

Assistant Collector of Central Excise Vs. Mammu and anr.

Assistant Collector of Central Excise Vs. Mammu and anr.

SooperKanoon Citation : sooperkanoon.com/721939

Court : Kerala

Decided On : Jan-14-1981

Reported in : 1985(5)ECC128

Judge : U.L. Bhat, J.

Appeal No. : Criminal R.P. No. 102 of 1978 and Criminal A. No. 83 of 1979

Appellant : Assistant Collector of Central Excise

Respondent : Mammu and anr.

Disposition : Petition dismissed

Judgement :

U.L. Bhat, J.

1. The appeal is filed by the accused in C.C. No. 404 of 1975 on the file of the Additional Judicial First Class Magistrate, Ernakulam. He has been convicted under Section 135(1)(b)(ii) of the Customs Act, 1962 and Section 85(ii) and (ix) of the Gold (Control) Act, 1968 and sentenced to pay a fine of Rs. 500 and in default to undergo simple imprisonment for three months under the former offence. No separate sentence was awarded for the latter offence. The revision is filed by the complainant, Assistant Collector of Central Excise, Ernakulam, challenging the sentence imposed under the Customs Act and the non-imposition of the sentence

under the Gold (Control) Act.

2. The prosecution case can be summarised as follows:-On the night of 30th October, 1968, P.W. 3, the Sub-Inspector attached to the X-Branch Vigilance Section of Police, got information that the appellant is engaged in the business of gold smuggling and is a black-marketeer and is secreting contraband gold, etc., in his house. He gave a report exhibit P8 to P.W. 2, the Sub-Inspector of Police, Narakal, who collected witnesses, prepared search memo exhibit P7 and sent it to Court and proceeded to the house of the appellant and searched the house in the presence of witnesses and found five gold bars, M. O. 1 series, wrapped in a paper kept in the drawer of a table in his bedroom and further search revealed a sum of Rs. 12,000 in currency notes. The gold bars have foreign markings and prima facie appeared to be smuggled gold in the shape of primary gold and the appellant had no reasonable explanation for possession of this gold. The gold and the currency notes were seized under exhibit P5 search list. In the early hours of the morning on 31st October, 1968 P.W. 2 registered a case as Crime No, 120 of 1968 under exhibit P6 F.I.R. against the appellant for offences under the Gold (Control) Act and the Customs Act. The F.I.R. and the material objects were sent to the Court. P.W. 2 transferred the case to the Excise Department and informed the Court accordingly. On a request by the concerned officer of the Excise Department, the articles seized were handed over to him for further investigation. The gold was caused to be analysed by a competent Chemical Examiner. Adjudication proceedings were held which resulted in exhibit P3 order under which the gold was confiscated absolutely under Section 111(d) of the Customs Act, 1962, a penalty of Rs. 10,000 was imposed on the accused under Section 112(b) of the Customs Act, and a penalty of Rs. 5,000 was imposed under Section 74 of the Gold (Control) Act by the Collector of Customs and Central Excise, Cochin. The currency notes were returned to the appellant as he established that the currency notes represented the cash balance of his textile business. The Additional Collector of Customs, Cochin, gave exhibit P1 sanction under the Customs Act for prosecution. The Collector of Customs granted exhibit P2 sanction for prosecution under the Gold (Control) Act. Accordingly the Assistant Collector of Customs and Central Excise, Ernakulam Division, laid the complaint against the appellant before the trial Magistrate.

3. The appellant pleaded not guilty before the Magistrate. The prosecution examined 11 witnesses and marked exhibits P1 to P10 and M.O. 1 series. The defence did not tender any evidence. The appellant denied the prosecution evidence and did not set up any specific plea. The learned Magistrate accepted the prosecution case as true and convicted and sentenced the appellant as stated above.

4. The prosecution case in brief is that on the night of 30th October, 1968, the appellant was found to have secreted five gold bars (primary gold of foreign origin) in the drawer of his table in the bedroom of his house and thereby committed the alleged offences, since import of gold is prohibited and its possession is not supported by any lawful authority. The five gold bars were seized as a result of the search conducted by P.W. 2, the Sub-Inspector of Police, Narakal. The search and seizure have been challenged on two broad grounds, namely, that the Sub-Inspector of Police is not a 'proper officer' entitled to search under Section 105 of the Customs Act and therefore the search is illegal and the evidence of search is unacceptable.

