

Md. Sakur Vs. the State

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Court : Orissa

Decided On : Aug-26-1983

Reported in : 1986(23)ELT332(Ori)

Judge : G.B. Patnaik, J.

Acts : [Customs Act, 1962](#) - Sections 3, 11A to 11G, 111, 132, 133, 134, 135, 135(1) and 137; Customs (Amendment) Act, 1969

Appeal No. : Criminal Revision No. 325 of 1980

Appellant : Md. Sakur

Respondent : The State

Advocate for Def. : R.K. Patra, Additional Govt. Adv.

Advocate for Pet/Ap. : P.K. Misra, Adv.

Disposition : Revision allowed

Judgement :

G.B. Patnaik, J.

1. Petitioner challenges the order of the Sessions Judge, Sambalpur, dated 11th July, 1980, in Criminal Appeal No. 101 of 1979 whereby the learned Sessions Judge has upheld the conviction and sentence passed by the sub-divisional

Judicial Magistrate, Bargarh, in II (c) CC Case No. 70 of 1976 (Tr. No. 925 of 1977) under Section 135 of the Customs Act (hereinafter called the 'Act') for violation of the provisions of Sections 11C, 11D, 11E, 11F and 111 (d) and (p) of the said Act.

2. According to the prosecution case, the Assistant Collector Customs, and the Inspector of Central Excises searched the shop of the petitioner Md. Sakur on 29th June, 1976, at 7 p.m. and seized 22 foreign watches alleged to have been imported without any valid authority and in violation of the provisions of the Act. Statement of the accused was recorded and a proceeding for confiscation under the Act was initiated. After obtaining necessary sanction as required under Section 137 of the Act, a criminal complaint was lodged against the petitioner and one Manju Bibhar. The Magistrate after taking cognizance tried the case.

3. The defence of the accused was one of denial.

4. Prosecution examined five witnesses of whom P.W. 1 is the Assistant Collector of Customs; P.W. 2 is the Inspector of Customs; P.W. 3 is the interpreter engaged at the time of interrogation for obtaining the statement of accused Manju Bibhar; P.W. 4 is the Superintendent of Central Excise who had recorded the statement of Manju Bibhar and P.W. 5 is a witness to the seizure of the 22 watches. The learned Magistrate on consideration of the materials on record came to hold that the prosecution had been able to establish that 22 foreign watches were recovered from the possession of accused Md. Sakur. He also found that accused Manju Bibhar was an accomplice taking the major part in helping the accused Md. Sakur in procuring the contraband articles. The learned Magistrate, therefore, held that both the accused persons were guilty under Section 135 of the Act for having contravened the prohibitions contained in different sections of the Act and convicted them thereunder and sentenced Md. Sakur to undergo rigorous imprisonment for 3 months and to pay a fine of ,Rs. 500, in default to undergo rigorous imprisonment for one month. So far as accused Manju Bibhar is concerned, the learned Magistrate awarded sentence of fine of, Rs. 300, in default to undergo rigorous imprisonment for one month.

5. On appeal, the learned Sessions Judge has set aside the conviction of Manju Bibhar but has upheld the conviction and sentence of accused Md. Sakur on a conclusion that the accused was dealing in foreign-made watches in contravention of Sections 11C, 11D, 11E, 11F and 111 (d) and (p) of the Act.

6. The findings of the two courts below that 22 foreign watches were recovered from the possession of accused Md. Sakur and further that the accused could not produce any documents like sale voucher, etc., have not been assailed before me and rightly so, since those are findings of fact based on cogent evidence on record. But the question that comes for consideration is whether notwithstanding the aforesaid findings, the accused is entitled for an acquittal on account of technical infirmities in the case.

7. It may be noted that no argument was advanced before the learned Magistrate or before the appellate court regarding the validity of the sanction though under the Act, previous sanction of the Collector of Customs as provided in Section 137 is a condition precedent for taking cognizance of any offence under Section 135 of the Act. The records of this case exhibit total non-application of mind by the courts below which I shall deal with later on with reference to the charges framed and the findings of the courts below. I would now briefly discuss the law on the subject so far as relevant to the facts and circumstances of the present case.

8. Section 135 of the Act makes possession of any goods by a person which he knows or has reason to believe are liable for confiscation under Section 111 an offence punishable with imprisonment for a term which may extend to three years, or with fine, or with both. Section 135(1), as far as relevant, provides :

'Evasion of duty or prohibitions.-(1) Without prejudice to any action that may be taken under this Act, if any person-

(a) ...

