bombay," does not in any manner detract from the. position that the order which governs the rights of the parties is the order of the Central Board of Revenue and not of the Collector of Customs. It is true that having regard to the language of Section 188, the Central Board of Revenue should have used the words that "it confirms the order of the Collector of Customs". In my view therefore the true construction of the order of the Central Board of Revenue is that it confirmed the order of the Collector of Customs, and did not make any variation or change in that order. The order that must be challenged by the plaintiff and would require to be set aside if the plaintiff has to succeed must be the order of the Central Board of Revenue. I therefore cannot accept the contention of Mr. Solomon that the whole of the cause of action arose in Bombay. Mr. Solomon admits that the Central Board of Revenue made its order in Delhi. He however says that the order was communicated to the plaintiff in Bombay. In my view the communication of the order to the plaintiff in Bombay cannot form part of any cause of action at all. The making of the order must be challenged. In my view a material part of the cause of action arose outside Bombay. As the Union of India does not carry on business or reside in Bombay. I hold that it was necessary for the plaintiff to apply for and obtain leave under Cl. XII of the Letters Patent before this Court could have jurisdiction to try and entertain this suit. The plaintiff having failed to obtain such leave I also hold that this Court has no jurisdiction to try this suit.

16. Mr. Joshi contended that on the principles which are to be found in Section 11 of the Civil Procedure Code having regard to the decision of Tendolkar J. in the matter of Mis. Petition No. 342 of 1953 filed by the plaintiff I should hold that the plaintiff is not entitled to reagitate the same contentions once again before his Court. Mr. Joshi has drawn my attention to the whole of

the. judgment of Tendolkar J. It is unnecessary to quote the whole judgment here. It is clear that Tendolkar J. was of the opinion that the petitioner (plaintiff) was guilty of delay in filing that petition by which he had challenged the orders as mentioned in the plaint in this suit. However he did not dismiss the petition on the ground of delay. He stated "However as the petition disclosed no cause on merits, I do not propose to dismiss it on that preliminary point." Tendolkar J. discussed in detail the contention of the petitioner in that petition that the orders made by the Collector of Customs dated December 29, 1950 and the Central Board of Revenue dated October 22, 1951 and the Government of India dated June 24th, 1953 were contrary to law and against principles of natural justice. In connection with the aforesaid contention of the petitioner (plaintiff) Tendolkar J. examined in detail the provisions of Section 167 (8) of the Sea Customs Act as also Section 182 of the Sea Customs Act and Section 8 of the Foreign Exchange Regulation Act. He held that under explanation (i) to Section 8 of the Foreign Exchange Regulation Act it was quite clear that it is not necessary for the purpose of constituting an import that the article should actually be imported. It is sufficient if it is brought into any Port and if the intention is to take it out without being removed from the ship. He further held that the final authority to determine whether in a given case there was import was vested in the Customs Collector and that this Court was not entitled to set aside a finding made by the Customs Collector in that connection. Against that decision on merits by Tendolkar J. the petitioner (plaintiff) did not file any appeal.

17. On the merits of the plaintiff's case and/or the contentions available to the plaintiff that was a decision made by a Court of competent jurisdiction entitled to give required relief. There must be finality to all questions and contentions raised as between the parties to a litigation.

18. Moreover, public policy requires that there should be an end of litigation. The question whether the decision is correct or erroneous has no bearing on the question whether it operates or does not operate as res judicata, otherwise, every decision would be impugned as erroneous and there would be no finality. The rule of *res judicata* may thus be put upon two grounds - the one, the hardship to the individual that he should be vexed twice for the same cause, and the other, public policy, that it is in the interest of the State that there should be an end of litigation. Putting it in another form, it may be said that every suit must be sustained by a cause of action, and there is no cause of action to sustain the second suit of the same party, it being merged in the judgment in the first.

19. Whatever be the nature of the proceeding by way of petition under Article 226 of the Constitution, in my view it would be contrary to well-established principles of procedure that parties to a litigation should be entitled to reagitate the same questions of facts or law once again in spite of a decision having been given on merits of the case by a Court of competent jurisdiction. It was not open to the plaintiff to bring to me an appeal against the decision of Tendolkar J. If this suit is heard on merits and the contentions of the plaintiff are accepted, I would have to reverse the decision of Tendolkar J. in Mis. Petn. 342 of 1953. Such a position cannot be allowed to be maintained. If Tendolkar J. had not gone into the merits of the

contentions of the plaintiff there might have been some scope for argument that there is no question of finally findings having been made and that in spite of a writ petition having been dismissed the plaintiff was entitled to file this suit. But as I have already indicated the contentions which could be raised on merits were before the Court in Miscellaneous Petition No. 342 of 1953 and have been decided by Tendolkar J.

