

Thandulal Dhanuka Vs. the State

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Court : Kolkata

Decided On : May-02-1963

Reported in : AIR1964Cal490,1964CriLJ536

Judge : Amaresh Roy, J.

Acts : Sea Customs Act, 1878 - Sections 167(8), 168, 172, 179, 182 and 184

Appeal No. : Criminal Revn. Case Nos. 392 and 393 of 1963

Appellant : Thandulal Dhanuka

Respondent : The State

Advocate for Def. : Anil Kumar Sen, Adv.

Advocate for Pet/Ap. : Ajit Kumar Dutta, ;Nikhil Chandra Talukdar, ;Anath Bandhu Pal, Advs. (in Cr.R. No. 392 of 1963) and ;Nikhil Chandra Talukdar, Adv. (in Cr.R. No. 393 of 1963)

Judgement :

ORDER

Amaresh Roy, J.

1. These two Revision Cases have been heard together as they arise out of the same case now pending in the Court of the Chief Presidency Magistrate, Calcutta,

and raise same point regarding the power and control of the Court of the Magistrate over the goods seized by the Customs authorities upon search warrant issued by the Magistrate under Section 172 of the Sea Customs Act.

2. Relevant facts for the purpose of these two cases are that a proceeding started in the Court of the Chief Presidency Magistrate, Calcutta, when on September 16, 1962, two persons were produced in that Court under arrest under Section 175 of the Sea Customs Act. On that day, on the prayer of the Customs authorities, search warrants were directed to be issued by the learned Chief Presidency Magistrate. On the next day, that is, September 17, 1962, an application was made by the Customs authorities that as a result of the searches on the previous day, they had reasons to suspect that the documents connected with illegal importation of goods seized at those previous searches and contraband goods are secreted in the Locker No. 236B at the United Bank of India, Jorasanko Branch. In accordance with the prayer in that petition, the learned Chief Presidency Magistrate issued search warrant for seizure of the contents of that locker No. 236-B to wit the documents and contraband goods. On September 27, 1962, an application was made to the Chief Presidency Magistrate by an officer of the Bank to direct that the locker may not be broken upon by ordinary mistries which will damage the locker but to have the Locker forced open by the manufacturers of the Locker Messrs. Godrej Boyce and that direction was made by the learned Chief Presidency Magistrate.

3. The search warrant issued by the Chief Presidency Magistrate on September 17, 1962, was executed on October 1, 1962, and wrist watches, Indian Currency Notes and documents etc., were seized from Locker No. 236-B. The Customs authorities made an application to the Chief Presidency Magistrate on October 3, 1962, and, on their prayer the seized articles were permitted by the Chief Presidency Magistrate to be retained by the Customs authorities for 'three months as prayed for' and he directed them to report by January 4, 1963. On January 4, 1963, upon the report made by the Customs authorities, the learned Chief Presidency Magistrate 'permitted them to retain the seized materials until further order in respect of Locker No. 236-8 in the Safe Deposit Vault of the United Bank of India as prayed for.' On February 20, 1963, prayers were made before the Chief

Presidency Magistrate by Thandulal Dhanuka and Ramprosad Dhanuka for return to them of Rs. 71,000/- and silver coins and 385 wrist watches seized from the Locker No. 236-6. On February 21, 1963, the Customs authorities made a report regarding the currency notes, silver coins and watches and the matter was heard on March 9, 1963, and orders were reserved by the learned Chief Presidency Magistrate for March 13, 1963. Before an order was made, however, on March 9, 1963, a formal complaint was made by Sri S. N. Banerjee, Assistant Collector of Customs and Superintendent, Preventive Service, Calcutta Customs, against 18 accused persons including Ram Prosad Dhanuka and Thandulal Dhanuka, who are accused Nos. 10 and 11 respectively in that complaint, alleging offences under Section 167(81) of the Sea Customs Act. Cognizance of that alleged offence was taken by the learned Chief Presidency Magistrate on March 9, 1963.

4. That was the stage of the proceedings before the learned Chief Presidency Magistrate when on March 13, 1963. his orders rejecting the prayer for return of the currency notes and watches were passed.

