

icchalal Sukhadeo Vs. State

icchalal Sukhadeo Vs. State

SooperKanoon Citation : sooperkanoon.com/329391

Court : Mumbai

Decided On : Feb-13-1963

Reported in : AIR1964Bom103; (1963)65BOMLR468; 1964CriLJ396; ILR1963Bom297

Judge : Tarkunde and ;Shah, JJ.

Acts : Sea Customs Act, 1878 - Sections 19, 167(2), 167(8), 167(36) and 167(81); Indian Tariff Act, 1934; Foreign Exchange Regulation Act, 1947 - Sections 23-A; Land Customs Act, 1924; [Government of India Act, 1915](#); Customs Consolidation Act, 1878 - Sections 186; Customs Consolidation Act, 1876 - Sections 186; [Customs Act, 1962](#) - Sections 135; Indian Aircraft Act, 1934

Appeal No. : Criminal Appeal No. 1359 of 1962

Appellant : icchalal Sukhadeo

Respondent : State

Advocate for Def. : V.H. Gumaste, Addl. Govt. Pleader

Advocate for Pet/Ap. : A.A. Peerbhoy, ;Porus Mehta and ;H.G. Mehta, Advs.

Judgement :

Tarkunde, J.

1. This appeal has been filed against an order of the Presidency Magistrate, Special Court No. 2, Esplanade, Bombay, convicting the appellant under Section 167(81) of the Sea Customs Act, 1878, and sentencing him to rigorous imprisonment for 12 months. At the relevant time the appellant was an employee in a firm of bullion merchants carrying on business under the name 'Messrs. Ambalal Amichand and Co.' One Ambalal Amichand was a partner of the firm. On the morning of 14th December 1960, the appellant went to the residence of Ambalal Amichand and came out after about 10 minutes. On account of some information which had been received, a Preventive Officer had kept a watch on the residence, and some time after the appellant came out of the residence, he was accosted by the Preventive Officer. It was found that the appellant had a jacket under his single, and in that jacket he was carrying four packages of 25 bars of gold each, each bar weighing 10 tolas. When questioned about the source of the gold, the appellant stated at first that the gold was given to him by a stranger, but later on he made another statement to the effect that his employer, Ambalal Amichand, had sent him that morning to his residence and that the wife of Ambalal Amichand had given him the gold for the purpose of being carried to the shop of the firm. The gold was confiscated under Section 167(8) of the Sea Customs Act, 1878 and thereafter the appellant was prosecuted for the offence defined by Section 167(81) of the Act.

2. On the evidence led before him, the learned Magistrate was satisfied in the first place that the gold which was being carried by the appellant was smuggled gold, that is to say, it was gold which had been imported into India contrary to a notification by which the import of gold was restricted, and also that the gold was imported without payment of the import duty prescribed by the Indian Tariff Act, 1934. The learned Magistrate was also satisfied that the appellant knew that the gold which he was carrying was smuggled gold. On these findings the learned Magistrate held that the offence defined by Section 167(81) of the Sea Customs Act, was established against the appellant.

3. On behalf of the appellant Mr. Porus Mehta argued before us that even if it were assumed that the appellant in this case was in possession of smuggled gold and that he knew that it was smuggled gold, even then the appellant could not be

convicted under Section 167 (81) unless the intent specified in that provision was proved against him. In order to appreciate the argument of Mr. Porus Mehta, the relevant part of Section 167(81) may be quoted :

'If any person knowingly, and with intent to defraud the Government of any duty payable thereon, or to evade any prohibition or restriction for the time being in force, under or by virtue of this Act with respect thereon acquires possession of, or is in any way concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any goods which have been unlawfully removed from a warehouse or which are chargeable with a duty which has not been paid or with respect to the importation or exportation of which any prohibition or restriction is for the time being in force as aforesaid..... such person shall on conviction before a Magistrate be liable to imprisonment for any term not exceeding two years, or to fine, or to both.'

In order to bring home the offence as defined above against the appellant, four ingredients of the offence had to be established in the present case. Firstly, it was necessary for the prosecution to show that the goods in question (the gold) were goods which were chargeable with a duty which had not been paid or with respect to the importation of which any prohibition or restriction-was for the time being in force; secondly, that the appellant was carrying those goods; thirdly, that the appellant was doing so knowingly, that is to say, he knew that the goods were chargeable with a duty which had not been paid or that there was any prohibition or restriction with respect to the importation of those goods; and fourthly that he was carrying the goods with the intent to defraud the Government of any duty payable thereon or to evade the prohibition or restriction which was for the time being in force with respect to their importation. According to Mr. Porus Mehta, the first three ingredients mentioned above might have been established against the appellant, but not the fourth. It was not established that he had the intent either to defraud the Government of any duty payable on the gold or to evade any prohibition or restriction with respect to the importation thereof.

