

Benechand Vs State of M.P.

Court: Madhya Pradesh High Court

Date of Decision: Aug. 28, 1966

Acts Referred: Criminal Procedure Code, 1898 (CrPC) â€” Section 403
Gold (Control) Rules, 1963 â€” Rule 126

Citation: (1968) JLJ 819

Hon'ble Judges: Shivdayal, J

Bench: Single Bench

Advocate: R.K. Pandey, for the Appellant; M.V. Tamaskar, Deputy Government Advocate, for the Respondent

Final Decision: Dismissed

Judgement

Shivdayal, J.

This petition challenges the competence of the Petitioner's trial under Rule 126 of the Gold Control Rules, 1963, for

possession of 720.100 grams of primary gold. The accused took a preliminary objection before the trial Magistrate that his prosecution was

barred u/s 403, Criminal Procedure Code. The trial Magistrate rejected the contention. The accused filed a revision in the Sessions Court which

too has been dismissed.

2. Shri Pandey, Learned Counsel for the Petitioner, narrates the following facts. On 6 May 1963, the house of the Petitioner was searched under

Rule 126 (2) of the Gold Control Rules, and according to the prosecution 720.100 grams of primary gold was seized from his possession, The

Collector, Central Excise, gave him notice to show cause why he should not be penalised. After hearing him, the Collector, Central Excise, held

him guilty under Rule 126 (1) and imposed a penalty of Rs. 250 under Rule 126-L (16) of the Gold Control Rules. Further, he directed

confiscation of the gold under Rule 126-M, but under Clause (8) of the said Rule, he gave option to the Petitioner to pay, in lieu of "confiscation of

the gold, a fine of Rs, 2000. Subsequent to these proceedings, the Petitioner was put up for trial under Rule 126-P of the Gold Control Rules. It is

this trial in the Criminal Court, which is challenged as illegal and barred by Section 403, Criminal Procedure Code, on the plea of autre-fois

convict. In this petition the trial is further assailed as being in violation of the fundamental right under Article 20 (2) of the Constitution.

3. In order to appreciate the contentions raised by the accused, it is necessary to refer to certain provisions of the Gold Control Rules, 1963:

(i) Rule 126-I (1) requires every person (not being a dealer required to apply for a licence, or licensed or a refiner) to make a declaration within

the prescribed period of 30 days to the Administrator in the prescribed form as to the quantity, description and other prescribed particulars of gold

(other than ornament) owned by him.

(ii) Rule 126-L (2) empowers a person authorised by the Central Government in writing in that behalf to (a) enter and search any premises: and (b)

seize any gold in respect of which he suspects that any provision of this Part has been, or is being or is about to be, contravened.

(iii) It is provided in Rule 126-M that any gold seized under Rule 126-L is liable to confiscation. Clause (2) of that Rule nominates the authorities

empowered to adjudge such confiscation and Clause (3) provides for an appeal.

Clause (8) (a) of that Rule runs thus:

(8) (a) Whenever confiscation of any gold is authorised by this Part the officer adjudging it may give to the owner of the gold an option to pay in

lieu of confiscation such fine as the said officer thinks fit.

(iv) It is further provided in Rule 126-L (16) as follows:

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 Rule

126-Mshall be liable in addition to any liability for any punishment under this Part, to a penalty not exceeding five times, the value of the gold

or one thousand rupees, whichever is more.....

(v) Rule 126-P prescribes punishments for offences under the Rules. It is enacted in Clause (2) of the said Rule:

(2) Whoever,-

(i) refines, processes, melts, converts, deals in or makes, manufactures or prepares any article of gold in contravention of any of the provisions of

this Part,

(ii) has in his possession or under his control any quantity of gold in contravention of any provision of this Part,

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shall be punishable with imprisonment for a term of not less than six months and not more than two years and also with fine.

4. The contention for the Petitioner is that imposition of a fine under Rule 126-M (8) (a), although in lieu of confiscation, is punishment and the

proceeding before the Administrator is prosecution. In my opinion, neither the plea of double jeopardy nor autre-fois convict is available to the

accused in this case. From the aforesaid provisions, it is quite clear that under Rule 126-M, gold is liable to be seized and confiscated. At the same

time, a provision is made to give the owner of the gold an option to pay a fine to be specified, in case he desires that the gold should not be

confiscated. Clause (8) (b) of the Rule reads thus:

For the removal of doubt it is hereby declared that the payment of fine in lieu of confiscation of gold shall not prevent the infliction of any

punishment to which the person affected is liable under the provision of this part.