5. In that order dated March 13, 1963, while referring to the 'generally acceptable position' that the orders for disposal of articles seized by virtue of search warrant issued by any Court can be passed by that Court, the learned Chief Presidency Magistrate held that 'different considerations may arise in the case of seized articles which are dutiable and prohibited or otherwise liable to confiscation.' In view of the fact that adjudication proceedings have already been started by the Customs Authorities with regard to the wrist watches on the ground that these are contraband and with regard to the Indian Currency Notes on the ground that these are liable to confiscation under Section 168 of the Sea Customs Act, the learned Chief Presidency Magistrate thought that the Customs authorities have assumed control over the currency notes under Sections 178 and 179 of the Sea Customs Act on the ground that these are liable to confiscation under Section 168 of the Act and he held that they alone are competent to pass orders for their disposal. The learned Chief Presidency Magistrate, therefore, held that he was not competent to make any order regarding disposal of the wrist watches and the currency notes which are subject-matter of adjudication proceedings and rejected the prayer for their return. He, however, made an order for return of the seized silver coins to

Thandulal Dhanuka, presumably because there was no adjudication proceeding under Section 182 of the Act in respect of those coins.

6. Against that, Thandulal Dhanuka has moved this Court for an order for the return of the Indian Currency Notes of the value of Rs. 71,000/- and that has given rise to Criminal Revision Case No. 392 of 1963. Ramprosad Dhanuka has moved this Court for an order for return of 385 wrist watches and that has given rise to Criminal Revision Case No. 393 of 1963.

7. Mr. Ajit Kumar Dutta appearing for the petitioner in Cr. Revision 392 of 1963 has contended that the learned Chief Presidency Magistrate has erred in law in thinking that the mere fact that an adjudication proceeding under Section 182 of the Sea Customs Act has been started deprives the Court of the Chief Presidency Magistrate of his power to make order for disposal of the property seized by search warrant issued by that Court. Mr. Dutta relied as an authority on the decision of this Court reported in *S. K. Srivastava v. Gajanand Patriwalla*, : AIR1956 Cal609 and also on the Supreme Court decision in the case of *Mohammad Serajuddin v. R. C. Misra*, reported in : 1983(13)ELT1370(SC) , where the Supreme Court has not only approved of the general powers of control over seized goods by the Court on whose search warrant they were seized, as held by Sen, J. in the decision of this Court referred to above, but also their Lordships of the Supreme Court held that the Magistrate's jurisdiction is both under Section 172 Sea Customs Act and the Code of Criminal Procedure for issuing a search warrant and after the warrant was issued it is for him to decide in the circumstances of each case whether he would make them over to the Customs authorities or not. The attitude of abdication of those powers by the learned Chief Presidency Magistrate only because of the initiation of an adjudication proceeding under Section 182 of the Sea Customs Act has been assailed by Mr. Dutta also on the authority of the Supreme Court decision where their Lordships have said that where the Customs authorities have been somewhat indiscriminate in their seizure, the Magistrate may find it necessary to have the goods or documents scrutinised under his control, so that goods or documents not really subject to the Sea Customs Act are not retained for an unduly long time.

8. Mr. Nikhil Chandra Talukdar appearing for the petitioner in Cr. Rev. Case No. 393 of 1963 has adopted the arguments of Mr. Dutta and has contended that his client has papers and documents to show that he is an innocent purchaser of those watches for valuable consideration and the watches are not liable to confiscation.

9. Mr. Anil Kumar Sen, appearing for the State in both the cases, has contended that, though it is true that the Magistrate has the general control over the goods seized under search warrant issued by him, once the goods have been seized on the ground that they are liable to confiscation in exercise of powers under Section 178 of the Act, they must be delivered to the care of the Customs authorities under Section 179 of the Sea Customs Act and, on the question whether or not any of the articles are liable to confiscation, the authority to decide is only in the Customs Authorities. When, therefore, an adjudication proceeding under Section 182 has been started, the Magistrate has no power to direct any such article to be returned or disposed of in any manner.

