Lalit Kumar Vs Collector of Central Excise

Court: Allahabad High Court

Date of Decision: Jan. 21, 2000

Acts Referred: Arms Act, 1959 â€" Section 19
Constitution of India, 1950 â€" Article 20, 20(2)
Criminal Procedure Code, 1973 (CrPC) â€" Section 403, 482
Customs Act, 1962 â€" Section 135
Gold (Control) Act, 1968 â€" Section 2, 67, 74, 75, 75A

Citation: (2000) 118 ELT 563

Hon'ble Judges: S. Rafat Alam, J; M.C. Agarwal, J

Bench: Division Bench

Advocate: V.K. Goel, for the Appellant; Surya Prakash, for the Respondent

Judgement

M.C. Agarwal, J.
This is a reference u/s 82B of the Gold (Control) Act, 1968 (hereinafter referred to as "the Act") made by the Customs,

Excise & Gold (Control) Appellate Tribunal, New Delhi that has referred the following questions for the decision of this Court:

(1) Whether in the facts and circumstances of the case the Tribunal erred in arriving at different findings contrary to the findings of the Allahabad

High Court in criminal revision No. 1756/80 ?

(2) Whether the Tribunal erred in imposing the penalty u/s 74 of the Gold (Control) Act, 1968 in the absence of any gold being seized and on the

basis of the accounts only ?

2. We have heard Sri V.K. Goel, learned counsel for the applicant at whose instance this reference has been made and Sri Surya Prakash, learned

Standing Counsel for the respondent.

3. The facts of the case are that on 12-10-1974 the Central Excise Department, Income Tax Department and the local police jointly raided the

residential premises of Shri Chandra Prakash and his son Lalit Kumar the present applicant. The two are father and son respectively. At the time of

the search only Shri Chandra Prakash was present and three bahi khatas containing entries of gold transactions were recovered from a bag in the

possession of Shri Chandra Prakash and accounts book containing entries for the period 3-11-1972 to 12-10-1974. Shri Chandra Prakash stated

at the time of the raid that the books of account pertain to his son. Neither the applicant nor Chandra Prakash had any licence to deal in gold and,

therefore, they were prosecuted for offence u/s 85(1)(iii), (vi), (vii) and (ix) of the Act. Simultaneously a show cause notice was issued as to why

penalty should not be imposed under Sections 74 and 75A of the Act. In the criminal proceedings the applicant was convicted by the Trial Court

and sentenced to undergo rigorous imprisonment for two years. The Additional Sessions Judge to whom the appeal was preferred affirmed the

conviction and reduced the sentence to a period of nine months. Then the present applicant filed a revision petition in this Court which was allowed

and the applicant was acquitted only on the ground that the entries in the bahi khatas had not been proved and that it was not proved that the

applicant was dealing in gold of a purity of nine carats or more and that no presumption u/s 67 of the Act could be raised against the applicant as

the documents were not seized from him. A SLP to the Supreme Court was dismissed.

4. In the proceedings under the Act for the levy of penalty the Collector of Central Excise held that the applicant was a gold dealer and that the

accounts books revealed entries of unauthorized acquisition of 669.125 grams of primary gold and 23,337.935 grams of old gold ornaments and

24,347.990 grams of new gold ornaments. The Collector of Central Excise, therefore, imposed a penalty of Rs. One lac. On appeal, the Tribunal

upheld the contravention of the provisions of the Act but reduced the penalty to Rs. 50,000/-. It is on these facts that the aforesaid two questions

have been referred. It may be mentioned that at the time of the search no gold or ornaments were actually recovered from the possession of either

of the two persons.

