

Hiranmoy Biswas Vs. the State

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Court : Guwahati

Decided On : Apr-18-1961

Judge : T.N.R. Tirumalpad, J.C.

Appellant : Hiranmoy Biswas

Respondent : The State

Judgement :

T.N.R. Tirumalpad, J.C.

1. The Sessions Judge has made this reference under Section 438 Cri.P.C. with a recommendation that the order of the S.D.M., Khowai, dated 16.3.60, issuing notice to the sureties Shri Hiranmay Biswas and Jagneswar Kar to show cause why the bail bond executed by them on 12.10.57 to produce one Surendra Kumar Nath in the Court of the S.D.M. on each date to be fixed, should not be forfeited, should be set aside.

2. Surendra Kumar Nath was arrested by the Inspector of Land Customs, under Section 173 of the Sea Customs Act, 1878 for illegal possession of 13 pieces of Arabiah and London gold. He was produced before the S.D.M., Khowai under Section 174 of the said Act with a covering letter from the said Inspector stating that pending intimation to the Customs Collector, Shillong the arrested person was being sent, for favour of necessary action under Section 175 of the said Act. Section 175 of the Sea Customs Act is as follows:

When any such person is taken before a Magistrate, such Magistrate may, if he thinks fit, either commit him to goal or order him to be kept in the custody of the Police for such time as is necessary to enable such Magistrate to communicate with the proper officers of Customs:

Provided that any person so arrested, committed or kept shall be released on giving security to the satisfaction of the Magistrate to appear at such time and place as such Magistrate appoints in this behalf.

The Magistrate ordered that the arrested person may be enlarged on bail of Ra. 1,000/- with two local sound sureties of like sum or in default to Hazat till 17.10.57. On this order Hiranmay Biswas a pleader of Khowai and Jagmeswar Kar, executed the surety bond in question for Rs. 2,000/- and not for Rs. 1,000/- as ordered by the Magistrate undertaking to produce Surendra Kumar Nath in the Court of the S.D.M., Khowai on each date to be fixed in the case. After that for a period of more than two years, nothing further was done in the matter by the Customs Authorities, as far as the production of Surendra Kumar Nath in the Magistrate's Court was concerned.

3. On 30.12.59, the Superintendent of Central Excise, Agartala No. II Circle wrote a letter to the Magistrate stating that the Collector of Central Excise, Shillong has confiscated the entire gold seized from Surendra Kumar Nath and imposed on him a personal penalty of Rs. 1,000/-, but that the party was not available for realization of the penalty and that the Department intended his prosecution in Court. He therefore requested the Magistrate to serve notice on the party for his presence in Court and to intimate the matter to him so that arrangement for the realisation of the penalty and for taking further action could be made under law.

4. On the strength of this letter, the Magistrate issued notice to the sureties on 29.1.60 to produce Surendra Kumar Nath in Court on 15.2.60. As they were unable to produce him, the Magistrate issued a further notice to the sureties on 16.3.60 to show cause by 18.4.60 why the bail bond should not be forfeited. It is this order of the Magistrate which is now complained against. The sureties subsequently filed a petition before the Magistrate stating that he had no jurisdiction to forfeit the bail bond. But the Magistrate passed an order on 30.4.60

that the said petition should be filed in a higher Court and that he cannot pass any order thereon. He however granted them time to move the higher Court. It is under those circumstances that the Sessions Judge was moved by the sureties.

5. The Sessions Judge, in his order of reference, states that the sureties had no longer any liability to produce Surendra Kumar Nath as the case against him terminated when a penalty was imposed on him under item No. 3 of Section 167 of the Sea Customs Act. Evidently, the learned Sessions Judge meant item No. 8 and not item No. 3, He has pointed out that after the disposal of the case by the Collector of Central Excise, Shillong, the liability of the sureties terminated and that the sureties had no obligation to produce the accused to enable the Customs Department to realise the fine from him, as Section 193 of the Sea Customs Act laid down the procedure to be followed for realisation of the imposed penalty.

6. There is a more vital objection to the enforcement of the bail bond than the one pointed out by the Sessions Judge, It is well-settled law that the surety bond taken from the sureties should be strictly in accordance with the order for bail passed by the Court and that if it is not so, it will become totally invalid and cannot be enforced. In this case, the security amount ordered by the Court was Rs. 1,000/-, but the surety bond was caused to be executed by the sureties was for Rs. 2,000/- and hence it is not in accordance with the order of Court. Hence, the surety bond is clearly invalid and the sureties have no liability at all under the invalid bond. On that one ground alone, this reference has to be accepted and the notice of forfeiture of the bond must be set aside.