10. Mr. Sen has also argued that the Magistrate has only the general power of control until the Customs authorities assume custody of the seized goods under Section 179 of the Act. Once they have done so, decision as to what goods are liable to confiscation is the exclusive jurisdiction of the Customs Authorities and that the Magistrate is not competent to decide whether the locker in the Safe Deposit Vault of a Bank is a 'package' within the meaning of Section 168 of the Sea Customs Act, so as to make all contents of the locker liable to confiscation under that section. Mr. Sen, however, concedes that a locker in the Safety Vault of Bank may not be a 'package' or at least that question may be Very much arguable. But he contends that, once an adjudication proceeding under Section 182 has been started, the Magistrate cannot proceed to decide that question even. If the Customs authorities make an unreasonable decision holding that a locker is a 'package', then the remedy of the party is by way of appeal under the pro-visions of the Sea Customs Act or, if the order is made mala fide, then by invoking a Writ under Article 226 of the Constitution.

11. Mr. Sen also argued that at least as a matter of propriety and prudence, the Court of a Magistrate should avoid the possibility of conflict between the order passed by Customs authorities by not making an order for disposal until the Customs authorities have concluded the proceedings for confiscation under Section 182. Mr. Sen, therefore, sought to justify the learned Magistrate's disinclination to make any order for disposal on the ground of discretion properly exercised by the learned Magistrate.

12. These contentions advanced on behalf of the State as the prosecutor in the criminal trial for alleged offence under Section 167(81) of the Sea Customs Act now pending in the Court of the Chief Presidency Magistrate have the countenance of an attempt at curtailing the authority of that Court to the extent of almost completely depriving that Court of any power in respect of control over the 'alamats' (either goods or documents or both seized upon search warrant issued by that Court. In support of his contentions, Mr. Anil Kumar Sen placed reliance on a passage in the judgment of Sen, J. reported in : AIR1956 Cal609 which reads:

'Any express provision of the Sea Customs Act as to final disposal would no doubt have to be given effect to in respect of the dutiable and prohibited goods seized in execution of a search warrant. Section 179, Sea Customs Act provides that all things seized on the ground that they are liable to confiscation under this Act shall, as soon as conveniently may be, delivered into the care of any Customs officer, authorized to receive the same. The terms of Section 179, Sea Customs Act are not inconsistent with seizure by the police and production before the Magistrate. They rather imply that procedure, and provide for what the Magistrate or the police with the Magistrate's consent should do in respect of the disposal of the particular class of goods seized.'

12a. This is the view on Section 179, Mr. Sen says, that the Supreme Court has approved in the decision reported in : 1983(13)ELT1370(SC) where it has been said; 'In our opinion, the view expressed by Sen, J. is correct.' I have no hesitation in holding that Mr. Anil Sen's reading of those two decisions is not at all correct. A careful reading of the judgment of Sen, J., : AIR1956 Cal609 would show that a distinction in the extent of magisterial control was made by that learned Judge of

this Court between goods, which are dealt with by Section 179 of the Sea Customs Act, and documents regarding which there is no specific or express provision in that Act. It is clearly revealed in the passage immediately following that portion of the judgment which Mr. Anil Sen relied on. That passage is:

'There is no such provision, however, in respect of the documents seized in execution of a search warrant under Section 172, Sea Customs Act. Accordingly, in respect of the documents the issuing Magistrate's jurisdiction remains unfettered. He must no doubt allow the Customs authorities at whose instance the seizure was made sufficient opportunity to scrutinise the books and papers, but ultimately the disposal of the books and papers must be under the Magistrate's order. There is nothing in the Sea Customs Act to show that the Customs Collector is the final authority to dispose of the papers and books seized in execution of a search warrant under Section 172, Sea Customs Act.'

The Supreme Court in Mohammad Serajuddin's case, : 1983(13)ELT1370(SC) of the judgment at pp. 762-63 of the report, obliterated that distinction sought to be made by Sen, J. between goods and documents, and only differentiated between the nature of control before and after issue of warrant under Section 172. Their Lordships of the Supreme Court held :

'A Magistrate thus has jurisdiction the moment an application for warrant is made before him and proceedings on that application can be said to have started under the Code. Section 172 of the Sea Customs Act by its second paragraph brings into operation the provisions of the Criminal Procedure Code, and, therefore, the Magistrate's jurisdiction is both under Section 172 of the Sea Customs Act and the Criminal Procedure Code. There can be no doubt also that unlike Section 96, the Magistrate is to be guided by the belief of the Customs authorities though he may prevent undue harassment in cases where it can be seen that the belief is not entertained by the Customs Officer or his action is mala fide. The Magistrate is certainly entitled to satisfy himself about the belief of the Customs Officer, but is not required to make up his own mind independently of that belief. To this extent only is the matter in the control of the Magistrate, before he issues the warrant.'