5. Section 105 of the Customs Act states that an Assistant Collector of Customs, or in certain areas, an officer of the customs specially empowered by the Board, may authorise any officer of customs to search or may himself search for goods which he has reason to believe, are liable to confiscation or any documents or things which in his opinion are useful for or relevant to any proceeding under this Act. The search was conducted by P.W. 2, the Sub-Inspector of Police who was the station house officer of Narakal Police Station in Ernakulam District. It is not alleged by P.W. 2 that he was authorised to conduct the search as contemplated by Section 105 of the Customs Act. But under the provisions of the Code of Criminal Procedure, P.W. 2 had certainly authority to conduct search and therefore it cannot be said that the search is illegal. On the strength of the decision reported in Assistant Collector of Customs v. Pratap Rao Sait 1972 KLT 307 it is argued that since P.W. 2 was not authorised under Section 105 of the Customs Act, the search is illegal and vitiated. It is true that such a conclusion was arrived at in the above decision. However, as I pointed out, the fact that under the provisions of the Criminal Procedure Code, a Police Officer has power of search was not adverted

to in that decision. Even assuming that the search was conducted contrary to law, can it be said that the search is illegal and the entire proceedings are vitiated. It is true that such a view was taken in the above decision. With due respect, it cannot be said to be good law in view of several decisions, the latest of which is the one reported in *State of Maharashtra v. Natwarlal Damodardas Soni* : 1980 CriLJ429 . In this case also, it was argued that the search and seizure by the police of gold was illegal and this illegality vitiated the trial. Dealing with this contention the Supreme Court observed as follows:

.Police had powers under the Code of Criminal Procedure to search and seize this gold if they had reason to believe that a cognizable offence had been committed in respect thereof. Assuming *arguendo*, that the search was illegal, then also, it will not affect the validity of the seizure and further investigation by the Customs Authorities or the validity of the trial which followed on the complaint of the Assistant Collector of Customs.

I am therefore unable to accept the argument that because P.W. 2 was not empowered to search the premises under Section 105 of the Customs Act, the search is illegal or that the trial is vitiated.

6. The search has been spoken to by P.Ws. 2 and 3. P.W. 3 is a Police Officer attached to the X-Branch of the Vigilance Section of the Police Force. He submitted exhibit P8 report in which he stated that it was part of his duty to collect information regarding gold smuggling and other activities, and in the course of his enquiries he came to know that the appellant is concerned in gold smuggling and business in contraband gold and has secreted gold and other articles in his house. P.W. 2 received this report and on the basis of the same, under the reasonable belief that any delay in making a search would enable the appellant to frustrate any search, prepared and sent exhibit P7 search memo and conducted the search of the house of the appellant in the presence of witnesses, P. Ws. 4 to 9. P. Ws. 2 and 3 have consistently deposed that they conducted the search and found gold in the drawer of a table in the bedroom of the appellant. P.Ws. 7 and 9 were apparently given up. P. Ws. 5 and 8 turned hostile. P. Ws. 4 and 6. are the remaining independent witnesses. Of them P.W. 6 is a certified goldsmith. There is

no contention before me that the witnesses are not independent or are not of the same locality. In fact the evidence is that all the witnesses belong to the same locality. P. Ws. 4, 5, 6 and 8 have deposed that the police took them to the house of the appellant. P. Ws. 4 and 6 have clearly deposed that they found gold bars on the table and the Sub-Inspector of Police and others were standing nearby. There was no suggestion to any of the prosecution witnesses that the gold bars were placed in the house by anyone else. All the witnesses admitted to have signed the mahazar exhibit P5 which contains clear recitals supporting the evidence of P. Ws. 2 and 3. The trial Court has accepted the testimony of P. Ws. 2 and 3 which is corroborated by the averments in exhibit P5 and to some extent by the oral evidence of the independent witnesses. Having carefully gone through the oral evidence and considered the circumstances, I do not think any different conclusion is reasonably possible. The evidence clearly establishes beyond any reasonable doubt that there was a search of the house of the appellant and M. O. 1 bars were found in the table situated in the appellant's bedroom.

