

(2006) 04 DEL CK 0174

Delhi High Court

Case No: Writ Petition (C) No. 5656 of 2006

Bowrings Fine Art Auctioneers
Pvt. Ltd.

APPELLANT

Vs

Archaeological Survey of India
and Others

RESPONDENT

Date of Decision: April 28, 2006

Acts Referred:

- Antiquities and Art Treasures Act, 1972 - Section 2, 24, 3
- Customs Act, 1962 - Section 4, 5, 8

Citation: (2006) 88 DRJ 832 : (2006) 133 ECR 435

Hon'ble Judges: Vikramajit Sen, J

Bench: Single Bench

Advocate: Tasneem Ahmadi and Deepti Nar, for the Appellant; S.K. Mishra and Amiet Andley and Neelam Grover, for the Respondent

Judgement

Vikramajit Sen, J.

The facts of the case are that the Petitioner had auctioned a number of paintings on 20th November, 2002. It has not been controverted that the Catalogue had been forwarded to the Archaeological Survey of India prior to the auction. Two paintings titled/named "Reconciled" by Frederico Andreotti and "The Kill" by George D. Rowlandson, were purchased by Messrs Tony Haynes of England and thus were to be exported. Whilst in the process of shipment, the Customs Authorities had detained these paintings as they appeared to be antiquities i.e. more than 100 years old and Therefore, it was impermissible for them to be exported by virtue of the sundry provisions of The Antiquities And Art Treasures Act, 1972 (hereinafter referred to as "the Antiquities Act").

2. Section 3 of the Antiquities Act prohibits the export of "antiquities", which include paintings, as per the definitions in Section 2 of the Act. Section 4 makes the Customs

Act, 1962, applicable to instances where antiquities are sought to be exported. The said statute prohibits, in Section 5, even the sale of antiquities except under a license granted u/s 8. The power to determine whether or not an article is an antiquity is dealt with by Section 24 which reads thus:

24. Power to determine whether or not an article, etc., is antiquity or art treasure.-- If any question arises whether any article, object or thing or manuscript, record or other document is or is not an antiquity or is or is not an art treasure for the purposes of this Act, it shall be referred to the Director General, Archaeological Survey of India, or to an officer not below the rank of a Director in the Archaeological Survey of India authorized by the Director General, Archaeological Survey of India and the decision of the Director General, Archaeological Survey of India or such officer, as the case may be, on such question shall be final.

3. The Director General, Archaeological Survey of India is invested with the power to certify whether any article, object or thing or manuscript, record or other document is or is not an antiquity or is and is not an art treasure for the purposes of the Act. Paintings could have been specifically mentioned, but inexplicably has not. It is not the case of the Respondents that the paintings in question are art treasures since they would have to be declared to be so by Notification in the Official Gazette, having regard to their artistic and authentic value. The works of Amrita Shergil and Ravi Verma, amongst others, have duly been Notified.

4. Since 2002 the post of Director General, Archaeological Survey of India, is held by an officer of the Indian Administrative Service (IAS). The statute should prescribe the qualifications for appointment to the post of the Director General, Archaeological Survey of India and this absence has become conspicuous in the present case since he/she has to discharge not merely administrative but also highly specialized functions, even though some of them can be delegated to an Officer not below the rank of a Director in the Archaeological Survey of India.

5. In the first instance the Director General, Archaeological Survey of India had appointed a Committee to furnish a Report on this question. An assault had been laid on the functioning of that Committee but the matter was eventually resolved by a consent order passed on March 24, 2005 by the Division Bench of this Court in WP (C) No.16598/2004 titled as Bowrings Fine Art Auctioneers Pvt. Ltd. v. Archaeological Survey of India. The consent Order reads as follows:-

We have heard learned Counsel appearing for the parties at some length.

Challenge in this Writ Petition is to the Minutes of the Expert Committee dated 9th June, 2003 and the order passed by the Additional Commissioner of Customs dated 22nd September, 2004.

In view of the stand taken before us by the learned Counsel appearing for the respective parties it would not be necessary for us to notice the facts or the various

contentions raised in the Writ Petition. Suffice it to note during the course of the hearing and upon instructions from the respective clients, counsel for the parties submit that the Writ Petition may be disposed of by a consented order. The agreed terms are:

1. The Respondents would re-constitute a Committee who shall examine the paintings and pass a fresh order in regard to the matter in controversy.
2. The Petitioner would be notified about the constitution of the Committee and when the Committee proposes to inspect the paintings subject matter of the present Writ Petition.
3. The Petitioner would have the right to file objections and also the expert opinions in support of their case which would be examined by the Committee.
4. When the Committee inspects the paintings, the representative of the Petitioner would be present. In its discretion, if the Committee so desires, it would obviously have the liberty to call the Petitioner for hearing.
5. A fresh order would be passed within three months from today and in the meanwhile the Respondents would take full care of the paintings and they would be placed at a place and in a manner which would ensure that the paintings are not spoiled in any manner.
6. It is also agreed between the parties that the Respondents would inform the date of inspection of the paintings in question at least one month in advance to the Petitioner to enable the Petitioner to have his experts also present on the same day.

