

Assistant Collector of Central Excise Vs. Mohammed

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Court : Kerala

Decided On : Aug-06-1986

Reported in : 1987(11)ECC26; 1987(30)ELT113(Ker)

Judge : K. Sreedharan, J.

Acts : [Customs Act, 1962](#) - Sections 11, 108, 111, 112, 123, 123(1), 135 and 135(1); Imports and Exports (Control) Act, 1947 - Sections 3(2); Evidence Act - Sections 21; Sea Customs Act - Sections 178A

Appeal No. : Criminal Appeal No. 337 of 1982

Appellant : Assistant Collector of Central Excise

Respondent : Mohammed

Advocate for Def. : P.K. Mohammed, Adv.

Advocate for Pet/Ap. : P.V. Madhavan Nambiar, Adv.

Disposition : Appeal allowed

Judgement :

K. Sreedharan, J.

1. The Assistant Collector of Central Excise Integrated Divisional Office, Kozhikode filed a complaint against the respondent before the Chief Judicial

Magistrate's Court, Tellicherry. That Court entertained the same as C.C. No. 79/74 for offence under Section 135 of the [Customs Act, 1962](#). Since the accused was absconding it was included in the long pending cases. Subsequently the accused surrendered before court on 17-2-1978. Thereupon the case was refiled as C.C. 38/78. Later, the case was transferred to the file of the Judicial First Class Magistrate's Court, Kasaragod. There it was entertained as C.C. 559/79. After trial, the learned Magistrate acquitted the accused. Hence this appeal.

2. The allegations made by the complainant are as follows :-

On information that contraband goods were concealed in godown No. KMC 10/196 at Talangara, Kasaragod the Superintendent of Central Excise, Special Customs Preventive Unit, Kasaragod searched the godown in the presence of its owner Sri Kekkepuram Abbas, the Village Officer and other independent witnesses. The search yielded 53 gunny packed bundles containing textiles of foreign origin covered with coconut palm leaves. In the reasonable belief that they were smuggled into India in violation of the prohibition imposed under Section 11 of the Customs Act read with Section 3(2) of the Imports and Exports (Control) Act, 1947, they seized 53 bundles of fabrics. Those bundles were taken to the customs house where a detailed examination was done and an inventory prepared. The owner of the godown Sri Abbas stated that the godown was leased out to the accused Mohammed on a monthly rent of Rs. 20 for storing fish manure and that he did not know the accused of having stored contra- band articles in the godown. He produced an unregistered lease deed to justify his statement. On 13-7-1972 the accused appeared before the Superintendent of Central Excise. A statement under Section 108 of the Customs Act was recorded from him. He deposed that the godown was taken on lease by him and that he agreed to the request of one Shaik to arrange for storage of contraband articles. He also admitted the concealment and storage of the 53 bundles of foreign fabrics in the godown knowing them to be smuggled goods. The accused by arranging the concealment of the seized contraband goods has committed an offence under Section 135(1) of the [Customs Act, 1962](#). Under Section 123 of the Customs Act the burden of proving the seized bundles of fabrics are not smuggled goods shall be on the accused.

3. In order to prove the prosecution allegations P.Ws 1 to 5 were examined and exts. P1 to P8 were marked. The sample cloth taken from the seized bundles was marked as M.O.I. After considering the above evidence, the trial court came to the conclusion that the prosecution has not proved the case against the accused beyond all shadow of doubt. In this view the accused was acquitted.

4. The prosecution relies on the statement given by the respondent under Section 108 of the Customs Act and on the presumption under Section 123 of the Act to bring home the guilt of the respondent. So the question that arises for consideration is whether the respondent is guilty of offence under Section 135 of the Customs Act.

5. The Court below framed charge under Section 135(Ixb)(i) of the [Customs Act, 1962](#). The said section reads as follows :-

'Without prejudice to any action that; may be taken under this Act, if any person -

(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) in the case of an offence relating to any of the goods to which section 123 applies and the market price whereof exceeds one lakh of rupees, with imprisonment for a term which may extend to five years and with fine :

Provided that in the absence of special and adequate reasons to the contrary to be record in the judgment of the court, such imprisonment shall not be for less than six months;'

For a successful prosecution under the above provision, the prosecution has to prove (a) that the respondent had acquired possession or was in any way concerned in keeping or concealing the contraband article and (b) that the respondent knew or had reason to believe that these articles were smuggled goods and thus liable to confiscation under Section 111 of the Customs Act. Now it is -to be seen whether these ingredients have been established by the

prosecution.

