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Jeevaraj and Another Vs. Collector of Customs and Central Excise and Others

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Court : Karnataka

Decided On : Dec-17-1992

Reported in : [1994]80CompCas478(Kar); 1993(41)ECC348; 1993LC601(Karnataka); 1993(64)ELT374(Kar); 1993(1)KarLJ167

Judge : K.A. Swami, ;R.K. Shyamsundar and ;S.A. Hakeem, JJ.

Acts : Gold Control Act, 1968 - Sections 79; Customs Act, 1962 - Sections 110 and 124

Appeal No. : Writ Appeals Nos. 2011 and 2012 of 1984 with Writ Petitions Nos. 17552 to 17554 of 1984

Appellant : Jeevaraj and Another

Respondent : Collector of Customs and Central Excise and Others

Advocate for Def. : D.V. Shailendra Kumar, Adv.

Advocate for Pet/Ap. : J. Jeshtamal, Adv.

Judgement :

P.K. Shyamsundar, J.

1. This is a reference made by our brethren B. P. Singh and K. Jagannatha Shetty JJ. (see Jeevaraj v. Collector of customs and Central Excise [1993] 1 Kar LJ 167) under section 7 of the High Court Act formulating for our consideration the following questions, which read (at page 169) :

'(1) Whether having regard to the provisions of sections 110 and 124 of the Customs Act, 1962, failure to comply with the provisions of section 110(2) of the Act would act as bar to the initiation of proceedings for confiscation and imposition of penalty in accordance with the provisions of Chapter XIV of the Act, by issuance of a show-cause notice under section 124 thereof; or whether such non-compliance would only result in entitling the person from whom goods are seized, to the returns of those goods without in any way affecting the proceedings for confiscation and imposition of penalty that may be initiated by issuance of a show-cause notice under section 124 of the Act

(2) Whether having regard to the provisions of section 79 of the Gold (Control) Act, 1968, the failure to issue a valid notice under section 79 of the Act within the period prescribed by law would only entitle the person from whose custody the goods are seized, to the return of those goods, or whether, having regard to the proviso to section 79, no proceeding for confiscation and imposition of penalty can be taken, and no show-cause notice for the confiscation of the goods and imposition of penalty can thereafter be issued ?'

2. The questions as aforesaid it is said arose in the course of hearing of a series of writ appeals and writ petitions referred to in the referral order. As we see from the order of reference a contention appears to have been taken that in the absence of service of a valid notice under section 110 of the Customs Act, within the time prescribed by law, on the person concerned, not only the goods seized would have to be returned but the entire proceedings relating to confiscation and penalty would come to nought. Similar was the contention taken with reference to section 79 of the Gold (Control) Act, 1968.

3. We have heard learned senior counsel, Mr. Vaidyanathan of the Supreme Court Bar, who appeared in support of the petitioners in Writ petitions Nos. 17552 to 17554 of 1984 and Sri Shailendra Kumar, learned senior standing counsel for the

Union of India.

4. Although in the referral order two questions have been raised touching two different enactments, viz., the Customs Act and the Gold (Control) Act, 1968, notwithstanding the difference in the layout of the two Acts, it appears to us that so far as the provisions relating to adjudication, like confiscation and levying of penalty, etc., are concerned, they being in pari materia, it, therefore, behoves us to record a conjoint answer to both the questions referred for our consideration.

Questions Nos. 1 and 2 :

5. Since the answers to the questions posed to us hinge on the interpretation of the relevant provisions, the one under the customs Act and the other under the Gold (Control) Act, it would be appropriate to lay the two provisions at the forefront of the discussion. So far as the Customs Act is concerned, the reference is to section 110 and section 124. Section 110 reads :

'110. Seizure of goods, documents and things. - (1) If the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods :

Provided that where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer.

(2) Where any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized :

Provided that the aforesaid period of six months may, on sufficient cause being shown, be extended by the Collector of Customs for a period not exceeding six months.'