It seems to me quite clear that such a clause, with however emphatic its wording, cannot take away the constitutional protection under Article 20

(2) . If it is held that fine in lieu of confiscation is punishment and the proceeding constitutes prosecution within the meaning of that Article, the law

making body cannot, by incorporating such a provision, abrogate the fundamental right guaranteed in that Article. If it is held that a trial under Rule

126-P is barred by Article 20 (2) of the Constitution, Clause (8) (b) of the above Rule will be ultra vires the Constitution.

5. I shall, therefore, examine whether a proceeding under Rule 126-M (8) (a) is prosecution. "Prosecution" means a proceeding either by way of

indictment or information in the Criminal Courts in order to put an offender upon his trial. Merely because the competent Authorities are

empowered to impose penalties under the Gold Control Rules they are not converted into a Court of Law. So also the penalty imposed by such

authorities is not the same thing as punishment by a Criminal Court for a criminal offence. There is no provision in the Rules that there will be a trial

nor are the competent Authorities invested with Magisterial functions in respect of trials under the Code of Criminal Procedure. Every penalty is

not punishment within the meaning of Art 20 (2) of the Constitution; that Article envisages punishments awarded by a Court of Law. Shri Pandey

laid a great deal of stress on the provisions contained in Rule 126-(12) and it was urged that as the provisions of the Code of Criminal Procedure,

relating to search and seizure, having been made applicable, the proceeding is prosecution. In my judgment this contention must be rejected.

Applicability of the provisions of the Code of Criminal Procedure, relating to search and seizure, is not the test and it does not convert a

proceeding into a trial before a criminal Court. Conferral of the power of adjudging confiscation or imposition of fine in lieu of confiscation are

penalties, which can be imposed by the authorities under the Gold Control Rules. The object is confiscation of offending gold and to give an option

to its owner to pay a fine in lieu of such confiscation. It is more in the nature of a proceeding in rem than a proceeding in personam. A proceeding

for adjudging confiscation is not prosecution as the authority dealing with that proceeding is not a criminal Court. The confiscation or fine in lieu of

confiscation cannot be said to be punishment.

6. In *Thomas Dana v. State of Punjab* AIR 1939 SC 375, their Lordships considered the applicability of Article 20 (2) of the Constitution to a trial

in the criminal Court, where the accused had been dealt with in proceedings before the Sea Customs Authorities u/s 167(8) of the Sea Customs

Act. Under that enactment, if any goods, the import or export of which is from time to time prohibited or restricted by or under Chapter IV of that

Act, is imported into or exported from India contrary to such prohibition or restriction (vide Sections 18 and 19), such goods are liable to

confiscation and any person concerned in any such offence is liable to penalty not exceeding three times the value of the goods or not exceeding Rs.

1000/- . It was held that such confiscation of goods and infliction of penalty does not bring into operation the provisions of Article 20 (2) of the

Constitution so as to bar his prosecution and imprisonment u/s 176(8), of the Act, read with Sections 23 and 23B of the Foreign Exchange

Regulation Act, and u/s 120B, Penal Code. Their Lordships said:

When a criminal prosecution and punishment of the criminal, in the sense of the Penal law, is intended, the section makes a specific reference to a

trial by a Magistrate, a conviction by such Magistrate and on such conviction, to imprisonment or to fine or both.....

The Legislature was, therefore, aware of the distinction made throughout the Schedule to Section 167, between a proceeding before Revenue

Authorities by way of enforcing the preventive and penal provisions of the Schedule and a criminal trial before a Magistrate, with a view to

punishing offenders under the provisions of the same section. It is, therefore, in the teeth of these provisions to contend that the imposition of a

penalty by the Revenue officers in the hierarchy created by the Act is the same thing as a punishment imposed by a criminal Court by way of

punishment for a criminal offence.