5. The contention of the learned counsel for the applicant Lalit Kumar was that the applicant was prosecuted for the same charge i.e. dealing in

gold without a licence and the penalty has also been levied for the same charge and, therefore, once the applicant was acquitted by this High

Court, it was not permissible to record contradictory findings in the proceedings u/s 74 of the Act. Reliance is placed on Pritam Singh and Another

Vs. The State of Punjab, in which the Hon''ble Supreme Court while dealing with the provision of Section 403 of the Code of Criminal Procedure

1898 held that the effect of a verdict of acquittal pronounced by a competent Court on a lawful charge and after a lawful trial is not completely

stated by saying that the person acquitted cannot be tried again for the same offence and that it must be added that the verdict is binding and

conclusive in all subsequent proceedings between the parties to the adjudication. The Hon''ble Supreme Court further observed that the maxim

''res judicata pro veritate accipitur'' is no less applicable to criminal than to civil proceedings and, therefore, an acquittal of an accused in a trial u/s

19(f) Arms Act, is tantamount to a finding that the prosecution had failed to establish the possession of certain revolver by the accused as alleged.

This was a case in which the accused Pritam Singh was accused of a murder by using a firearm. He was able to escape from the scene of murder

and was later apprehended and after his arrest a revolver was recovered on the basis of the statement made by him. The Hon''ble Supreme Court

held that the accused having been acquitted in the prosecution launched for the offence u/s 19(f) of the Arms Act, evidence of recovery of the said

firearm could not be used against him at the trial for murder. Reliance is also placed on Manipur Administration Vs. Thokchom, Bira Singh, in

which the aforesaid judgment was relied upon and affirmed by a Bench of five Judges of the Hon''ble Supreme Court explaining the Rule of issue

estoppel in a criminal trial. The Hon''ble Supreme Court held that the Rule relates only to the admissibility of evidence which is designed to upset a

finding of fact recorded by a competent Court at a previous trial and that Section 403 of the Code of Criminal Procedure, 1898 does not preclude

applicability of the rule of issue estoppel. In our view the rule of issue estoppel cannot be applied. Here two proceedings are of a different nature

and are conducted in different forums. The prosecution against the applicant was governed by the provisions of the Code of Criminal Procedure

and the Evidence Act and the burden of proof lay exclusively on the prosecution that is why the accused was acquitted on the technical ground that

the prosecution had led no evidence that the gold in which the applicant dealt was of a purity of nine carats or more. Gold has been defined in

Section 2(j) of the Act to mean gold including its alloy (whether virgin, melted or re-melted, wrought or unwrought), whether in any shape or form,

or a purity of not less than nine carats and includes primary gold, article and ornament. The proceedings for the levy of penalty u/s 74 of the Act

were not criminal proceedings and were governed neither by the Code of Criminal Procedure nor by the Evidence Act. The forum was also

different while the prosecution had to take place before the Magistrate. The proceedings for the levy of penalty had to be undertaken by the

adjudicating authority mentioned in Section 78 of the Act. Discussing the nature of proceedings for the levy of penalty under the Income Tax Act,

1961 a Full Bench of this Court in Raghunandan Prasad Mohan Lal, Bareilly Vs. The Income Tax Appellate Tribunal and Others, observed that

penalty proceedings have a civil sanction and are revenue in nature and, therefore, Article 20 of the Constitution of India does not apply to them. In

V. Datchinamurthy and Another Vs. Asst. Director of Inspection, (Intelligence), I.T. Dept. and Another, the question was whether decrees passed

by a Civil Court on the basis of promissory notes were binding on the assessing officer while making the assessment of the person against whom

the said decrees were passed. The Hon''ble Madras High Court held that while the civil court adjudicated on the claim of the alleged depositors

based on the promissory notes executed in their favour, the investigations and enquiry by the ITO was to find out the persons to whom the money

really belonged. It also observed that the ITO had exclusive jurisdiction to go into the question as to whether the amount was income or not, he

could not be prohibited from making any enquiry in relation to the amounts decreed.