6. The other section, viz., section 124, is to the following effect :

'124. Issue of show-cause notice before confiscation of goods, etc. - No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person -

(a) is given a notice in writing informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and

(c) is given a reasonable opportunity of being heard in the matter.'

7. The relevant section in the Gold (Control) Act is section 79. It reads :

'Giving of an opportunity to the owner of gold, etc. - No order of adjudication of confiscation or penalty shall be made unless the owner of the gold, conveyance, or animal or other person concerned is given a notice in writing -

(i) informing him of the grounds on which it is proposed to confiscate such gold, conveyance or animal or to impose a penalty; and

(ii) giving him a reasonable opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the confiscation or imposition of penalty mentioned therein and, if he so desires, of being heard in the matter :

Provided that the notice and the representation referred to in this section may, at the request of the owner or other person concerned, be oral :

Provided further that where no such notice is given within a period of six months from the date of seizure of gold, conveyance or animal or such further period as the Collector of Central Excise or of Customs may allow, such gold, conveyance or animal shall be returned after the expiry of that period to the person from whose possession it was seized.

Explanation. - Where any fresh adjudication is ordered under this Act, the period of six months specified in the second proviso shall be computed from the date on which such order for fresh adjudication is made.'

8. Mr. Vaidyanathan, learned counsel appearing for the petitioners, urged that the question raised admitted of no answer except that in the absence of a valid notice issued to the person concerned within six months from the date of seizure of the goods informing him of the grounds on which the goods seized from him are proposed to be confiscated, the officer empowered under the Act is not merely bound to return the goods seized but the confiscation proceedings also would come to an end as well. In this connection he relied on two decisions of the Supreme Court (i) Assistant Collector of customs v. Charan Das Malhotra : 1973ECR1(SC) and (ii) Rao (I.J.) v. Bibhuti Bhushan Bagh : 1989(42)ELT338(SC) .

9. In Assistant Collector of Customs v. Charan Das Malhotra : 1973ECR1(SC) , the Supreme court held that without holding an enquiry, an order extending the period for giving notice of confiscation under section 124(a) cannot be made. In Rao's case : 1989(42)ELT338(SC) , the Supreme Court held (headnote) :

'Notice must issue to the person from whose possession the goods have been seized of the proposal to extend the period of six months, In the normal course, notice must go to such person before the expiry of the original period of six months. Though notice must go to the person, from whose possession the goods have been seized, before the expiry of the original period of six months, it is possible that while notice is issued before the expiry of that period, service of such notice may not be effected on the person concerned in sufficient time to enable the Collector to make the order of extension before that period expires. Service of the notice may be postponed or delayed or rendered ineffective by reason of the person sought to be served attempting to avoid service of notice or for any other reason beyond the control of the Customs authorities. In that event, it would be open to the collector, if he finds that sufficient cause has been made out before him in that behalf to extend the time beyond the original period of six months, and thereafter, after notice has been served on the person concerned, to afford a post-

decisional hearing to him in order to determine whether the order of extension should be cancelled or not. Having regard to the seriousness and the magnitude of injury to the public interest in the case of illicit importation of goods, and having regard to considerations of the damage to economic policy underlying the formulation of import and export planning, it seems necessary to reconcile the need to afford an opportunity to the person affected with the larger considerations of public interest.'

10. We notice the final order made in that case was as follows (at page 1890) :

'In our opinion, the person from whose possession the goods have been seized is entitled to notice of the proposal before the Collector of Customs for the extension of the original period of six months mentioned in section 110(2) of the Customs Act, and he is entitled to be heard upon such proposal but subject to the restrictions referred to earlier in regard to the need for maintaining confidentiality of the investigation proceedings.'