4. Considering first whether the intent to evade any prohibition or restriction with respect to the importation of the gold has been proved against the appellant, it is

common ground that there was at the relevant time in force, 3 notification issued under the Foreign Exchange Regulation Act, 1947 (which by virtue of Section 23-A of that Act, must be deemed to have been issued under Section 19 of the Sea Customs Act, 1878) directing that gold shall not be brought or sent into India from any place outside India except with the general or special permission of the Reserve Bank. It may also be taken-as common ground that the gold which the appellant was carrying on his person had been imported into India in contravention of the restriction imposed by this notification. On these facts, however. It cannot be assumed that when the appellant was carrying the gold he had the intent of evading the aforesaid restriction. The gold might have been imported years ago, so that the transaction of evading the aforesaid restriction might have taken place long before the appellant was found carrying the gold. The gold was liable to confiscation under Section 167 (8) of the Sea Customs Act, and in fact was confiscated after it was seized from the appellant. That provision in so far as it is relevant says that 'if any goods, the importation of which is for the time being restricted by or under Chapter IV of this Act, be imported into India contrary-to such restriction, such goods shall be liable to confiscation'. When the appellant was carrying the gold-in the inside packets of his jacket, which was below his-single, it was possible to hold that he had the intent to evade the confiscation of the gold under Section 167(8). That intent is, however, different from the intent which is required to be proved under Section 167(81). Since the restriction might have been evaded a long lime back by the smuggler of the gold, it cannot be- held that the appellant while carrying the gold had the intent to evade the said restriction.

5. We are also unable to hold that the prosecution have succeeded in proving that the appellant while he was carrying the gold had the intent to defraud the Government of any duty payable thereon. There is no reason-to suppose that the appellant himself had imported the gold. The appellant, therefore, could not have been personally liable for the duty payable on the gold. Nor was it shown that the unpaid duty could have been recovered from the gold which was seized from the appellant. Though we saw the relevant provisions of the Sea Customs Act 1878, the Indian Tariff Act, 1934, the Land Customs Act, 1924 and the Indian Aircraft Act, 1934, we did not come across any provision which authorises in general

terms that customs duty could be recovered at any stage from the goods which are shown to have remained uncustomed. Uncustomed goods may pass from hand to hand and may reach innocent parties who are in bona fide possession thereof. It is, therefore, not surprising that there is no general provision enabling the Government to seize uncustomed goods at any time after their import and to recover the duty which was payable thereon at the time of import. The learned Additional Government Pleader was also not able to show us any such general provision. He argued that even in the absence of such provision the Government would have the right to file a suit for the recovery of the unpaid duty. It may be that such a suit could be filed by the Government against the person who imported the goods without paying the duty. It has not been shown in the present case that either the appellant or his employers were the importers of the gold. Since it is not shown that the duty which was payable on the gold at the time of its import was recoverable either from the appellant personally or from the gold which he was carrying, it cannot be held that the appellant had the intent to defraud the Government of any duty payable on the gold when he was carrying the same.

6. The learned Additional Government Pleader then argued that even supposing that the duty as such, could not have been recovered from the gold which the appellant was earning the gold could have been confiscated on the ground that it had escaped duty. The learned Additional Government Pleader further argued that confiscation of goods, on the ground that they were uncustomed could be regarded as a mode of recovering the duty payable thereon, and that the appellant could be held to have intent to defraud the Government of the duty payable on the gold if he had the intent to prevent its confiscation on the ground that it had escaped duty. Now, in the first place there is no provision of general applicability to the effect that if any goods are found to have been imported at some time in the past, without the payment of the duty which was payable thereon, they can be confiscated by the Government. The absence of such a general provision is not surprising. Uncustomed goods might in the course of time, go into possession of innocent parties and it is hardly to be expected that the Legislature would make a provision that such goods could be simply confiscated by the Government from whoever was found in possession thereof. In support of his argument that uncustomed goods could be confiscated at any time and from any person, the

learned Addl. Government Pleader relied on the provisions of Section 167(2) and Section 167(35) of the Sea Customs Act, 1878. He also pointed out that similar provisions apply to goods imported by land or by air in consequence of certain provisions of the Land Customs Act, 1924 and the Indian Aircraft Act, 1934 respectively. We find, however, that these provisions enable the goods to be confiscated in certain specific circumstances. Those circumstances did not obtain in the present case. We must, therefore, hold that the gold which was being carried by the appellant could not have been seized and confiscated on the ground that it had escaped duty. Needless to say that we are not here considering the liability of the gold to be confiscated under Section 167 (8) of the Sea Customs Act, on the ground that it was imported contrary to the restriction imposed on its import.

7. Supposing moreover that the gold could have been confiscated on account of its having escaped the customs duty, the intent to evade its confiscation cannot be equated with the intent to defraud the Government of the duty payable thereon. In support of his argument that confiscation of goods in these circumstances is a mode of recovering unpaid duty, the learned Additional Government Pleader relied on the decision in *C. Govindtajulu Naidu v. Secy, of State for India in Council* ILR 50 Mad 449 : AIR 1927 Mad 689. In that case a suit was filed in the Madras High Court against the Secretary of State for India in Council, for the recovery of money which was derived by the Government from the sale of smuggled goods which had been seized and confiscated. It was held that the suit was not maintainable by reason of Section 106(2) of the [Government of India Act, 1915](#). Under that section the High Court had no jurisdiction in any matter 'concerning the revenue or concerning any act done or ordered to be done in the collection thereof according to the usage and practice of the country or the law for the time being in force'. It was held that the recovery of money by the sale of smuggled goods was a matter concerning the revenue or concerning any act done or ordered to be done in the collection thereof. 'The word 'revenue' is much wider than the word 'duty'. It seems clear that the money recovered by the sale of the confiscated smuggled goods concerned the revenue of the Government. It cannot, however, be said that this decision supports the view that the recovery of money by the sale of confiscated smuggled goods amounts to the recovery of the duty which was payable on those

