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91 CWN 1143

Calcutta High Court

Case No: Criminal Rev. No. 1648 of 1985

Bharat Shivji and Another	APPELLANT
Vs	
State	RESPONDENT

Date of Decision: March 30, 1987

Acts Referred:

- Imports and Exports (Control) Act, 1947 - Section 3, 3(1), 5
- Penal Code, 1860 (IPC) - Section 120B

Citation: 91 CWN 1143

Hon'ble Judges: Sankar Bhattacharyya, J; J.N. Hore, J

Bench: Division Bench

Advocate: S. Gupta, A.G., M. Gupta and G. Bhattacharjee, for the Appellant;Samir Chatterjee, for the Respondent

Judgement

Sankar Bhattacharyya, J.
This revisional application raises an important question of law. Bharat Shivji Sethia and Madhusudhan Deb Chand Sethia, the two petitioners before us were tried before a learned Metropolitan Magistrate on the following charges :

Madhusudhan Deb Chand Sethia.

That you on or about dated 15.12.59 contravened the condition of the Customs Clearance Permit and the Bond and" purchased or otherwise acquired from Sri Nicholas Nesekar the said Demlar Benz Mercedes Car bearing Registration No. WBE 5973 and the terms and conditions of the said Customs Clearance Permit as well as of the Bond were known to you from before and thereby committed an offence punishable u/s 5 of the Imports and Exports (Control) Act, 1947 and within my cognizance.

Bharat Shi"viji Sethia.

That you on or about dated 15.12.59 contravened the condition of the Customs Clearance Permit and the Bond and purchased or otherwise acquired from Sri Nicholas Nesekar the said Demlar Benz Mercedes Car bearing Registration No. WBE 5973 and the terms and conditions of the said Customs Clearance Permit as well as of the Bond were known to you from before and thereby committed an offence punishable u/s 5 of the Imports and Exports (Control) Act, 1947 and within my cognizance.

Madhusudhan Deb Chand Sethia and Bharat Shivij Sethia that you on or about December 1959 and onward at Calcutta agreed with Nicholas Nesekar and other to do an illegal act to wit, to contravene the conditions of Customs Clearance Permit No. 0968383/57/CCP/HQ/MOO dated 2.1.59 executed by Nicholas Neskar and to purchase the Demlar Benz Mercedes Motor Car, bearing Registration No. WBE 5973 and imported by Nicholas Nesekar, by illegal means viz. by advancing Rs. 33,000/- as the consideration of the said car and made correspondence in the name of Nicholas Nesekar, even after his departure on 20.12.59 from India for redemption of the said bond, executed by Sri Nesekar and possessed the car in violation of the terms and conditions of the bond, which were known to you and thereby committed an offence punishable u/s 120B I.P.C., read with Section 5 of the Imports and Exports (Control) Act and within my cognizance.

2. On conclusion of the trial they were convicted of both the charges. For their conviction u/s 5 of the Imports and Exports (Control) Act, 1947 ("Act" for short), each of them was sentenced to rigorous imprisonment for one year and to a fine of Rs. 2,000/-, in default to rigorous imprisonment for three months more, while for their conviction u/s 120B, Indian Penal Code, read with Section 5 of the Act, each of them was sentenced to rigorous imprisonment for six months and to a fine of Rs. 2,000/-, in default to rigorous imprisonment for two months more, the sentences running concurrently. The learned Magistrate also passed an order for confiscation of the car to the Government.

3. Against the above order of conviction and sentence the petitioners took an appeal to the learned Chief Judge, City Sessions Court, Calcutta, but the appeal was dismissed by the learned Chief judge and the order of "conviction and sentence were upheld. Being aggrieved, the petitioners then moved this court in revision and obtained this Rule.

4. Prosecution case, in brief, was as under:

One Nicholas Nesekar of Barru, Holland. C/o. Bird & Co., Calcutta, came to. India in 1958 on business tour on the strength of a Dutch passport. While in India, he made an application to the Customs Authorities for permission to import his Daimler Benz Car to this country. On the basis of the application Customs Clearance Permit ("C.C.P" for short) No. 0968383/57/CCP/HQ/MQQ dated 2.1.59 was granted on condition that he would export the car back to his country if his stay in India was for a period of less than three years. If, however, the period of his stay exceeded three years, he was not to sell the car without permission of the Government. At the time of issuing the C.C.P. a bond

containing the above conditions was obtained from Nicholas by the Joint Chief Controller of Imports and Exports and on the strength of the C.C.P. Nocholas imported to India his Daimler Benz Car worth Rs. 11,000/- approximately.

5. The further case of the prosecution was that on 15.12.59 Nicholas sold the said car to M/s. Ikhra Nandy Coal Company, Gillanders House, 8, Netaji Subhas Road, Calcutta, for Rs. 33,000/- in violation of the conditions of the C.C.P. and the bond which was an offence u/s 5 of the Act and left this country on 20.12.59 leaving the car in the possession of the petitioners who are partners of M/s. Ikhra Nandy Coal Company. According to the prosecution, the sale of the car in contravention of the C.C.P. and the bond was the outcome of a criminal conspiracy between the petitioners and Nicholas (against whom the case was filed), punishable u/s 120B, Indian Penal Code, read with Section 5 of the Act.

6. The defence of the petitioners was that they were not partners of M/s. Ikhar Nandy Coal Company at the material time, as the partnership was dissolved as far back as on 31.12.57 after which, they had no concern with the said firm. Another defence was that the car was not sold but merely pleadged as security for an advance of Rs. 33,000/- taken by Nicholas from the said firm as loan. According to the petitioners, they were falsely implicated in the case merely for the purpose of harassing them.