7. The next contention urged at the bar by the learned Counsel for the appellant is that P.W. 2 had no authority to effect any seizure of M. O. 1 series as he is only a Police Officer and not a Customs Officer under Section 110 of the Customs Act. Section 110 of the Customs Act authorises 'a proper officer' to seize goods if he has reason to believe that such goods are liable to confiscation under the Act. 'Proper officer' is defined in Section 2(34) of the Customs Act as an Officer of Customs who is assigned to those functions by the Board or the Collector of Customs. Section 6 of the Customs Act authorises the Central Government by notification to entrust to any officer of the Central or State Government or a local authority any functions of the Board or any officer of customs under the Act. The Government of India, by virtue of the powers vested in Section 6 of the Customs Act has issued a notification MF (DR & I) Notification No. 195/Customs, dated 29th October, 1966 as amended by Notification No. 207/Customs, dated 10th December, 1966. Under this notification, the Central Government entrusted to the police officers in the State of Kerala specified in the Schedule appended thereto, within the limits of the respective jurisdiction but excluding the customs areas therein, the functions of an officer of customs under Sections 100, 101, 102, 104, 106 and 110 of the Customs Act. The Schedule takes in Narakal Police Station

situated in Ernakulam District. It is therefore clear that P.W. 2, as the Station House Officer attached to the Narakal Police Station is a proper officer duly empowered to effect seizure under Section 110 of the Customs Act. His authority cannot be challenged.

8. The question which next arise is whether the seizure has been made properly. Section 110 of the Customs Act authorises seizure where an officer concerned has reason to believe that the goods involved are liable to confiscation. The liability for confiscation is provided under Section 111 of the Act. There is no dispute that since about 1947 import of gold into India has been prohibited. According to the prosecution, P.W. 2 on examining M.O. 1 series gold bars found in the house of the appellant was satisfied that they are foreign contraband gold liable for confiscation under the Act. This is spoken to by P.Ws. 2 and 3 and is mentioned in the F.I.R. also. No other ground is urged to challenge the seizure made. The seizure is proved to be lawful.

9. I may also consider another argument advanced on behalf of the appellant, namely, that the prosecution failed to prove beyond reasonable doubt that M.O. 1 series seized from the appellant's custody is really gold. Gold has not been defined in the Customs Act or the Rules framed there under. We have to depend, therefore, on the general meaning attached to the expression 'gold' or the definition contained in the Gold (Control) Act, 1968. Section 2 Clause (j) of the Gold (Control) Act defines 'gold' as meaning gold, including its alloy (whether virgin, melted or re-melted, wrought), or unwrought in any shape or form, of a purity of not less than nine carats and includes primary gold, article and ornament.

10. Section 101 of the Gold (Control) Act enables an authorised Gold Control Officer to take samples of gold from any dealer, refiner or other person and send such samples for assay or analysis to such authority as may be prescribed and require such authority to send to him a report as to the result of the assay or analysis. Rule 18 of the Gold Control (Forms, Fees and Miscellaneous Matters) Rules, 1968 states that the authority referred to in Section 10(1)(b) to which samples of gold may be sent for assay or analysis shall be the Mint of the Government of India. Rule 12 of the Gold Control (Specification of Standard Gold

Bars and Conditions of Refining) Rules, 1968 states that every refiner shall draw dip samples, in duplicate in the presence of the Refinery Officer, from each processing lot melted for refining and preserve the same until such time as the process or refining of the particular lot of gold has been completed and the gold refined has been tested and particulars thereof have been entered in the Register of Processing. It also authorises a Refinery Officer to take any one or more of the samples and forward the samples to the mint for assay or test. It is argued for the appellant that since the Gold (Control) Act prescribes a specific procedure for sampling and testing and since the Gold (Control) Act and the Rules contain specific provisions for testing a sample at the Government Mint, that is the only method by which an article can be tested in order to find out whether it is gold. I am unable to agree with this argument. The sample to be taken and forwarded for analysis under Section 101 of Gold (Control) Act is not for the purpose of testing whether a particular article is gold or not. Section 101 does not authorise a Gold Control Officer to take samples of any article from any person and send it for analysis. It authorises only to take a sample of gold and send it for analysis. This makes it clear that the purpose is not to find out if an article taken is gold or not but only to find out whether a particular sample of gold is of a particular quality or fineness. Section 101, Clause (2) requires the sample to be restored to the person from whom it was taken after the purpose has been carried out. This makes it clear that Section 101 of the Act is not intended to detect offences where confiscation would be the result. Similarly, the rules referred to also are not intended to lay down the procedure for finding out if an article seized is gold or not. Hence, I am unable to agree that because a sample was not taken and sent to the Government Mint, no other evidence can be adduced to show that M.O. 1 series are gold.