20. Mr. Solomon however contends that jurisdiction exercised by this Court under Article 226 of the Constitution is not of a civil nature. He says that it is a supervisory jurisdiction. In that connection he has relied upon the decision of the Patna High Court in *Collector of Monghyr v. Pratap Singh*[1], In that case on behalf of the opposite parties it was contended that the proceeding in the High Court for grant of a writ under Article 226 of the Constitution is not a civil proceeding within the meaning of Article 133 of the Constitution and that the petitioner had no right of appeal to the Supreme Court under that Article. Ramaswami C. J. accepted that contention as correct and held that the petitioners were not entitled to a certificate for going in appeal to the Supreme Court against the decision of the High Court in the matter of petitions under Article 226 of the Constitution. It is unnecessary for me to make any comment on the decision of the Patna High Court in that case. The issue before me is not whether a certificate should be granted for going in appeal to the Supreme Court in the matter of the petition under Article 226 of the Constitution. The issue before me is of general character and is this, viz., whether in the event of one of the Judges of this Court having finally decided on merits the contentions raised in a writ petition under Article 226, this Court would allow the same contentions to be reagitated in a suit. In my view the answer must be that such a position cannot be allowed to exist. Once a Judge of this Court and/or a Court of competent jurisdiction decides on merits the validity or invalidity of an impugned order in a petition filed under

[1] AIR 1957 Pat 102 (FB)

Article 226 of the Constitution the only remedy which can be open to the aggrieved party must be the usual remedy of appeal. In the words of Chagla C. J. in the decision of *In re Prahlad Krishna*[2],

> "Although the decision of the High Court refusing a writ or an order under Article 226 may became final qua the High Court, it is not as if the Constitution does not provide other remedies to the citizen. He has a right, an independent right, to approach the Supreme Court under Article 32. Apart from that there is a right of appeal given to the citizen from an order of refusal of the High Court to enforce his fundamental rights. He has the right to ask the Supreme Court to grant him special leave to appeal under Article 136. Therefore, it is not as if the citizen is without a remedy in the event of the High Court refusing to review its own judgment, however erroneous that judgment may be."

21. Mr. Solomon has cited several authorities dealing with the nature of the proceedings by way of a petition under Article 226 of the Constitution. Having regard to the view which I am taking I find it unnecessary to discuss the various authorities cited by Mr. Solomon.

22. It is relevant to point out that the High Court of Madras in the case of *Chenchanna Naidu v. Praja Seva Transports Ltd*[3]*.,* has held as follows :

> "If the application for the issue of a writ under Article 226 is made on the civil side, in dealing with such an application the High Court is governed by Che provisions of the Civil Procedure Code, and the High Court has jurisdiction to review its order under Article 226." The High Court of Calcutta in the case of *Budge Budge Municipality v. Mongru Mia*[4]*,* also observed as follows :
> "A judgment of a single Judge on an application made under Article 226, whether in a matter arising within the original jurisdiction or in a matter arising outside, is a judgment pursuant to Section 108 Government of India Act, 1915 and therefore is appealable under Clause 15 of the Letters Patent ....."
> "It is unarguable that nothing but judgments given in exercise of the jurisdiction specifically conferred by and mentioned in the Letters Patent as contemplated by Clause 15. In actual fact, judgments given in exercise of several jurisdictions not expressly mentioned in the Letters Patent have been held to be appealable."

23. Though no decision has been cited to me as regards the principles of Section 11 of the Code of Civil Procedure being applicable to a matter which is initially decided in a writ petition under Article 226 of the Constitution having regard to what I have already observed, I am of the view that the same principles ought to be held to be applicable to all such matters. I accordingly hold that the plaintiffs suit is barred by rules of res judicata.

24. The 2nd defendant in this suit is described as the Collector of Customs. On December 29, 1950 the impugned order was made by one M. E. Rahman who was the then Collector of Customs. At the date when the suit was filed, viz., February 24, 1954 it is admitted by Mr. Soloman that one M. G. Abroi was the Collector of Customs. The Collector of

[2] AIR 1951 Bom 25 (FB) [4] AIR 1953 Cal 433
[3] AIR 1953 Mad 39

Customs is not a legal entity, but is merely an office occupied by several persons from time to time as appointed by the authorities. On prima facie grounds a suit cannot be filed against any one who is not a legal entity. The 2nd defendant in this case is described as "the Collector of Customs and does not indicate any legal entity or person against whom this suit is filed. In my view a suit cannot be filed against or in the name of "the Collector of Customs" and my finding on issue No. 5 is that the suit against the 2nd defendant in official description is not maintainable.

25. My answers to issues Nos. 3, 4, 5 and 6 are :

> Issue No. 3 : In the negative. Issue No. 4 : In the affirmative. Issue No. 5 : In the negative. Issue No. 6 : In the affirmative.

26. The result therefore is that this suit is dismissed with costs.

Suit dismissed.