

(1971) KLJ 341

High Court Of Kerala

Case No: O.P. No. 3413 of 1968

Adeelagath Ali Haji

APPELLANT

Vs

Asst. Collector of
Central Excise and
another

RESPONDENT

Date of Decision: Nov. 26, 1970

Acts Referred:

Constitution of India, 1950 – Article 226

Citation: (1971) KLJ 341

Hon'ble Judges: P. Govindan Nair, J

Bench: Single Bench

Advocate: T.M. Krishnan Nambiar, V. Sivaraman Nair, V.M. Nayanar, K.C. Sankaran and T.V. Ramakrishnan, for the Appellant; P. Ramen Menon, for the Respondent

Final Decision: Dismissed

Judgement

P. Govindan Nair, J.

The question arising for decision in this case is an interesting one but by no means an easy one to answer, though I

ventured to express an opinion in favour of the position contended for by the petitioner's counsel in a similar case which came up before me for

decision in A.S. Bava v. Collector of Customs and Central Excise, Cochin reported in 1965 KLT 481. The question is whether under rule 9 (2) or

33 (2) of the Central Excise Rules, 1944, the goods in respect of which it has been found that either of the rules has been contravened can be

confiscated even if it be that the goods belong to a person other than the one who contravened the provisions in those rules.

2. The case against the petitioner was that he removed the goods, coffee in this case, from the place where they were cured and transported the

goods in contravention of rule 33. The case has been found against the finding being ""The 48 bags of coffee seized from the godown of the

petitioner were received in an unauthorised manner and are liable to confiscation under rules 33 (2) and 9 (2) of the Central Excise Rules, 1944"". It

also has found that ""there is no evidence to prove that the petitioner himself transported the 48 bags of coffee from a place of curing under fictitious

TP 3 Permits. No penalty can therefore be imposed on the petitioner. In addition there are the further findings in Ex. P2 order that Ibrayi

transported goods in violation of rule 33 of the Central Excise Rules from a place of curing. He is therefore liable to penalty under rule 33 (2). The

driver is also liable for having violated rule 33 (2). The vehicle is also liable to confiscation.

3. Rules 9 and 33 of the Central Excise Rules, 1944 are in these terms:--

9. Time and manner of payment of duty:--(1) No excisable goods shall be removed from any place where they are produced, cured or

manufactured or any premises appurtenant thereto, which may be specified by the Collector in this behalf, whether for consumption, export, or

manufacture of any other commodity in or outside such place, until the excise duty leviable thereon has been paid at such place and in such manner

as is prescribed in these Rules or as the Collector may require, and except on presentation of an application in the proper form and on obtaining

the permission of the proper officer on the form;

Provided that such goods may be deposited without payment of duty in a store-room or other place of storage approved by the Collector under

rule 27 or rule 47 or in a warehouse appointed or licensed under rule 140 or may be exported under bond as provided in rule 13

Provided further that such goods may be removed on part payment of duty leviable thereon if the Central Government, by notification in the official

Gazette, allow the goods to be so removed under rule 49;

Provided also that the Collector may, if he thinks fit instead of requiring payment of duty in respect of each separate consignment of goods

removed from the place or premises specified in this behalf, or from a store-room or warehouse duly approved, appointed or licensed by him

keep with any person dealing in such goods an account-current of the duties payable thereon and such account shall be settled at intervals, not

exceeding one month and the account-holder shall periodically make deposit therein sufficient in the opinion of the collector to cover the duty due

on the goods intended to be removed from the place of production curing, manufacture or storage.

(2) If any excisable goods are, in contravention of sub-rule (1) deposited in, or removed from, any place specified therein, the producer or

manufacturer thereof shall pay the duty leviable on such goods upon written demand, made by the proper officer, whether such demand is

delivered personally to him, or is left at his dwelling house, and shall also be liable to a penalty which may extend to two thousand rupees and such

goods shall be liable to confiscation.

33. Unmanufactured products not to be carried from the place of curing except under transport document--(i) No unmanufactured products of any

description shall be removed from the place of curing except to the premises of a person licensed to carry on business in such products or to warehouse

such product on which duty has not been paid and no such products shall be so carried or transported without a valid permit in the proper

Form signed by an officer or a certificate in the proper form, signed by an officer or a certificate in the proper Form, signed by the curer, a licensed

broker or commission agent or the wholesale dealer to whose premises they are to be carried or transported.

(2) If any person

(a) removed such products otherwise than as provided in Sub-rule (i), or

(b) carried or transports such products without a valid permit or certificate, or

(c) while carrying or transporting such products, does not on request by an Officer, forthwith produce valid permit or certificate as the case may

be, or.

(d) enters any particulars in the certificate in respect of any such products, which are, or which he has reason to believe to be false, he shall be

liable to a penalty not exceeding one thousand rupees and the products in respect of which the offence is committed shall be liable to confiscation.

The order Ex. P. 2 concluded;

I have also given my finding as to the liability to confiscation of lorry KLQ 2086 Since the lorry was provisionally released to the owner on a B. 11

bond, the owner was telegraphically instructed on 20-7-68 to produce the lorry before the superintendent of Central Excise, Cannanore circle

before 12 noon on 22-7-1968. The owner has not produced the lorry. On his failure to produce the lorry in terms of the bond, I appropriate a

sum of Rs. 500/- (Rupees Five hundred Only) towards the value of the lorry. The balance amount of Rs. 2,500/- (Rupees Two thousand and five

hundred only) is to ordered to be refunded to the owner of the lorry.

