

ibrahim Ismail Vs. Superintendent of Customs and ors.

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Court : Chennai

Decided On : Sep-24-1993

Reported in : 1994(45)ECC65

Judge : Ratnam and ; Somasundaram, JJ.

Appeal No. : Writ Appeal No. 2006 of 1992

Appellant : ibrahim Ismail

Respondent : Superintendent of Customs and ors.

Disposition : Appeal dismissed

Judgement :

ORDER

Ratnam, J

1. This Writ Appeal has been preferred against the order in W.P. No. 13125 of 1992 [reported as Ibrahim Ismail v. The Superintendent of Customs, Madras Airport and Ors. in : 1993(65)ELT174(Mad)] dismissing the writ petition of the appellant for a declaration that the proviso to Section 124 of the Customs Act, 1962, hereinafter referred to as 'the Act', providing for giving of notice referred to in Clause (a) and representation referred to in Clause (b) of Section 124 may be oral at the request of the person concerned, is unconstitutional and violative of Articles 14, 21 and 300-A of the Constitution of India. There were two other prayers in the

writ petition ancillary to the main relief prayed for. Having regard to the limited scope of the constitutional validity of the proviso to Section 124 of the Act, it is unnecessary to set out the facts in extenso, except to state that by order dated 29-6-1992, passed by the second respondent herein, confiscation of certain goods and imposition of penalty had been ordered. Before the learned Judge, several grounds were urged by learned Counsel for the appellant to support the stand of the appellant that the proviso to Section 124 of the Act is unconstitutional but none of the contentions so advanced on behalf of the appellant was accepted. Ultimately, the learned Judge dismissed the writ petition, the correctness of which is questioned in this appeal.

2. Before us also, learned Counsel for the appellant reiterated the contentions put forward before the learned Judge. It was urged that the proviso enabling giving of an oral notice and the acceptance of oral representation dispensing with the issue of a written notice and written representation is violative of Articles 14, 21 and 300-A of the Constitution. The proviso was characterised as being vague, uncertain and arbitrary as well, as no guidelines had been indicated for invoking the proviso. The complexity of the provisions of the Act and the Rules, Regulations and the notifications issued from time to time were also pressed into service, to contend that an oral show-cause notice by an official and an oral representation by the person concerned would be not effective and would defeat the very purpose of the issue of show-cause notice prior to confiscation of goods. It was also contended that the Officer issuing the oral show-cause notice and receiving oral representation may not be the same officer, who orders confiscation or impose penalty and the latter may not be aware of the grounds in the oral show-cause notice or the representation. It was also submitted that uncontrolled and unbridled discretion is given to the officer leaving it almost to his will and pleasure to give oral notice and accept oral representation. Counsel also pointed out that two different kinds of procedures, not based on any intelligible differentia, have been introduced with no relation to the object sought to be achieved. The proviso, when invoked, enables a person to even waive his fundamental right, according to learned Counsel. It was also further contended that the proviso is violative of Articles 21 and 300-A of the Constitution. Reliance in support of the aforesaid contentions was also placed on some decisions to which a reference shall be

made later.

3. Before proceeding to examine the contentions put forward, it would be necessary to briefly notice the provisions in Chapter XIV of the Act, of which Section 124 is one. Sections 111 and 112 of the Act provide for confiscation of improperly imported goods and for levy of penalty for improper importation of goods. Under Section 113, the export goods liable to confiscation have all been catalogued. The penalty for attempt to export goods improperly is provided for under Section 114. Section 115 enumerates the conveyances liable to confiscation. Sections 116 and 117 deal with penalties for non-accounting for the goods and for contravention of the provisions of the Act, not expressly mentioned. Sections 118 to 121 deal with confiscation of packages, their contents, confiscation of goods used for concealing smuggled goods, confiscation of smuggled goods irrespective of change in form and confiscation of sale proceeds of smuggled goods. The adjudicating authorities for the purposes of confiscation or levy of penalty, have been enumerated under Section 122. Under Section 123, the burden of proof in certain cases has been stated. Section 125 deals with option to pay fine in lieu of confiscation, while Section 126 provides for the consequences of confiscation. Under Section 127 provision is made that an order of confiscation or penalty shall not prevent the imposition of any punishment to which the person affected is liable under the provisions of Chapter XIV of any other law. Having thus taken note of the provisions of Chapter XIV of the Act, it is necessary to refer to Section 124 of the Act which runs as follows:

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:

Provided that the notice referred to in Clause (a) and the representation referred to in Clause (b) may, at the request of the person concerned be oral.