11. We think, apart from the foregoing dicta in support of which the entire decision was devoted to, nothing else was decided in that case in the course of which their Lordships also referred to the earlier decision in Charan Das Malhotra's case : 1973ECR1(SC) . Their Lordships were pleased to cull out a part of that decision as follows (para 10 at page 1887 of AIR 1989 SC) :

'The Appellate Bench of the High Court is of opinion that the decision of the High Court in Assistant Collector of Customs v. Charan Das Malhotra : 1973ECR1(SC) , lays down the correct law and applied to the facts of this case, that there is a duty on the part of the Collector of Customs to act judicially in exercising the power conferred under the proviso to section 110(2) of the Act and that, therefore, notice should have gone to the owner of the goods before the extension was ordered under the proviso. It has been held further that the order of extension should have been communicated to the owner and as that was not done the order was ineffective.'

12. It, therefore, seems to us and we entertain no doubt at all that what was decided in the two decisions referred to supra was only of the need to hear the

person from whose custody the goods were seized by the Customs authorities before the period of detention of the goods could be extended under section 110(2) read with section 124 of the Customs act. Beyond that they did not decide anything more and certainly did not lay down that where a notice is issued beyond the time limit prescribed in the Customs Act, the goods should not merely be returned but the confiscation proceedings, should also come to an end. It has to be stated that in neither of the two decisions apart from saying that the affected person should be heard in the matter of extending the period of notice under section 110(2) of the Customs Act, nothing more has been said or held. Mr. Vaidyanathan, learned senior counsel, repeatedly urged that the aforesaid ratio was really not the core dicta in Charan Das Malhotra's case : 1973ECR1(SC) , but even so it was so understood by most of the High Courts in this country by virtue of the statement found in para 5 of the judgment which according to counsel was actually the submission made at the Bar and not the ratio of the decision itself. Suffice it for our purpose to notice that the decision of the Constitutional Bench in Rao (I.J.) v. Bibhuti Bhushan Bagh : 1989(42)ELT338(SC) , concluded this controversy by pointing out that Charan Das Malhotra's case : 1973ECR1(SC) , only decided the need to issue notice to the affected person when the time prescribed for notifying the person whose goods are seized had lapsed but even so the Collector acting under section 110(2) of the Customs Act intends to extend the time contemplated under section 110(2).

13. Mr. Shilendra Kumar, learned senior standing counsel for the Central Government, invited out attention to a later Bench decision of the Supreme Court in Chaganlal Gainmull v. Collector of Central Excise [1990] Supp. SCC 527 in which, after considering the decision in Charan Das Malhotra's case : 1973ECR1(SC) , the court had laid down that the default, if any, in not issuing the show-cause notice within the prescribed time would only result in the seized goods being returned to the owner thereof and it would not further result in the adjudication proceedings themselves standing annulled. That was again a case in which adjudication proceedings were assailed on the ground that the show-cause notice contemplated under section 110(2) of the Customs act had not been issued within the time prescribed by law. The Supreme Court held at page 529 :

'The delay beyond six months in the issue of the show cause notice goes to and affects the power to detain the seized goods beyond six months and does not denude the adjudicating authority of the power to initiate proceeding even thereafter.'

14. Their Lordships in the context of that question, after adverting to counsel's submission, observed (at page 528) :

'Support for Sri Javali's proposition that a show-cause notice under section 124(a) cannot be issued after the lapse of six months of the seizure is sought to be drawn entirely from the proviso to sub-section (2) of section 110. Section 110 deals with the seizure of goods, documents and things. Sub-section (1) of that section says that 'if the proper officer has reason to believe that any good are liable to confiscation under this Act, he may seize such goods'. Sub-section (2) says that 'where any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized. It appears to us that the consequence that flows from the failure to issue a show-cause notice under section 124(a) within the period of six months is limited to what is envisaged in sub-section (2), namely, that the goods shall be returned to the person from whose possession they were seized. Section 110(2), does not prescribe a period of limitation within which a show-cause notice is to be issued. But if not action by way of issue of a show-cause notice is initiated under section 124(a) within the period of six months, stipulated by section 110(2) the effect would be that the person from whom the goods were seized would become entitled to their return.'