11. Of course it is the duty of the prosecution to show beyond reasonable doubt that the article seized is gold. The normal way of determining the same is by causing it to be examined by a competent Chemical Examiner. That has been done in this case. A sample of the gold bar was sent to P.W. 1 who issued exhibit P10 certificate. He is the Deputy Chief Chemist of the Government of India in charge of the Central Excise Laboratory, Bombay. Earlier, he was the Chemical Examiner to the Government attached to the Customs House, Cochin. He holds a

First Class degree in M.Sc. in Chemistry and has 27 years of experience in analysis of gold metal, etc. He has deposed that the metallic bars involved in the case and sent to him by the Assistant Collector of Central Excise, Ernakulam were weighed, analysed, physically, chemically, qualitatively and quantitatively. He has given his opinion that the five bars are gold bars, identical in nature and bear similar mark, weight and colour. The bars were of more than 99.5 per cent purity. The certificate does not contain the methods of analysis conducted by him. For that reason, it is argued before me on the strength of the decision in Assistant Collector of Customs v. Pratap Rao Sait 1972 KLT 307, that his opinion cannot be accepted. In the above case, it has been observed that the normal test applied in the case of gold is the furnace test. But that test was not applied in that case, and the certificate did not contain the actual data. But it is also seen that in the case which came up for consideration in the above decision, the certificate was not implemented by the testimony of the Analyst; In other words, the Analyst was not examined in proof of the certificate. That was the main reason on which the certificate was rejected by this Court. The case is clearly distinguishable on facts.

12. The same matter came up for consideration again before this Court in a later decision reported in M.G. Venugopalan v. E.V. Govindan 1976 CrL LJ 165. However, in the later case, the Chemical Examiner was examined in Court but was not asked what tests were conducted by him. Dealing with this question, Janaki Amma, J., observed as follows:

It is no doubt true that some of the rulings have referred to the specific gravity and furnace tests as modes of finding out the purity of gold. But nowhere it is stated that the certificate of an expert should contain the particulars of the tests conducted by him. On the other hand in the State of Kerala v. Mammu Musaliar 1974 KLT 792 : 1975 CrL LJ 409 (FB) a Full Bench of this Court has held that a Public Analyst under the Prevention of Food Adulteration Act need not state the method adopted or the technical processes involved in analysing the food. The identical principle should apply in the case of the opinion expressed by an expert that an article is gold of particular quality and purity. So long as no definite tests have been prescribed under law it is only a question of proof whether an article alleged to be gold is really gold and whether it is primary gold. It has to be borne in

mind that the opinion of an expert on a point that he is skilled is relevant under Section 45 of the Evidence Act. There is no reason why the evidence of P.W. 3 who is an experienced Chemical Examiner of the Customs department should not be given due weight. No material has been produced to discredit his testimony. No counter evidence is also produced...

I am in respectful agreement with the views expressed by Janaki Amma, J., in the above decision. On the facts and the evidence of the present case also, there does not appear to be any reason not to rely on the opinion given by P.W. 1 that M.O. 1 series are gold metal. P. Ws. 2 and 3 are also officers who have some experience in regard to gold metals. They have also deposed that the metal is gold. P.W. 6 is a certified goldsmith having experience in the line. He also deposed that the bars seized by the officers are made of gold. To the same effect is the testimony of the two witnesses P. Ws. 4 and 6. Under these circumstances, the Court below was right in holding that the articles seized are gold metal.