Their Lordships of the Supreme Court proceeded in that judgment to say:

'After the warrant is issued, it is on order of the Magistrate enabling the Customs authorities to take action, for without warrant, they cannot enter any house or premises. The warrant of the Magistrate, so to speak, opens the door for entry into a house or premises, and the authority to do so is based upon the Magistrate's order. The forms prescribed under the Code require that articles seized as a result of the warrant should be brought into Court, and a Magistrate, who issues a search warrant, is entitled to see that his warrant is not abused, and has been properly executed. In a suitable case, of course, a Magistrate may amend, the warrant dispensing with the production of the goods or documents before him. That, however, would be in a clear case only; but if the Magistrate so desires, he need not amend the forms, and may keep the control of the goods or documents in himself. This he may find necessary to do, so that the warrant issued by him is not abused or made the instrument of harassment. A condition, therefore, in the warrant that the goods or documents should be produced before the Magistrate must be complied with, and once the goods or documents have been produced before the Magistrate, it is for him to decide, in the circumstances of each case, whether he would make them over to the Customs authorities or not.'

13. It is clear, therefore, that while the view of Sen, J. on the extent and nature of control of the Magistrate flowing from Section 172 was approved by the Supreme Court, the view of that learned Judge of Section 179 regarding the goods seized was not approved by the Supreme Court by holding that not only documents but also goods seized remain under the control of the Magistrate on whose search warrant they are seized. That it is for the Magistrate to decide what goods or documents are not liable to confiscation under Section 168 of the Sea Customs Act either for the purpose of seizure or for the purpose of being given to the care of the Customs authorities has been expressed by their Lordships of the Supreme Court by saying at the end of paragraph 12 at p. 763 of the Report:

'Where' the Customs authorities have been somewhat indiscriminate in their seizure, the Magistrate may find it necessary to have the goods or documents scrutinised under his control, so that goods or documents not really subject to the Sea Customs Act are not retained for an unduly long period.'

14. That being the law stated by the Supreme Court, the learned Chief Presidency Magistrate, in the present case, was grossly in error in declining to exercise the power which he has under the law and in thinking that only authority to exercise such power was the Customs authorities. He is not right also about his own records when he says in the impugned order that Customs authorities have assumed control of the watches and money seized under Sections 178 and 179 of the Sea Customs Act, because it was by his order only that the Customs authorities have been allowed to hold the watches and money for specified periods. It is also to be noticed that the search warrant that was issued by the learned Chief Presidency Magistrate on September 17, 1962, there was no amendment of the form made and that warrant required that the articles seized should be produced before the Magistrate. That an adjudication proceeding under Sec-182 has been commenced does not make any difference nor bring about any deficiency in the powers of the learned Magistrate to decide what articles are really subject to Sea Customs Act, that is liable to be confiscated under Section 168, or what is a 'package' within the meaning of that section or what are the goods that are seized on the ground that they are liable to confiscation for the purpose of Section 179 to be given to the care of the Customs authorities. For making decision on these points, the statement of the belief in the application under Section 172 that induced the learned Chief Presidency Magistrate to issue the search warrant and also the terms of the search warrant may be dependable guides for deciding what was seized on the ground that they are liable to confiscation. That is to because without the authority, of the search warrant of the Magistrate, the goods could not have been seized at all. If the particular articles were seized on the ground that they are liable to confiscation as those were in the same 'package' with goods for seizure of which search warrant was issued, then what is a 'package' within the meaning of Section 168 need also be decided by the Magistrate. The learned Advocate for the State Mr. Sen argued that authority to decide whether the Locker No. 236B is a 'package' is the Customs authorities in proceeding under Section 182; yet even he was hesitant before me to contend that a locker in the safety vault of a bank can by any modicum of reasons, be called a 'package' for obtaining tie effect that not only all its contents but the locker itself will be liable to confiscation only because some contraband or dutiable articles

may have been in it. Absurdity of such contention becomes patent when one thinks of either seizure or confiscation of a locker which is a permanent fixture in the safety vault of a bank.