6. In M.K. Mohamed Hussain and Another Vs. Central Board of Excise and Customs and Another, the petitioner M.K. Mohamed Hussain was

prosecuted for offence under the Sea Customs Act and was acquitted. It was held that the acquittal being on the technical ground, the

administrative authority may punish the accused on the same facts and that Article 20(2) of the Constitution of India could not be invoked.

7. In State of Karnataka Vs. Sir Janakusa Jeevansa Bakale and Another, the Customs Authority had confiscated the gold and the accused was

prosecuted for an offence u/s 135 of the Customs Act. The High Court had quashed the Criminal proceedings in exercise of powers u/s 482 of the

Code of Criminal Procedure on the ground that the accused need not be penalized again. The Hon''ble Supreme Court held that the two

proceedings are of a different nature and, therefore, the view taken by the High Court was wrong. In Assistant Collector of Customs v. L.R.

Malwani 1999 (110) E.L.T. 317 the accused was given benefit of doubt in departmental adjudication by Collector of Customs but thereafter

prosecuted for being a party to smuggling conspiracy. The Hon''ble Supreme Court held that the principle of resjudicata could not be invoked in

the circumstances of the case.

8. On a consideration of the aforesaid authorities, we are of the view that the proceedings before the adjudicating authority under the Act were of a

different nature than the Criminal prosecution proceedings and the adjudicating authority was a forum of exclusive jurisdiction under the Act and,

therefore, the adjudicating authority and the Tribunal could arrive at their own conclusion on the material available before them and they could

arrive at different findings and the judgment of the Allahabad High Court in criminal revision No. 1756/80 did not operate as res judicata nor the

adjudicating authority and the Tribunal were estopped from finding the facts for themselves. We, therefore, decide question No. 1 accordingly.

9. As regards, question No. 2 the contention of the learned counsel for the applicant was that no gold having been recovered, no penalty u/s 74 of

the Act was leviable. Section 74 reads as under :-

Section 74. Liability to penalty. Any person who, in relation to any gold does or omits to do any act which act or omission would render such

gold liable to confiscation under this Act, or abets the doing or omission of such an act, or is in charge of the conveyance or animal which is liable

to confiscation under this Act, shall be liable to a penalty not exceeding five times the value of the gold or one thousand rupees, whichever is more,

whether or not such gold has been confiscated or is available for confiscation.

10. As is evident, Section 74 itself takes note of a situation in which gold or articles of gold may not be physically available and, therefore, may not

be available for confiscation. Therefore, the physical presence of gold and its recovery cannot be a pre-condition for levy of penalty under this

Section. Learned counsel for the applicant, however, contended that the penalty should have been levied u/s 75 which reads as under :-

Section 75. Penalties for contravention, etc. not expressly mentioned. Any person who contravenes any provision of this Act or any rule or order

made thereunder or abets any such contravention or who fails to comply with any provision of this Act, or any rule or order made thereunder shall,

where no express penalty is elsewhere provided for such contravention or failure, be liable to such penalty, not exceeding one thousand rupees, for

every such contravention, failure or abetment, as the case may be.

11. This contention is beyond the scope of the question that the Tribunal has referred for the decision of this Court. The judgment of the Tribunal

also shows that it was not the case of the applicant that penalty should have been levied u/s 75 of the Act. In any case, the allegation against the

applicant was that he was carrying on business in gold without a licence. Recovery of gold could have been only a circumstance to show that he

was dealing in gold. In this case, no gold was recovered but from the books of account and other material including the Appellate"s own statement

it was established that the applicant was carrying on business in gold. Therefore, non-recovery of the gold was immaterial and the allegation could

be established even without recovery of gold. There was sufficient other evidence to support the finding of the Tribunal that the applicant was

carrying on business in gold in violation of the provisions of the Gold (Control) Act, 1968 and, therefore, was liable for penalty u/s 74 of the Act.

We decide the question accordingly.

12. In the circumstances of the case, the parties will bear their own costs.

13. An authenticated copy of this judgment be transmitted to the Tribunal in accordance with the provision of Section 82F of the Act.