goods. The learned Additional Government Pleader also relied on the decision of this Court in *Brusgaard Kiosteruds Dampskibs Aktieselskab v. Secy. of State for India in Council* : AIR1940 Bom294 . This decision adopts the view of the Madras High Court referred to above and does not support the argument of the learned Additional Government Pleader any further.

8. We are accordingly of the view that the prosecution have failed to prove that the appellant when he was carrying the gold had the intent either to defraud the Government of any duty payable thereon or to evade the restriction which was then in force with respect to its import. It seems obvious, that generally speaking, such an intent cannot be attributed to a person who acquires possession or who is concerned in carrying, removing, depositing, harbouring, keeping or concealing any goods long after they were smuggled, and who is not the smuggler himself or one interested in the smuggler. A person who is concerned with the transaction of smuggling the goods might have the intent either to defraud the Government of any duty payable thereon or to evade any prohibition or restriction to the importation thereof. We find that this view was recently adopted by a Division Bench of the Calcutta High Court in *Sitaram Agarwala v. State* : AIR1962 Cal370 . That was also a case of smuggled gold and the learned Judges were concerned with the question whether the mere possession of smuggled gold without proof that the accused had any hand in carrying the same into this country, is sufficient to bring the accused within Clause (81) of Section 167 of the Sea Customs Act. The learned Judges observed :

'As the clause stands, it is necessary that the person should have the intent either to defraud the Government in respect of duty i.e., to evade payment of duty, or to evade any prohibition or restriction in force as to import. The clause therefore requires that the person should be a direct importer or concerned in some way in importing.'

9. The above decision of the Calcutta High Court was cited before the learned Magistrate who convicted the appellant in the present case. The learned Magistrate differed from the Calcutta view by relying on certain English precedents. The English cases cited before him were *Beck v. Sinks* (1948) 2 All

ER 1058 and R. v. Cohen (1951) 1 All ER 203. The learned Additional Government Pleader cited before us a subsequent decision of the Queen's Bench Division in Sayce v. Coupe, (1952) 2 All ER 715. Now, these decisions relate to the scope and effect of section 186 of the Customs Consolidation Act, 1878 (Vide Halsbury's Statutes of England, Second Edition, Volume 21, page 227). A reference to the wording of Section 186 of the Customs Consolidation Act, shows that the scope of that section is much wider than the scope of Section 167(81) of the Sea Customs Act, 1878. Under Section 186 of the Customs Consolidation Act, 1876, a person can be punished if he 'shall knowingly harbour, keep or conceal.....any prohibited, restricted or uncustomed goods, or any goods which shall have been illegally removed without payment of duty from any warehouse or place of security in which they may have been deposited; or shall knowingly acquire possession of any such goods'. Under another clause of that section a person can also be punished if he 'shall be in any way knowingly concerned in carrying, removing, depositing, concealing, or in any manner dealing with any such goods with intent to defraud Her Majesty of any duties due thereon, or to evade any prohibition or restriction of or application to such goods. ' This, knowingly to acquire possession of uncustomed goods is by itself a complete offence under Section 186 irrespective of any intent to defraud Her Majesty of the duties payable thereon. It may be that the intention of those who drafted Section 167(81) of the Sea Customs Act, was to introduce a similar provision in the Indian Act. It is clear, however, that if that was the intention, it was not properly carried into effect. Under the Indian provision it is not an offence to knowingly acquire possession of uncustomed goods unless this was done with the intent to defraud the Government of the unpaid duty. It is also possible that provisions for the recovery of unpaid duty are not the same in Great, Britain. The English decisions relied upon by the learned trial Magistrate and cited before us do not, therefore, provide a sure guidance in deciding the scope of Section 167(81) of the Sea Customs Act, 1878.

10. It may further be observed that the Sea Customs Act, 1878, by which the present case is covered, as well as several other Acts, have now been repealed and replaced by the [Customs Act, 1962](#), Section 135 of the [Customs Act, 1962](#), corresponds with Section 167(81) of the Sea Customs Act, 1878. However the

intent to defraud the Government of the duty payable on the goods in question, or to evade any prohibition or restriction to the importation or exportation of the goods, is no longer an ingredient of the offence defined by that section. The type of difficulty which the prosecution had to face in the present case is, therefore, not likely to arise in a case under Section 135 of the [Customs Act, 1962](#).

11. Since we agreed with Mr. Porus Mehta that one of, the ingredients of the offence has not been proved against the appellant, we did not hear him on the other grounds of the appeal.

12. In the result, the appeal is allowed and the order of conviction and sentence passed against the appellant set aside.

13. Bail Bond cancelled.

14. Appeal allowed.