From Section 124 referred to above, it is seen that the following requirements have to be fulfilled before an order confiscating goods or an order imposing any penalty on any person is made:

(1) the issue of notice informing the person affected of the grounds on which it is proposed to confiscate the goods or impose a penalty,

(2) giving of an opportunity to that person to make a representation within such reasonable time as may be specified in the notice against the grounds for confiscation or imposition of penalty and

(3) the giving of a reasonable opportunity to the person concerned to be heard. The proviso enables the person concerned to exercise an option to dispense with the notice in Clause (a) and also the representation referred to in Clause (b) of Section

124. In other words, by the exercise of an option, the owner of the goods or the person against whom an order confiscating goods or imposing penalty is to be made, can dispense with the issue of a written notice and submission of a written representation and in such a case, the notice as well as the representation could be oral. The purpose behind the proviso is not far to seek. There may be cases, where the person concerned may desire to have an expeditious adjudication avoiding the delay that may occur in the process of sending a written notice and submission of a written representation. Equally, there may be cases where the nature of the goods is such that there is an immediate necessity for completing the adjudication process as early as possible from the view point of the person affected. There may also be a variety of other circumstances which would require

an expeditious adjudication process and it is only to enable such persons and assist them to have the benefit of an early adjudication, which otherwise may consume quite some time, the proviso had been introduced and that too, for the benefit of the person concerned. Under the proviso, it is not as if any right had been conferred on the authorities to dispense with the prescribed procedure under Clause (a) and Clause (b) of Section 124 as they like. There is no scope for any doubt or ambiguity insofar as the applicability of the proviso is concerned, as it can be invoked only when the person concerned makes a request to that effect, but not otherwise. When under the proviso an option is exercised by the person concerned to be satisfied with oral notice and oral representation, only then, the proviso stands attracted and it is not as if the authorities have any choice regarding the procedure to be followed under Section 124(a) and (b) or the proviso. When the request is made by the person concerned to be satisfied with an oral notice and oral representation, the authorities can dispense with the procedure prescribed under Clause (a) and (b) of Section 124, but this cannot be at their pleasure. In this case, there is no dispute that the appellant had opted for an oral notice and representation and also made a request for the same and thereafter, the appellant cannot be heard to complain that the oral notice and oral representation are either bad or invalid. The argument that there is vagueness and arbitrariness associated with the proviso and that guidelines for invoking the proviso have not been prescribed, has, in our view, no substance. In view of the clear terms of the proviso, it would be wholly unnecessary to prescribe or lay down further guidelines for invoking the proviso. Likewise, the argument that handling of the adjudication process by different officers at different stages would render the oral show-cause notice and representation ineffective and defeat the object of the notice and representation, cannot be accepted, for, in the case reported in *M/s. Pannalal Binjraj v. Union of India*, : [1957]1SCR233 , the Supreme Court pointed out that there is a presumption that the officials will discharge the duties honestly and in accordance with the rules of law and that if there is an abuse of such power, the parties aggrieved are not without ample remedies under the law and in such cases, the abuse of power will be struck down, but not the provision which invests the authority with the power. It cannot be assumed that the officers will act irregularly and on that basis the proviso can be invalidated. The non-specification