15. On the question what is a 'package', Mr. Dutta has argued that the word 'package' has been used not only in Section 168 of the Act but has been employed in several other places in the Sea Customs Act, though the word has not been defined in that Act. The ordinary meaning of the word in the English language is 'a bundle of things packed up and contained in a receptacle'. A receptacle containing packages is not always a package, though sometimes it may be so. He contends that bundles inside the receptacle that are really the 'packages'. Mr. Dutta has relied on the decision of the Bombay High Court reported in Valimahomed Gulamhussain Sonavala and Co. v. C.T. A. Pillai, : AIR1961 Bom48 . for contending that a locker in a safety vault cannot itself be a 'package', though such locker may have contained several packages. In that reported decision, Desai, J. has quoted a passage from an un-reported decision of the Division Bench of the Bombay High Court (Dixit and Shelat, JJ.) saying:

'The word 'package' has not been defined in the Sea Customs Act, and, therefore, it cannot be said that the word 'package' has any peculiar or unusual meaning attached by the Legislature. We must, therefore, treat the word 'package' in its literal and ordinary meaning. Murray's Dictionary, Vol. VII, page 362 defines a 'package' as a bundle of things packed up and contained in a receptacle. This definition which was indeed pointed out to us by Mr. Mehta would seem to make each of the cloth bags contained in the safe or the box as a separate and distinct package. We do not find any force in the contention of Mr. Mehta that merely because the various articles as also the currency notes of Rs. 42,900/- were kept in the safe or box, all those goods could be said to be in a single 'package' as mentioned in Section 168 of the Sea Customs Act.'

16. I respectfully agree with that view of law that has been accepted in Bombay High Court and I am of the view that the Locker in the safety vault of the Bank is not a 'package' within the meaning of Sec, 168 of the Sea Customs Act and the money found in such locker is not liable to confiscation under the Sea Customs

Act merely because other prohibited or dutiable goods liable to confiscation were found in that locker.

17. The watches which are subject of the Revision Case No. 393 of 1963, however, were seized on the allegation that they are either prohibited or dutiable goods and, therefore, liable to confiscation and those watches may reasonably be within the Sea Customs Act and, therefore, be the subject of adjudication proceedings under Section 182 of the Act.

18. The learned Chief Presidency Magistrate has not applied his mind to come to his own decision whether an order of disposal either of the currency notes or watches should be made as was prayed for before him, but he refused to make an order as he thought that he had no power. The order of the learned Chief Presidency Magistrate in respect of the currency notes and the watches must, therefore, be set aside and the case remanded to him for making his own decision in the light of the observations made above.

19. It must be clearly understood that while mere pendency of an adjudication proceeding under Section 182 before the Customs authorities is not a reason for the learned Magistrate to refuse to make a proper order; if an order confiscating the money or the watches has been made rightly or wrongly by the Customs authorities in the proceeding Under Section 182 in terms of Section 167 (8), then that order brings about a change in the ownership of the property and that must be taken into consideration by the learned Chief Presidency Magistrate for making an order of disposal of the articles and money. Upon an order of confiscation, when made, ownership shall vest in the Government of India under Section 184 of the Act. Until the order of confiscation is annulled or avoided in an appropriate proceeding against that order of the Customs authorities, the ownership remains there. The Chief Presidency Magistrate has no jurisdiction to sit in appeal or to set aside an order of confiscation, if already made in a proceeding under Section 182 of the Sea Customs Act. Yet in whomsoever the ownership of the articles may vest and to whomsoever's care the articles may be given, the control of the articles which were seized on the search warrant issued by the Magistrate remains with the Magistrate so long as the proceeding before the Magistrate remains pending

and until a final disposal of the articles has been made by an order passed by the Magistrate under one or the other of Sections 517 to 523 of the Code of Criminal Procedure.

20. Both the Rules are made absolute. The order of the learned Chief Presidency Magistrate dated March 13, 1963, in respect of the currency notes of the value of Rs. 71,000/- and the 385 wrist watches seized from Locker No. 2366 in the Safety Vault of the United Bank of India, Joran-sanko Branch, is set aside. The learned Chief Presidency Magistrate will rehear the application of the present petitioners for return to them of the money and watches abovementioned and pass appropriate order in accordance with law and in the light of the observations made above.

21. Let the records go down without delay.

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