6. At about 2 a.m. on 24-4-1972 P.W.I opened godown bearing KMC 10/196 and seized 53 bundles of textile goods. The seizure was effected by P.W. 1 in the presence of Abbas the owner of the godown, the Village Officer of Kasargod Village and other independent witnesses. Abbas gave a statement under Section 108 of the Customs Act. As per that statement the godown was rented out to the respondent on a monthly rent of Rs.20, Rent deed executed by the respondent was produced before P.W. 1. It is marked as Ext. P3 in this case. Respondent appeared before P.W. 1 and he gave a statement under Section 108 of the Customs Act. That statement is marked in this case as Ext. P4. In Ext. P4 the respondent admits the rental arrangement. The question that arises is whether the statement given by the respondent under Section 108 can be acted upon and whether Ext. P3 rent deed is taken as validity proved.

7. The respondent appeared before P.W.I in pursuance to notice under Section 108 of the Customs Act on 18-7-1972. After due compliance with the requirements of law P.W.I questioned the respondent and recorded his statement under Section 108 of the Customs Act. At the time when the statement was recorded the respondent was not accused of any offence. Therefore that statement is clearly admissible under Section 21 of the Evidence Act as admission of incriminating facts [Vide *Veera Ibrahim v. The State of Maharashtra* (1976) 2 SCC 302].

8. Ext. P3 contains the signature of the respondent who was the lessee. His signature in Ext. P3 has got striking similarity to the signatures affixed by him in the bail bond executed by him on 21-6-1974 in favour of the Chief Judicial Magistrate, Tellicherry and also to the signature affixed by him in the 'summons to the accused' on 31-5-1974. On the various pages of his statement under Section 108 he had affixed his signatures. The signature on the first page of Ext. P4 has striking similarity, with that seen in Ext. P3. The owner of the building who gave statement under Section 108 of the Customs Act, admitted the rental arrangement and the execution of Ext. P3. Ext. P3 as stated earlier was executed by the respondent in favour of said Abbas. The lower Court observes that the person in whose favour Ext. P3 was executed could not be examined because he was

reported dead. In view of the above circumstances, I hold that the prosecution has succeeded in establishing the respondent's possession of godown No. KMC 10/196.

9. P.W.I searched the godown on information that contraband goods were concealed in it. Before breaking open the lock of the godown he secured the presence of the local Village Officer and the owner of the godown. Other independent witnesses were also present. In their presence the godown was broken open. The Village Officer swears to the breaking open of the godown as P.W.3. The Court below doubted the search and seizure conducted by P.W.I on the ground that the lock which was broken open was not produced before court and on the ground that P.W.I did not try to get the key of the lock from the respondent. The evidence now before Court will not go to show that the respondent was available at the locality at the time when P.W.I effected the seizure. So, the Court below was wrong in finding fault with P.W.I's failure in getting the key from the respondent. The non-production of the broken lock in Court is not at all a sufficient ground to discard the seizure which is otherwise found to be acceptable.

10. The textile fabrics which were seized were subjected to chemical examination. P.W.5 is the Chemical Examiner of Customs House, Cochin. After chemically examining the fabrics he gave an opinion 'It is fabric mainly composed of synthetic yarn'. Ext. P4 is the report signed by P.W.5. P.W.5 gave evidence before Court to the effect that in 1972-73 the Government of India had not given permission to manufacture the textile goods having the same composition. He has further stated 'From my experience, feel, marking, finish and analytical report I can find that it was of foreign origin'. In cross-examination he stated 'During 1972-73 the Textile Commissioner did not allow to manufacture such composition manufactured in India'. Nothing has been brought out to discredit his testimony and his report. Therefore the article seized were established to be of foreign origin.

11. Section 123 of the Customs Act as it stood in 1962 reads as follows :

'(1) where any goods to which this section applies are seized under this 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.

(2) This section shall apply to gold, diamonds, manufactures of gold Or diamonds, watches, and any other class of goods which the Central Government may by notification in the Official Gazette specify.'