of the goods to which the proviso is applicable would not, in our view, render the proviso vague, for, on a reading of the proviso, it is clear that it would be applicable to all cases in which an order of confiscation of goods or imposition of penalty is proposed to be made, and this will be so irrespective of the nature of the goods or their value. The submission that the provision for oral notice and oral representation is inherently bad and not constitutional, has no substance. Reliance placed by learned Counsel for the appellant on *Harikishan v. State of Maharashtra* : AIR 1962 SC911 is also of no avail. Even if the notice is oral, but is understood by the person concerned so as to inform him of the grounds on which the order is proposed to be made, then, in our view, that would be sufficient to fulfil the requirements of the law as a valid notice. In such a case, the notice, though oral, makes the person concerned aware of the grounds put against him and though it may be that the proviso does not prescribe the language to be used, it is implicit that such oral notice should be in a language, which can be understood by the person concerned. The decision reported in *Harikishan's case* : AIR 1962 SC911 dealt with the scope of a 'communication' of the grounds in relation to Article 22(5) of the Constitution, with respect to a person detained under the provisions of the Preventive Detention Act, 1950. It was in that context the Supreme Court laid down that if a person is not conversant with the English language, in order to satisfy the requirements of the Constitution, the detenu must be given the grounds in a language which he can understand and in a script which he can read, if he is a literate person. This decision, in our view, cannot have any application whatever with reference to the proviso under Section 124 of the Act, which enables the person concerned to exercise an option for oral notice and oral representation. When it is not the case of the appellant that the oral notice was in a language with which he was not acquainted, we do not see how the appellant can have any cause for complaint at all. The appellant cannot, therefore, be stated to have been deprived of knowledge of the grounds on the basis of which the order confiscating the goods or imposition penalty, was to be passed.

4. With reference to the arbitrary and uncontrolled discretion said to have been given to the officers to pick and choose cases in which oral notice and written notice can be given, it may be pointed out that the giving of oral notice, would at all arise only if a request in that behalf is made by the person concerned and the

choice of oral notice or written notice is not left with the authorities. The contention that under Section 124(a) and (b) of the Act and the proviso thereunder, two different procedures have been prescribed is also without any substance. Section 124(a) and (b) lay down the procedure to be adopted generally, while the proviso applies to a separate class of persons, who have made a request for oral notice and representation. The object of the section being only to put the person concerned on notice of the grounds on which it was proposed to confiscate or levy a penalty, that is not defeated, in any manner, by the oral notice and the representation and such oral notice and representation can be as effective as a written notice and representation and the proviso cannot, therefore, be stated to be totally unconnected with the object sought to be achieved by Section 124(a) and (b) of the Act and the proviso thereunder.

5. The submission that a request for oral notice and a representation, when made by a person, amounts to waiver of fundamental right and that is invalid and opposed to law, cannot be accepted, for we are unable to see any fundamental right with reference to any particular procedure. All that the appellant can put forward as a fundamental right is a fair and reasonable opportunity to be informed of the grounds against him and an effective opportunity to make representations and for a fair hearing as well. The right of the appellant, at best, can be to have a fair enquiry which accords with the principles of natural justice and the exercise of an option to have an oral notice does not, in our view, amount to giving up any right to have such notice. In other words, there is no waiver by the appellant of any right to have notice, but he had only chosen the mode of such notice as oral instead of in writing. There can, therefore, be no waiver of any fundamental right by the appellant, when he opted out for oral notice and representation in terms of the proviso. In *Bashesshar Nath v. Income Tax Commissioner* AIR 1959 SC 149 referred to by learned Counsel, it was laid down that it was not open to a person to waive his fundamental right conferred under Part III of the Constitution. Similarly in *Olga Tellis v, Bombay Municipal Corporation* : AIR 1986 SC180 , it was held that there can be no estoppel against the Constitution and there can also be no waiver of any fundamental rights. We have carefully considered the aforesaid decisions and we are of the view that they do not in any manner assist the appellant. Our attention was also invited to some observations in *Maneka Gandhi v. Union of*

India : [1978]2SCR621 but as we pointed out earlier, by reason of the exercise of an option under the proviso, there is no question of waiver of any right much less any fundamental right under Article 21 of the Constitution of India. We are also of the view that the contention that Article 300-A of the Constitution is violated, has no substance. Even by the order dated 25-5-1992, the appellant had been clearly informed that an appeal against that order would lie under Section 128 of the Act and it is always open to the appellant to prefer an appeal and put forward all contentions that are available to him touching on the merits of the controversy. The writ appeal is, therefore, dismissed.

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