13. The next question is whether it is primary gold. Primary gold is defined in Section 2(r) of the Gold (Control) Act as meaning gold in any unfinished or semi-finished form and includes ingots, bars, blocks, slabs, billets, shots, etc. M.O. 1 series are in the form of bars and therefore they clearly come under the category of primary gold. In order to decide whether gold is primary gold or not, it is unnecessary to go into the question of its fineness. Whatever be the fineness of a bar of gold, it will be treated as primary gold if it is in the form described in Section 2(r) of the Gold (Control) Act. I am therefore in agreement with the view taken by the trial Court that M.O. 1 series consist of primary gold since they are in the shape of bars.

14. The evidence in the case makes it clear that the appellant has been in possession of primary gold. His conviction under Section 85(ii) of the Gold (Control) Act is correct and is confirmed. But there is no evidence to show that he has been carrying on any business or transaction in gold as contemplated in Section 85(ix) of the Gold (Control) Act. His conviction for the offence under Section 85(ix) cannot stand and is set aside.

15. In order that the appellant could be validly convicted under Section 135(1)(b) of the Customs Act, the prosecution must prove beyond reasonable doubt that M.O. 1 series gold bars are contraband articles, that is, are of foreign origin. If they are of foreign origin, it is for the appellant to show that he got possession of the same under some lawful authority. No lawful authority has been pleaded. If the finding that the bars are of the foreign origin is to be upheld, then the conviction also has to be upheld, if the appellant knows or has reason to believe that they are liable for confiscation under Section 111 of the Customs Act.

16. The trial Court has relied on Section 123 of the Customs Act to put the onus of proof to a limited extent on the defence. This is supported by the learned prosecutor before me. However, the learned Counsel for the appellant would contend that the trial Court was not justified in seeking the help of Section 123 of the Customs Act. Section 123(1) of the Customs Act states that where any goods to which the section applies are seized under the Customs Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be on the person from whose possession the goods were seized, etc., Section 123(2) states that the section shall apply to gold, diamonds and other articles. The trial Court has found and I have concurred with the finding that the bars seized from the appellant are of gold. Section 123 of the Customs Act applies to gold. It is for the prosecution to prove that the section applies to the particular goods seized and that the seizure was made in the reasonable belief that the goods are smuggled goods. If so, the burden of proving that they are not smuggled goods is shifted to the defence. We have already seen that the goods seized are goods to which the section applies since they consist of gold. The evidence of P. Ws. 2 and 3 would show that the goods were seized in the reasonable belief that they were smuggled goods. Of course, they must actually believe in it and the belief must be reasonable. We have already seen that the search was preceded by definite information received by a Police Officer P.W. 3 which was passed on to another Police Officer P.W. 2 who conducted the search and found five gold bars in the possession of the appellant in his house. The appellant did not have any reasonable explanation for his possession of the gold bars. The gold bars have also certain apparent foreign markings as follows: CREDIT SUISSE 999.0, 10 TOLAS, CHI ESSAYEUR, FOUNDEUR. Each bar

weighed about 116 grams while standard gold as contemplated by the Gold (Control) Act and the relevant Rules made under it, can have a weight only of 10 grams, 50 grams or 100 grams as seen in Schedule I to the Gold Control (Specification of Standard Gold Bars and Conditions of Refining) Rules, 1968. The definite case of the prosecution is that the markings referred to above are foreign markings.

17. It is argued by the learned Counsel for the appellant that marks are only hearsay evidence and are inadmissible in evidence. He has relied on the decisions reported in Assistant Collector, Customs, Baroda v. M. Ibrahim Pirjada 1970 CrL LJ 1305 and Assistant Collector of Customs v. Pratap Rao Sait 1972 KLT 307 to show that markings cannot be relied on. In the first of these decisions, the Gujarat High Court only held that mere markings could not be taken as proof of the fact that the gold was of foreign origin as the markings would be hearsay evidence. This dictum was followed by this Court in the latter decision referred to above. These decisions do not go to the extent of saying that the markings cannot be looked into for any purpose by any one. On the other hand, there are other decisions where it is laid down that markings can be looked into and relied on for certain purposes.

