

(1989) 08 KL CK 0051

High Court Of Kerala

Case No: O.P. Nos.4444/88 and 5898/89

C.J. Palu and Another

APPELLANT

Vs

Assistant Collector of Central
Excise and Others

RESPONDENT

Date of Decision: Aug. 2, 1989

Acts Referred:

- Constitution of India, 1950 - Article 20
- Customs Act, 1962 - Section 129, 129C

Citation: (1990) 29 ECC 15

Hon'ble Judges: K.T. Thomas, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

K.T. Thomas, J.

As common questions are involved in these Original Petitions, they can be disposed of by this common judgment. Petitioners now face prosecutions for offences falling u/s 85(1) of the Gold Control Act, 1968 (for short "the Act"). Proceedings were already initiated against them under Sections 71 and 74 of the Act for confiscation and imposition of penalty in regard to gold articles allegedly seized from them. The Collector of Central Excise has passed orders of confiscation and penalty by two different proceedings against the petitioners. The appeals filed by them before the Appellate Tribunal against the orders of confiscation and imposition of penalty were disposed of. When prosecution proceedings were initiated against them in the criminal court for economic offences, they have filed these original petitions to stall such proceedings as they infringe the protection guaranteed in Article 20(2) of the Constitution of India. The launching of the prosecution is sought to be justified u/s 77 of the Act which reads thus:

No confiscation made or penalty imposed under this Act shall prevent the infliction of any other punishment to which the person affected thereby is liable under the provisions of this Act or under any other law.

Petitioners have prayed in these Original Petitions, for a declaration that Section 77 of the Act is unconstitutional, void and inoperative, besides the prayer for quashing the proceedings now initiated against them before the criminal court.

2. The contention is mainly based on Article 20(2) of the Constitution of India, "No person shall be prosecuted and punished for the same offence more than once". It was urged that since the proceedings taken against the petitioners u/s 71 and 74 of the Act amount to prosecution and punishment, the petitioners are not liable to be subjected to a second prosecution.

3. Neither Section 71 nor Section 74 of the Act contemplates prosecution for any offence. Section 71 only says that the gold in respect of which any provision of the Act or any rule is being contravened shall be liable to confiscation. Section 74 says that any person who does or omits to do any act rendering such gold liable to confiscation shall also be liable to a penalty not exceeding five times the value of the gold. Those provisions are included in Chapter-XIII of the Act whose title itself is "Confiscation and Penalty". Section 85 which enumerates various offences under the Act is included in Chapter-XV which is entitled "Offences and their Trial". No doubt to constitute an offence u/s 85, there must be contravention of the provisions of the Act or any rule or order there under. But unless such offence is established in a trial in a criminal court the offender is not liable to the punishment prescribed therein. Confiscation and penalty, on the other hand, can be imposed by the administrative officer who may be Collector of Central Excise or Collector of Customs. For the said purpose no prosecution is contemplated in the Act or Rules. Prosecution is a proceeding in the criminal court in order to put an offender upon his trial. Punishment and penalty have different shades of meaning in the context in which they are used in the Act. Though the authority who conducts the proceedings for confiscation or imposition of penalty has to act judicially, such authority does not become a criminal Court or a judicial tribunal. So, proceedings under the Act for imposition of penalty cannot be equated with or considered the same or prosecution. The word "offence" is defined in the Code of Criminal Procedure, 1973 as any act or omission "made punishable by any law for the time being in force". Thus it is clear that by imposition of penalty under the Act no person is punished for any offence.

4. In [Magbool Hussain Vs. The State of Bombay](#), ; [Thomas Dana Vs. The State of Punjab](#), and [Assistant Collector of Customs and Another Vs. L.R. Malwani and Another](#), the Supreme Court has considered the argument that proceedings for imposition [of] penalty and confiscation are prosecution proceedings ending in punishments. The contention was based on the provisions in the Sea Customs Act. The provisions are identical with the relevant provisions in the Customs Act and

Gold Control Act. The Supreme Court held in those decisions that proceedings for confiscation and imposition of penalty under the Sea Customs Act are not prosecution proceedings within the meaning of Article 20(2) of the Constitution. Learned Counsel tried to draw a distinction between provisions as they remained then and the provisions in Section 129 of the Customs Act as they now remain after the amendment by Finance Act, 21 of 1984. After the amendment the Appellate Tribunal shall consist of a judicial member whereas there was no such member before the amendment. (Section 129(2) of the Customs Act enjoins on the Central Government to constitute an Appellate Tribunal called the Customs, Excise and (Control) Appellate Tribunal consisting of as many judicial and technical members as it thinks fit. The Appellate Tribunal to exercise appellate powers under Gold Control Act is the same as the Tribunal constituted u/s 129(1) of the Customs Act. Section 81B of the Gold Control Act permits the provisions of Section 129C of the Customs Act to apply to the discharge of the functions by the Appellate Tribunal while exercising jurisdiction under the Act. Section 129(2) of the Customs Act contemplates inclusion of a judicial member who has held a judicial office at least for two years to be one of the members of the Appellate Tribunal). It was contended that since a judicial member has been included in the Appellate Tribunal, the proceedings to confiscate or for imposition of penalty would stand converted into judicial proceedings and would hence be prosecution proceedings.

5. The contention cannot be accepted for more than one reason. The first reason is that the order of confiscation or imposition of penalty is to be passed by an administrative officer like Collector of Customs. It is against his order that the aggrieved party can file the appeal. Whatever be the composition or nature of formation of the appellate body, it can only deal with the order passed by the administrative officer. Secondly, the mere addition of a judicial member in the appellate tribunal will not make it a court much less a criminal court. Thirdly, the decision of the Appellate Tribunal confirming or annulling or modifying the original order would not transform the order into one of conviction or acquittal and hence the question of punishment does not arise in such proceedings. Section 77 of the Act which stood valid before the addition of a judicial member to the Appellate Tribunal will continue to be valid thereafter also. Even if Section 77 is absent in the body of the Act, there is no bar in initiating prosecution proceedings for the offences inspite of the pendency or conclusion of proceedings u/s 71 and 74 of the Act. For the aforesaid reasons, I cannot accept the contention that the addition of a judicial member of the appellate forum would necessitate a changed approach to the question from what has been well-settled by the Supreme Court in the decisions cited supra.. Hence I reject the petitioners' contention that Section 77 of the Act is unconstitutional.

Original Petitions are accordingly dismissed. Issue carbon copy on usual terms.