15. Thereafter, the Bench referred to the earlier decision in Charan Das Malhotra's case : 1973ECR1(SC) , and went on to state at page 529 :

'The view that commended itself to the Division Bench of the High Court is supported by the following observation of this court in Assistant Collector of Customs v. Charan Das Malhotra : 1973ECR1(SC) :

'Section 124 provides that no order confiscating any goods or imposing any penalty on any person shall be made unless the owner of the goods or such person is given a notice in writing informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty. The section does not lay down any period within which the notice required by it has to be given. The period laid down in section 110(2) affects only the seizure of the goods and not the validity of the notice.'

The delay beyond six months in the issue of the show-cause notice goes to and affects the power to detain the seized goods beyond six months and does not denude the adjudicating authority of the power to initiate proceedings even thereafter.'

16. The above decision of the Supreme Court, brings to an end and gives a quietus to the controversy as to whether adjudication proceedings could be carried on even after the expiry of the period prescribed under section 110(2) of the Act. Mr. Vaidyanathan pointed out that in Gainmull's case [1990] Suppl. SCC 527 the decision in I. J. Rao's case : 1989(42)ELT338(SC) , was not noticed at all and, therefore, contends that the ratio of the decision in Gainmull's case [1990] Suppl. SCC 527 is somewhat weakened. This is not an aspect on which we perhaps can comment. However, it behoves us to state that neither in I. J. Rao's case : 1989(42)ELT338(SC) , nor in Gainmull's case [1990] Suppl. SCC 527 had the Supreme Court held that non-issuance of notice within the period enjoined by law would bring to an end the confiscation proceedings themselves. It is very clear from the decision supra that non-issuance of notice would only entitle the owner of the goods to claim return of the goods seized. Hence, the petitioner cannot seek for such salvation at out hands. What is more, at the moment, we are surely bound by the decision of the Supreme court in Gainmull's case [1990] Suppl. SCC 527 referred to supra, making it very clear that the omission to issue notice within six months of the seizure of the goods would only entail the return of the goods to the person concerned and would not bring to an end the adjudication proceedings at all and they could go on even thereafter.

17. Even so, it is contended that on the strength of the decisions of this court in Writ Petitions Nos. 8663 to 8665 of 1985, subsequently affirmed in Writ Appeals Nos. 370 to 372 of 1991 from which it appears there was a special leave petition preferred to the Supreme court, which also came to be dismissed, the position is no longer res integra the court having taken the view that following the quashing of a notice issued under section 79 of the Gold (Control) Act there could be no further adjudication. According to Sri Vaidyanathan, it was, therefore, not open to us to take a view contrary to the settle position in law as aforesaid. With great respect to counsel, we are not persuaded by this argument. Having read through the decisions of this court referred to supra, we must point out that in none of those decisions it was held that adjudication proceedings cannot go on after a notice therefor was quashed. That question has not been gone into in any of the decision, either by the single judge or by the Division Bench, and, therefore, we are not deterred from taking a different view untramelled by the decisions of this court on which counsel relies.

18. It now only remains for us to point out that the position is not any different under section 79 of the gold (Control) Act. Under the said enactment, after the initial notice of six months, one more notice could be issued as enjoined by the second proviso to the section made clear by the Explanation appended thereto. Therefore, the provision under the Gold (Control) Act being similar to the provision under the Customs Act, non-issuance of notice would only result in the returning of the seized gold to the person concerned and would not operate to stop further proceedings. This being the view we take on the questions referred for our consideration, the following will be our answer to the questions raised for our consideration :

Both under the Customs Act and the Gold (Control) Act failure to issue notice within the time enjoined by law would create an obligation on the part of the authority concerned to return the seized goods but would not hamper or preclude the continuance of the adjudication proceedings for confiscation or for levying of penalty, etc.

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