7. As stated already, both the courts below negatived the defence case and concurrently held that the petitioners were guilty of the charges framed against them.

8. Mr. Sadhan Gupta, the learned Advocate General appearing in support of the Rule, contends before us that the impugned judgment suffers from serious infirmities and is not sustainable in law. The points canvassed by Mr. Gupta in assailing the impugned judgment are set out below:

(i) the allegations made in the charges u/s 5 of the Act, even if proved, did not constitute an offence under the said section as it stood on date of alleged commission of the offence that is, alleged sale of the car on 15.12.59;

(ii) the charge u/s 120B Indian Penal Code, read with section 5 of the Act, was not proved as there was no material on record to show any conspiracy between the petitioners and Nicholas;

(iii) the charges u/s 5 of the Act, as framed, are misconceived and erroneous and. occasioned a failure of justice as the petitioners were seriously prejudiced in their defence;

(iv) there was no sale of the car at all; it was a mere pledge of the car to secure the sum of Rs. 33,000/- advanced to Nicholas as loan;

(v) even if the transaction was a sale, there was nothing to connect the petitioners with the transaction in question; and

(vi) the order of confiscation of the car was unwarranted, illegal and bad in law.

9. We propose to deal with the first point in the first place. Section 5 of the Act, as it stood before its amendment by the Imports and Exports (Control) Amendment Act, 1960 (Act 4 of 1960) is extracted below:

5. Penalty - If any person contravenes, or attempts to contravene, or abets a contravention of, any order made or deemed to have been made under this Act, he shall, without prejudice to any confiscation or penalty to which he may be liable under provisions of the Sea Customs Act, 1878 (VIII of 1878), as applied by sub-section (2) of section 3, be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

10. A plain reading of the section would at once make it clear that any person who contravenes or attempts to contravene or abets a contravention of any order made or deemed to have been made under the Act would be guilty of the offence under the Act punishable u/s 5 (emphasis supplied).

11. It is to be noted, however, that the charges were not for contravention of any order made or deemed to have been made under the Act that is, u/s 3(1) of the Act but for contravention of the conditions of the C.C.P. and the bond. By Act 4 of 1960 which came into force on 7.3.60 the words "or any condition of a licence granted under any such order" were inserted in the section after the words "if any person contravenes or attempts to contravene or abets a contravention of any order made or deemed to have been made under this Act." The result of the amendment was that contravention, attempted contravention of abetment of contravention of any condition of a licence granted under any such order was also made punishable u/s 5 of the Act. It must, however, be borne in mind that the above amendment came into force on 7.3.60, whereas the petitioners were charged for contravention of the condition of the C.C.P. and the bond on 15.12.59 when contravention of such conditions did not constitute any offence at all.

12. This point was emphetically canvassed before the learned Chief Judge and the observation of the Supreme Court in the case of Boothalinga Agencies Vs. V.T.C. Poriaswami Nadar, was also cited in support of the above point but it did not find favour with the learned Chief Judge who repelled the point with the observation that the decision was given in a different context. It is no doubt true that the above decision was pronounced in a different context but then, the question was whether contravention of a condition of a licence granted under the Act constituted an offence u/s 5 as it stood before its amendment by Act 4 of 1960 directly fell for consideration of Their Lordships and Their Lordships held that contravention of a condition of a licence was not tantamount to a breach of the statutory order within the meaning of section 5 of the Act. We, therefore, find it difficult to comprehend how the learned Chief Judge could brush aside the above decision as regards interpretation of section 5 of the Act before its amendment by Act 4 of 1960.

13. Apart from the decision cited above, it is the fundamental principle of criminal law that nobody can be convicted or punished for an act or omission which did not constitute an offence on the date of such commission or omission. As pointed out already, contravention of any condition of a licence granted under any order made or deemed to have been made under the Act which was the grave men of the charges was made punishable u/s 5 of the Act only after its amendment by Act 4 of 1960. The amendment had no retrospective effect and hence, contravention of the conditions of the C.C.P. and the bond was not an offence under the Act punishable u/s 5 as it stood on, 15.12.59 that is, the date of alleged sale of the car. That being the position, the conviction of the appellants u/s 5 of the Act is clearly illegal, unwarranted and unsupportable.

14. We next advert to the charge u/s 120B Indian Penal Code, read with section 5 of the Act. Since contravention of the conditions of the C.C.P. and the bond did not constitute any offence punishable u/s 5 of the Act, the question of an agreement between the petitioners and Nicholas to do an illegal act namely, to contravene the conditions of the C.C.P. and the bond could not arise at all. In such a situation, the conviction of the petitioners under the aforesaid charge is also bad in law and unsustainable.

15. In view of our above discussions, we do not consider it necessary to delve into the other points except point No. (vi) urged by Mr. Gupta.

16. As no offence was committed by the petitioners u/s 5 of the Act the order for confiscation of the car could not lawfully be passed. That apart, in view of the Supreme Court''s decision in the case of Additional Collector of Customs, Calcutta and Another Vs. Best and Company, order of confiscation can only be made u/s 167, Clause 8 of the Sea Customs Act, 1878. In the above case the Supreme Court held that the provisions of the Sea Customs Act, 1878 cannot be invoked to punish the breach of condition of a licence granted under the Imports and Exports (Control) Act, 1947.

For the foregoing reasons we make the Rule absolute, set aside the judgment and order passed by the lower appellate court and acquit the petitioners of the charges u/s 5 of the Act as well as of the charges u/s 120B Indian Penal Code, read with section 5 of the Act. We also set aside the order of confiscation in respect of the car in question.

J.N. Hore, J.

I agree.