18. This Court went into the question again in the decision reported in Venugopalan v. Unnikutty Panicker 1977 KLT 1009 and distinguished the decision reported in Assistant Collector of Customs v. Pratap Rao Sait 1972 KLT 307. Dealing with the earlier decision, Janaki Amma, J., observed as follows:

The learned Judge then observed that it would 'be unwise from the markings alone to be drawn to the conclusion that the article is of foreign origin'. The decision is not an authority for the proposition that the markings on the articles cannot be used for any purpose. (para 10)

The further discussion reads as follows:

11. No authority has been brought to my notice which states that the appearance of an article which may include the existence of marks suggesting foreign origin should not be taken into account in deciding whether particular articles are

smuggled goods.. If that be so, the appearance of the goods, the inscriptions thereon, and the fact that the accused were not in a position to give proper explanation for the possession of such a large quantity of yarn in unopened bundles, are circumstances which can be taken into account by the Customs officials to form a reasonable belief under Section 123(1) of the Customs Act. The burden is, therefore, on the accused to show that the goods are not of foreign rights.

19. I am in respectful agreement with the dictum mentioned above. This dictum finds support in the observations of the Supreme Court in *Hukma v. State of Rajasthan* : 2008(228)ELT8(SC) where it was observed that the appearance of the goods, the manner of packing and the inscriptions on them and writing on the boxes are materials on the basis of which an inference could be drawn. Reliance is also placed by the counsel on the decision in *Jalil Ahmad v. State* 1979 CrL LJ 514. There can be no doubt that the shape, appearance and constitution of contraband articles, the inscriptions on them, the inability of the person in possession to explain these matters, could form the foundation for a reasonable belief in the mind of a seizing officer to believe that the goods are smuggled goods. The goods in this case consist of gold in the shape of bars containing foreign inscriptions. The appellant was unable at that stage to give any reasonable explanation for these goods. He never had any case that the markings were not genuine and were intended to deceive any one. Under these circumstances, there can be no doubt that the seizing officer had reasonable belief that the goods are smuggled goods. The seizure was also made under the Act since P.W. 2 was authorised to effect the seizure under Section 110 of the Act in view of the notification already referred to. Therefore, the burden is shifted to the appellant to prove that they are not smuggled goods. He has not adduced any evidence to discharge the burden.

20. It is established that the appellant was in possession of contraband gold of foreign origin containing foreign markings. The circumstances in which the contraband gold was found in his possession, would show that he knew or must have had reason to believe that they are contraband goods liable for confiscation. This state of mind is clearly inferable from the surrounding circumstances. Hence

the conviction under Section 135(1)(b) is unassailable.

21. The trial Magistrate has placed reliance on Exhibit P9 which is the statement recorded from the appellant by an Excise Official, P.W. 10, evidently under Section 107 of the Customs Act. The document contains certain admissions said to have been made by the appellant. Section 107 authorises a Customs Officer empowered in that behalf to record statements. Section 108 authorises any Gazetted Officer of the Customs, to summon any person and record his statement. There is no evidence to show that the person who recorded exhibit P9 was empowered under Section 107 of the Customs Act or was a Gazetted Officer of the Customs at that time as contemplated under Section 108 of the Act. Hence the learned Magistrate was not justified in placing reliance on Exhibit P9. However, the other evidence in the case fully supports the conclusion entered by the trial Court.

22. It is true that the learned Magistrate was lenient in the matter of sentence. He imposed only a very light sentence under Section 135(1)(b) of the Customs Act and did not impose a separate sentence under the Gold (Control) Act. It is argued by the learned Prosecutor that under Section 85(1)(a), proviso of the Gold (Control) Act, a minimum sentence of imprisonment for six months has to be imposed. But I find that punishment cannot be imposed on the appellant under Section 85(1)(a) of the Gold (Control) Act. The offence will fall only under Section 85(1)(b) of the Act which does not prescribe any minimum punishment. No doubt, the learned Magistrate ought to have imposed a sentence under Section 85(2) of the Gold (Control) Act. He has not done so. This was certainly not justified. However, in view of the fact that the offence was detected more than 12 years ago and in view of the other circumstances existing in the case, I do not propose to interfere with the sentence in any way.

In the result, the conviction and sentence entered by the trial Magistrate are confirmed. The appeal and the revision petition are dismissed.