The Custom Officers have seized the goods in the reasonable belief that they are smuggled goods. The goods so seized are now established to be of foreign origin. So the burden of proving that the goods seized are not smuggled goods is on the respondent. The scope and effect of the similar provision contained in the Sea Customs Act came up for consideration before the Supreme Court in Kewal Krishnan v. State of Punjab AIR 1967 SC 737. (Section 178A of the Sea Customs Act is identically worded as Section 123(1) of the Customs Act). Their Lordships observed :

'It is quite clear that when Section 178A of the Sea Customs Act provides that when the goods are seized in the reasonable belief that they are smuggled goods, then the burden of proving that they are not smuggled goods is on the person from whose possession the goods are seized. The onus is on him to show that the goods are not smuggled, that is, not of foreign origin of which duty is not paid. The onus is not on the prosecution to show that the goods are not of Indian origin'.

The respondent has not let in any evidence worth the name to discharge the said burden. Therefore it has only to be found that the respondent was in possession of goods of foreign origin. The learned counsel appearing for the respondent contend that the goods seized in the case will not come within the purview of Section 123 because it is not mentioned in Clause 2 of that section. Nor was it specified in any notification of the Central Government published in the official gazette. This argument is not tenable. By notification No. 52-Cus dated 27th March, 1968 fabrics made wholly or mainly of synthetic yarn are included within the purview of Section 123 of the Customs Act. In view of this notification the statutory presumption under Section 123 can be invoked by the prosecution.

12. Once it is found that the respondent was in conscious possession or keeping of smuggled goods it will follow as a necessary corollary there- from that he had the 'mens rea' requisite under Clause (b) of Section 135(1) of the Customs Act. At this juncture I think it worthwhile to quote the following observation of the Supreme Court from *State of Maharashtra v. Natwarlal* (AIR 1980 SC 593). 'The provisions of Section 135(1) and like statutes which are designed to suppress smuggling have to be construed in accordance with the mischief rule first enunciated in *Heydon's case*. Accordingly the words 'acquires possession' or 'keeping' in Cl. (b) of Section 135(1) are not to be restricted to 'possession' or 'keeping' acquired as an owner or a purchaser of the goods. Such a narrow construction - which has been erroneously adopted by the High Court - in our opinion would defeat the object of these provisions and undermine their efficacy as instruments for suppression of the mischief which the Legislature had in view. Construed in consonance with the scheme of the statute, the purpose of these provisions and the context, the expression 'acquires possession' is of very wide amplitude and will certainly include the acquisition of possession by a person in a capacity other than as owner or purchaser. This takes its colour from the succeeding phrase commencing with the word 'or' which is so widely worded that even the temporary control or custody of a carrier, remover, depositor, harbourer, keeper, or dealer of any goods which he knows or has reason to believe to be smuggled goods or prohibited goods (liable to confiscation under Section 111), cannot escape the tentacles of Clause (b).'

13. The Court below found fault with the prosecution is not producing the seized articles before the Court. When the case was pending before the Chief Judicial Magistrate's Court, Tellicherry, the prosecution filed CrI. M.P. 1590/78 praying for taking samples of the articles and to allow the remaining portion to be disposed of by the department. Since that application was not opposed, the learned Magistrate allowed the same- in pursuance to that order one bundle was opened by Court in the presence of Sri T.P.. Hussain, the defence Counsel and P.W.I. One piece of fabric measuring 30 yds was taken out as sample for keeping in Court. That sample kept in a sealed packet was forwarded to the Chief Judicial Magistrate's Court, Tellicherry. to the Judicial First Class Magistrates Court, Kasargod on 14-5-1980. The Court at Kasargod received that packet on 16-5-1980 and the same is

marked in this case as M.O.I. In view of these circumstances, the learned Magistrate was clearly in error in finding fault with the prosecution for not producing the entire goods seized before court.

In view of what has been stated above, I hold that the prosecution has succeeded in bringing home the guilt of the respondent under Section 135(1)(b)(i) of the [Customs Act, 1962](#). He is convicted of that offence. The smuggled goods were seized on 24-4-1972. More than 14 years have lapsed. The textile goods which were seized were confiscated under Section 111 of the Customs Act as far back as on 26-2-1973. A penalty of Rs. 20,000 was also imposed on the respondent under Section 112 of the Customs Act. On account of this long lapse of time and in the light of the order passed in adjudication I do not consider it just and proper to impose a sentence of imprisonment on the respondent. I think a fine will meet the ends of justice in this case. Therefore the respondent is sentenced to pay a fine of Rs. 5,000. In default of payment of fine he will undergo rigorous imprisonment for one year. The Appeal is allowed in the above terms.