I am not concerned in this case with the remaining part of the decretal portion of the order Ex. P2.

4. Counsel on behalf of the petitioner has submitted that the only finding on the basis of which the goods have been confiscated is that which I have

already read; namely ""The 48 bags of coffee seized from the godown of the petitioner were received in an unauthorised manner and are liable to

confiscation under Rules 33 (2) and 9(2) of the Central Excise Rules, 1944"". Neither rule 9 nor rule 33 has provided that receiving coffee would

be an offence liable to be penalised. This is clear from the rules themselves. Counsel on behalf of the respondents however contended that in any

event the confiscation of the goods would be justifiable under rule 9 or rule 33 and the petitioner having been allowed to take the coffee after

furnishing cash security can be directed to pay the value of the goods from the security if the coffee is not produced by him as the coffee is liable to

confiscation. His submission is that the last part of rule 9(2) which provides that ""Such goods shall be liable to confiscation"" is not related to the

earlier part of the rule and is not dependent upon the earlier part of the rule and that this last part is not a cumulative penalty imposed on the

contravener but a provision for dealing with the goods that are tainted. This is the submission. As I indicated at the very beginning, the matter is not

free from doubt as it is quite conceivable that provision can be made that goods which may be said to be tainted as having been the subject-matter

of contravention of some states or other are liable to be confiscated. The only question is whether the rules in question are capable of being

interpreted in the manner pleaded by counsel on behalf of the respondents.

5. In *Shewpujanrai Indrasanrai Ltd. Vs. The Collector of Customs and Others*, , the Supreme Court considered a similar section, section 23 of the

Foreign Exchange Act. Section 23 (i) which at the relevant time was in these terms:--

23. Penalty and procedure:--(i) whoever contravenes any of the provisions of this Act or of any rule, direction or order made thereunder shall be

punishable with imprisonment for a term which may extend to two years or with fine or with both, and any court trying any such contravention may,

if it thinks fit and in addition to any sentence which it may impose for such contravention, direct that any currency, security, gold or silver, or goods

or other property in respect of which the contravention has taken place shall be confiscated.

Dealing with this provision, the Supreme Court observed:--

Section 23 of the Foreign Exchange Act is a proceeding against the offender, and is applicable to the persons who contravenes any of the

provisions of that Act, even though on a confiscation for such contravention, the Court may, if it thinks fit and in addition to any sentence which it

may impose for such contravention, direct that the goods in respect of which the contravention has taken place be confiscated. In substance it is a

proceeding against a person for the purpose of penalising him for a contravention of the provisions of the Foreign Exchange Act, and such a

proceeding is available when the offender is known"". Earlier in the judgment the court observed that ""A distinction must at once be drawn between

an action in rem and a proceeding in personam.

6. The wording of rules 9(2) and 33 (2) are very similar to the wording in section 23 of the Foreign Exchange Act interpreted by the Supreme

Court. No doubt the words ""in addition to"" are contained in section 23 of the Foreign Exchange Act and those words or similar words are absent

in rule 33 of the Central Excise Rules, 1944. But according to me, this makes no difference.

7. The finding being that the petitioner has not contravened those rules and the position being accepted that the Petitioner is the owner of the goods

there can be no confiscation of his goods and therefore the direction that Rs. 5000 from the cash security of Rs. 12,000/- furnished by the

petitioner will be appropriated towards the value of the goods cannot stand.

8. It is clear from rule 9 (2) that duty can be directed to be paid only by the producer or manufacturer. It is not urged or even suggested that the

petitioner is the producer or manufacturer or the person who had contravened the provisions of rule 9. This being so, there can be no question of

the petitioner being made liable for the duty on the goods which are said to have been transported. The direction for setting off Rs. 2332.12

towards duty from the cash security furnished by the petitioner cannot also stand.

9. It was suggested by counsel on behalf of the respondents that the direction to pay the duty was in terms of the bond and was in enforcement

thereof as stated in the order, and because the petitioner had undertaken in the bond to produce the goods he can be made liable for the duty

payable as well as the value of the goods. The bond has been executed only as a security for any liability that can be imposed on the petitioner for

the alleged contravention of the rules. If under the rules he has no liability, nothing can arise under the bond which is only a security for the

performance of the obligations that may arise on the petitioner being found to have contravened the provisions of the rules.

10. In the light of the above, I set aside the direction in the order Ex. P2 that a sum of Rs. 2332.12, duty payable on the goods in question as well

as a sum of Rs. 5000/- the value there of would be set off from the security deposit made by the petitioner. The result is these amounts will be

refunded to the petitioner. I direct accordingly.

11. I cannot leave this case without adverting to the contentions raised by counsel on behalf of the respondents that there is a right of appeal

available to the petitioner under the statute and this Court should not exercise its jurisdiction under Article 226 of the Constitution. Where there are

patent errors and mis-application of the rules even on the findings entered by the authorities it will be appropriate for this Court to interfere in

proceedings under Article 226 of the Constitution, particularly in cases where the right of appeal provided by the statute is subject to the condition

that the penalty imposed must be paid before the appeal is taken. In any view of the matter this petition having been admitted in 1968 and having

been pending for this long, it will not be in the interests of justice to dismiss the petition now by holding that the proceeding under Article 226 of the

Constitution is not a proper remedy. I direct the parties to bear their respective costs.