(b) acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with, any goods which he knows or has reason to believe are

liable to confiscation under Section 111,

he shall be punishable-

(i)...

(ii) In any other case, with imprisonment for a term, which may extend to three years, or with fine, or with both.'

Section 111 of the Act deals with confiscation of improperly imported goods. In this particular case we are concerned with Sections 111 (d) and (p) of the Act since the accused persons are charged for violation of these two provisions. Clause (d) of Section 111 provides that when goods are imported or are attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under the Act, or any other law for the time being in force, they are liable to confiscation. Clause (d), therefore, applies in three situations, namely, (i) when the goods have already been imported, or (ii) when the goods are being attempted to be imported, or (iii) when the goods are found within the Indian customs waters for the purpose of being imported. In the facts of the present case, according to the prosecution, the goods had already been imported having been found in possession of the accused at the time of seizure.

Clause (p) of Section 111 provides that any notified goods brought from a place outside India in relation to which any provisions of Chapter IV-A of the Act or of any rules made thereunder for carrying out the purposes of that Chapter have been contravened, are, liable for confiscation.

Chapter IV-A was introduced by way of amendment by Central Act 12 of 1969 with the object of checking large scale smuggling of various consumers' articles smuggled into the country. It contains seven sections, namely, Sections 11A to 11G. Section 11A defines various expressions used in the Chapter and Clause (d) thereof defines 'notified goods' to mean 'goods specified in the notification issued under Section 11B'. 'Watch' is one of the notified goods which is Item No. 1 of Notification No. 12/F. No. 2/5/68-Cus-VI, dated 3rd January, 1969, issued under

Section 11-B of the Act published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) dated 3rd January, 1969 at page 13, under G.S.R. No. 41. Section 11C casts an obligation on the owner of any of the notified goods to deliver a statement to the appropriate officer within seven days from the date of the notification containing particulars to be specified by the rules. If, however, acquisition of the notified goods is subsequent to the date of notification, then the person concerned before the acquisition must deliver to the officer concerned an intimation containing the particulars required under the s. Section 11D prohibits acquisition of notified goods unless the goods are accompanied by documents enumerated therein .which are broadly either a sale voucher or evidence of clearance from the customs. Section 11G provides that provisions of Sections 11C, 11E and 11F will not apply to goods in personal use or goods kept in residential premises of a person for his personal use. In other words, this is an exception to the earlier provisions. When the watches in question were recovered from the shop/house of petitioner Md. Sakur, he never claimed the exception contained in Section 11G. His plea in the trial was a denial of recovery from his house which has been negated by the courts of fact and as such cannot be interfered with by the High Court in this revision. Thus, the petitioner under the facts of the case appears to have contravened the provisions of Sections 11C, 11D, 11E and 11F as well as Section 111 (d) and (p) of the Act.

9. Under Section 137 of the Act, no court shall take cognizance of any offence under Sections 132, 133, 134 or 135 of the Act except with, the previous sanction of the Collector of Customs.

10. A perusal of the charge's framed by the learned Magistrate as well as the sanction given by the Collector will show that proper attention has not been bestowed to the facts involved as well as to the provisions of law. There has been no charge for violation of Sections 11C, 11D, 11E and 11F and on the other hand, charge is for an offence under Section 11. It is to be stated that Section 11 is in Chapter IV and Section 11A is in Chapter IV-A, The charges framed by the Magistrate is quoted below :

'I, Madhuri Pattnaik, S.D.J.M., Bargarh, hereby charge you (1) Mohammed Sakur (2) Manju Bibhar as follows :-That you on or about the 22nd day of June, 1976, at 7 P.M. at your shop at Bargarh town were procuring and in possession *of 22 foreign-made watches said to have been imported into India in contravention of the provisions of Section 11 and Section 111 (d) and (p) which were seized by the Customs Officers and his staff and thereby committed an offence punishable under Section 135 of the Customs Act and within my cognizance; And I hereby direct that you be tried by the said Court on 'the said charges.'