7. There are also other reasons why this surety bond cannot be allowed to be enforced. Section 174 of the Sea Customs Act, provides that every person arrested for an offence under the Act, should forthwith be taken before the nearest Magistrate or Customs Collector. Section 175 contains the procedure to be followed by the Magistrate if the arrested person is produced before him. He can commit the person to Jail or order him to be kept in Police custody for such time as is necessary to enable him to communicate with the proper Officers of the Customs or he can release the arrested person on his giving security to the satisfaction of the Magistrate to a near at such time and place as such Magistrate

appoints in this behalf. Thus, it is clear that the commitment to Jail or order for Police custody of the taking of security was only for the period as is necessary to enable the Magistrate to communicate with the proper Officers of the Customs. When once the Magistrate has so communicated, there is no further jurisdiction for the Magistrate to continue to keep him in jail or in Police custody or to keep him on bail. Thus, it instead of committing the person to Jail or ordering him to be kept in Police custody for such time as is necessary for the Magistrate to communicate with the proper Officers of Customs, the Magistrate takes security, he has to appear at such time and place as such Magistrate appoints in this behalf. This will mean that the Magistrate has to fix a time and place for the arrested person to appear before him and the surety bond can be only for appearance at such time and place so appointed.

8. It has to be made clear that the wording of the proviso to Section 175 of the Sea Customs Act is not so wide as the wording of Section 499(1) Cr.P.C. in the matter of surety bonds. Under Section 499 the person who is to be bound can be directed to attend at such time and place mentioned in the bond and to continue to so attend until otherwise directed by the Court. But in the proviso to Section 175, the Magistrate has to fix the time and place in the bond for the arrested person to appear and he cannot be directed to continue to so attend until otherwise directed by the Court. Thus form No. XLII in Schedule V, Cr.P.C. cannot be used for a surety bond to be taken under Section 175 proviso of the Sea Customs Act. The surety bond has to fix the time and place for the arrested person to appear. As the surety bond in question did not fix the time and place as required under Section 175, Proviso, but directed the person to appear on each date to be fixed in the case, it is not in accordance with Section 175, Proviso and hence cannot be enforced.

9. The question whether the Collector of Customs, Shillong has disposed of the case against the arrested person under Section 167 item No. 8 of the Sea Customs Act or not has nothing to do with the enforcement of the surety bond. The sureties under Section 175, Proviso of the Sea Customs Act cannot have the liability to go on producing the appellant in Court until such time as the case against him remains pending before the Customs Authorities. The liability of the

sureties is only to produce the arrested person at a particular time and place to be fixed by the Magistrate in the surety bond. The learned Sessions Judge is not correct when he says that the liability of the sureties ceased when the case against him was disposed of by the Customs Collector, Shillong. The sureties had no liability at all under this invalid surety bond.

10. It follows therefore that the Superintendent of Central Excise, at Agartala No. II Circle cannot call upon the Magistrate to direct the production of the arrested person eitfiei1 for the purpose of realisation of the penalty or for the intended prosecution of the said person. I agree with the Sessions Judge that the Customs Department cannot call upon the Magistrate to produce the arrested person to realise the penalty imposed.

11. It was pointed out for the respondent that it was intended to prosecute the arrested person under Section 23 of the Foreign Exchange Regulation Act, 1947 and that the Superintendent, Central Excise, wanted the arrested person to be produced for that purpose, to initiate a proceeding under Section 23 of the said Act. As per that section, there has to be a complaint in writing made by a person authorised in that behalf by the Central Govt. or the Reserve Bank by a general or special order. No such complaint has been filed, Thus, no offence under Section 23 has been taken cognizance of by a Court and hence no question of producing the arrested person by the sureties would arise at that stage.

12. Thus, it is clear that the Magistrate had no power to forfeit the surety bond in this case and hence cannot issue a notice calling on the sureties why the bond should not be forfeited. The reference is accepted. The order of the Magistrate dated 16.3.60 calling upon the sureties to show cause why the surety bond should not be forfeited is set aside.

13. Before I part with this case, I must point out to the Superintendent, Central Excise, Agartala No. II Circle, that it was improper on his part to write a letter to the Magistrate, palling upon the latter to serve notice on a party for his presence in Court at to intimate to the Superintendent of such appearance in Court. The Superintendent must remember that he is not dealing with an Executive Officer of the Government, with whom he can carry on correspondence. He is dealing with a

Court and the Court cannot be called upon by means of a letter to direct the attendance of a party in Court or to intimate, the same to the Superintendent. The Superintendent will have to move the Court in the proper manner prescribed by law and obtain the necessary order from Court. The Magistrate was, wrong in having acted on the letter of the Superintendent of Central Excise.

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