In *Maqbool Hussain Vs. The State of Bombay*, , the Supreme Court had another occasion to consider the question as to the constitutionality of a

subsequent prosecution launched against a person whose goods had been confiscated u/s 167 of the Sea Customs Act. It was held as follows;

The Sea Customs Authorities are not a judicial tribunal and the adjudging of confiscation, increased rate of duty or penalty under the provisions of

the Sea Customs Act do not constitute a judgment or order of a court or judicial tribunal necessary for the purpose of supporting a plea of double

jeopardy.

It, therefore, follows that when the Customs Authorities confiscated the gold in question neither the proceedings taken before the Sea Customs

Authorities constituted a prosecution of the Appellant nor did the order of confiscation constitute a punishment inflicted by a Court or judicial

tribunal on the Appellant.

The law was recently recapitulated in *Indo-China Steam Navigation Co. Ltd. Vs. Jasjit Singh, Additional Collector of Customs and Others*, .

Gajendragadkar, C. J., spoke for the Court thus:

It is settled by decisions of this Court that the Customs Officer who initially acts u/s 167 (12-A) is not a Court or Tribunal, though it is also settled

that.....the Customs Officer has to act in a quasi-judicial manner..... In *Thomas Dana Vs. The State of Punjab*, , this Court has observed that the

Collector and other officers in the hierarchy mentioned by the Sea Customs Act may have to act judicially in the sense of having to consider

evidence and hear arguments in an informal way ; even so, the Act does not contemplate that in doing so, the said authorities are functioning as a

Court.

Referring to *Maqbool Hussain (supra)*, their Lordships said:

It was held that the proceeding before the Sea Customs Authorities under the Act was not a prosecution and the order of confiscation was not a

punishment inflicted by a Court or judicial Tribunal within the meaning of Article 20 (2) .

Referring to certain observations in that case that the Customs Officers are not required to act judicially on legal evidence tendered on oath and

they are not authorised to administer oath to any witness, their Lordships said that they were obiter. On a review of these decisions, the following

law was laid down in *Indo-China Steam Navigation Company (supra)*:

The result, therefore, is that it is no longer open to doubt that the Customs Officer is not a Court or Tribunal though in adjudicating upon matters

u/s 167 of the Act, he has to act in a judicial manner.

7. As regards the penalty provided in Rule 126-L (16), it is true that the penalty, which may extend to five times the value of the gold or one

thousand rupees, whichever is more, is punishment, and it is also made expressly clear in the same clause that such penalty may be imposed ""in

addition to any liability for any punishment under this Part"". This clearly means that two punishments are provided: (i) Penalty under Rule 126-L

(16); and (ii) punishment under Rule 126-P. But these two punishments differ in their nature. The former can be imposed by the authorities

enumerated in the clause itself, but not by a Court of law, while the latter can be awarded only by a criminal Court after trial. The fundamental right

under Article 20 (2) of the Constitution is not infringement, unless the accused has already been ""prosecuted and punished"", which words indicate

that there must be not only punishment but also prosecution. And, as already said, a prosecution in this context means initiation or starting of

proceeding of a criminal nature before a Court of law or a judicial tribunal in accordance with the procedure prescribed in the statute, which

creates the offence and regulates punishment. See Maqbool Hussain (supra). Proceedings before the competent authorities mentioned in Rule 126-

L (16), do not constitute prosecution. That being so, such proceedings do not bar a criminal prosecution for the same offence, although punishable

under two different provisions.

8. For the reasons aforesaid, it must be held that a proceeding under Rule 126-M (8) of the Gold Control Rules, for imposition of fine in lieu of

confiscation, or a proceeding under Rule 126-L (16) for imposition of penalty, is not prosecution within the meaning of Article 20 (2) of the

Constitution. It is not a proceeding either by way of indictment or information in a criminal Court. The officer dealing with the matter is not a

criminal Court; the imposition of fine in lieu of confiscation is not punishment. Therefore, the trial of a person accused of the offence under Rule

126-P of the Gold Control Rules is not an infringement of his rights under Article 20 (2) of the Constitution on the ground of double jeopardy, nor

can his plea of autre-fois convict u/s 403, Criminal Procedure, be upheld just because a penalty has been imposed by a competent officer under

Rule 126-L (16), or because he has been given an option under Rule 126-M (8) (a) of the Gold Control Rules. 9. The petition is dismissed.