Thus, the learned Magistrate has not framed any charges for contravention of the provisions of Sections 11C, 11D, 11E and 11F. Even while convicting the accused, the learned Magistrate has stated in paragraph 6 of the judgment that the accused had violated the provisions of Section 11 (c) and (d) of the Act. The learned Sessions Judge while confirming the conviction and sentence though has rightly held that the accused committed offence under Sections 11C, 11D, 11E and 11F, has failed to notice that there had been no charge framed on that score by the learned Magistrate. It is no doubt true that if no prejudice is caused to the accused in the matter of framing of charge, the conviction cannot be set aside on that ground, and it is contended by the learned counsel appearing for the State that no prejudice can be said to have been caused since the necessary facts constituting the offence have been brought out and the accused was given due opportunity to make his defence. Yet, it reveals the state of affairs as to how the courts below have not taken due care while dealing with the matter and have not even looked at the relevant provisions of the Act.

11. That conviction of the petitioner Sakur, however, cannot be maintained on the ground that there has been no due sanction by the sanctioning authority. The sanction of the Collector has been exhibited as exhibit 3, which states :

'Whereas it has been made to appear to me by paper and documents in connection with the case, that one Md. Sakur, son of S.K. Kadar, Proprietor of M/s. Hindustan Watch House, Main Road, Bargarh, Dist. Sambalpur, Orissa, and Shrimati Manju Bibhar, daughter of Samir Bibhar, Bisipara (W. No. 7), P.S. Bargarh, Dist. Sambalpur, Orissa, an employee of said M/s. Hindustan Watch

House, Main Road, Bargarh, have committed an offence under Section 11 of the [Customs Act, 1962](#), in connection with seizure of 22 Wrist Watches of foreign origin recovered from the drawer and from black thick cotton bag inside the shop premises of M/s. Hindustan Watch House, Main Road, Bargarh.

Now, therefore, after carefully considering the facts and circumstances of the case, I, Shri H. Vumkhawthang, Collector of Central Excise and Customs, Bhubaneswar Collectorate, Bhubaneswar, in exercise of the powers conferred upon me under Section 137 of the [Customs Act, 1962](#), do hereby authorise Shri P.N. Sarangi, Assistant Collector of Central Excise and Customs, Sambalpur Division, Sambalpur, to file a complaint in writing for offence under the [Customs Act, 1962](#), against the aforesaid person before the jurisdictional Sub-Divisional Judicial Magistrate, Bargarh, Orissa.'

A bare perusal of the sanction would show that the Collector has sanctioned for contravention of an offence under Section 11. There has been no sanction for contravention of Sections 11C to 11F or section 111 (d) and (p) of the Act. There is no contravention of Section 11. In fact, Section 11 is merely an enabling provision authorising the Central Government to issue notification prohibiting import or export of goods of any specified description for the purposes enumerated in Sub-section (2) of the said section. The Act does not prescribe any particular form of sanction, but the sanction must itself show that the concerned authority had full knowledge of the facts upon which the accused is sought to be prosecuted and a deliberate decision of the sanctioning authority to that effect. Non-application of mind of the sanctioning authority vitiates the order of sanction. The order of sanction (exhibit 3) ex facie shows non-application of mind, since Section 11 does not constitute an offence under the Act, but confers power on the Central Government to issue notification prohibiting import of goods. On the facts alleged and proved, the accused committed an offence under Sections 11C, 11D, 11E and 11F and Section 111 (d) and (p) of the Act for which there is no sanction of the Collector at all. In view of the peremptory nature of the provisions of Section 137 of the Act, the court had no jurisdiction to take cognizance without a valid sanction of the Collector of Customs. In that view of the matter, the conviction of accused Md. Sakur cannot be upheld.

12. Mr. R.K. Patra, the learned Additional Government Advocate, contended that since this was not urged either before the trying Magistrate or before the appellate court, the accused should not be permitted to urge this point in revision. Grant of sanction goes to the root of the matter, namely, jurisdiction of the Magistrate to take cognizance of the offence. The accused in this case is not referring to any facts, but argues with regard to the validity of the sanction with reference to the document (exhibit 3). Since the sanction of the Collector is a condition precedent for taking cognizance, [would reject the submission of the learned Additional Government Advocate and hold that the petitioner is entitled to urge this point even in revision.

13. In the result, the conviction and sentence passed by the learned Magistrate and confirmed by the learned Sessions Judge are hereby set aside and the accused is acquitted. His bail bond is cancelled.

14. The criminal revision is accordingly allowed.

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