In view of the above terms or otherwise which are fair and equitable and meet the ends of justice, as the parties have already agreed to appoint a fresh Committee who shall make a fresh report and a fresh order be passed by the Competent Authority, it will not be necessary for the parties to give effect to the earlier report.

This consented order, however, would in no way adversely effect the proceedings under the Customs Act taken by the Authorities.

If a new report is passed the earlier report will not be given effect to.

Accordingly, the Writ Petition is disposed of.

6. A Second Committee of Experts came to be constituted by the Director General, Archaeological Survey of India of which Dr. Amarendra Nath, Dr. G.T. Shendey, Prof. Rajeev Lochan and Ms. Rupika Chawla are members. It appears that two other persons had also been appointed, but failed to attend any of the proceedings.

7. The Petitioner filed an application in the Writ Petition No. 16598/2004 ventilating complaints pertaining to the functioning of that Committee of Experts, namely, that the Report of that Committee was not forthcoming. The prayer in that application was for compliance with the Consent Order passed on 24.3.2005. That application

came to be disposed in terms of the following Orders dated 20th March, 2006.

CM No.2175/2006

The respondents have, along with the reply filed by them to this application, placed on record copies of two reports submitted by the Expert Committee appointed by the ASI. Copies of both the reports, which are signed by two members each of the said Committee have been furnished to counsel for the petitioner, who submits that no further orders are required in the present application except that the petitioner may be given the liberty to seek further redress in accordance with law in appropriate proceedings before the appropriate authority.

The application (CM No.2175/2006) is, accordingly, disposed of with the liberty to the petitioner to seek appropriate redress in appropriate proceedings before the competent authority not only against the reports submitted by the Committee but also for any other direction including the direction for production of any record or document.

Order dusty.

8. It now transpires that a so-called "unanimous" Report was forwarded to the Director General signed by only two members, namely, Dr.Amarendra Nath and Dr. G.T.Shendey. Thereafter, another Report has been forwarded to the Director General, Archaeological Survey of India on 8.2.2006 which is signed by Prof. Rajeev Lochan and Mrs.Rupika Chawla. The earlier Report states that the subject paintings are antiques, whereas the later Report is to the effect that the experts are unable to return an unequivocal finding on this point.

9. Mr.Mishra, learned Senior Counsel appearing for the Respondents submits that on a reading of the Orders of the Division Bench passed on March 24, 2005 as well as on March 20, 2006 a fresh determination has to be carried out by the Competent Authority in contradistinction to the fresh Committee. There has been no debate before me, nor is there any scope for it, that the Competent Authority is none other than the Director General, Archaeological Survey of India.

10. It is a foregone conclusion that if the paintings are declared as antiquities, the Petitioners will be liable to be prosecuted under the Antiquities Act. The Petitioners are already facing prosecution under the Customs Act. In this regard it will be relevant to underscore that on 24.3.2005 the Division Bench had axiomatically ordered that as and when the new Report is passed, the earlier Report will not be given effect to. The CBI and Customs Authorities are indubitably acting on the basis of the "earlier" Report.

11. A perusal of Section 24 of the Antiquities Act makes it palpably clear that it is either the Director General or any officer not below the rank of Director, Archaeological Survey of India appointed by the former, who is authorised to determine the age of an article. The Director General, Archaeological Survey of

India, had departed from this procedure by Constituting the First Committee. By consent of parties, however, that arrangement had been varied by the Division Bench in terms of the appointment of the Second Committee, whose Report far from being unanimous, is evenly split down the middle. On first principles of criminology, it may not be permissible for any person to be prosecuted either under the Antiquities Act or under the Customs Act where there is a clear division on the question of the age of the painting itself; benefit of the doubt would have to be extended to the person charged with violation of the Statute. Accepting the argument of Mr. Mishra, the Competent Authority, namely, the Director General, Archaeological Survey of India, would now have to take a final decision on the matter. In this regard, keeping the annals of the litigation in view, the decision would now have to be taken by the Director General, Archaeological Survey of India himself, with the aid of or reference to the split opinion of the Second Expert Committee. This will indeed be a difficult and formidable task if not impossible one for any person who is not academically and professionally trained to return a finding on the extremely technical question of the age of a Painting. It was because of this vexed situation that the absence of qualifications of the Director General, Archaeological Survey of India had manifested itself. An IAS Officer may be fully competent to discharge administrative functions. However, unless he has attained specialisation in the field of determination of the age of a Painting, he would have to depend only on the Experts' opinions. Keeping in perspective the absence of even a preponderant opinion he may be left with only one option.

12. The auction took place almost three and a half years ago. Valuable consideration has been paid towards the price of the paintings in question. Differing a final decision will only be to the detriment of the purchaser. A decision should already have been taken by the Director General, Archaeological Survey of India since the Report of Prof. Rajeev Lochan and Ms. Rupika Chawla had been received by him as far back as on 18.2.2006. It should not be forgotten that delay in this regard also exposes the Petitioner to continued prosecution.

13. This Writ Petition is disposed of with the direction to the Director General, Archaeological Survey of India to pass an order in terms of the decision of the Division Bench dated March 24, 2005, within four weeks.

14. In view of these events the prosecution of the Petitioners under the Antiquities Act or under the Customs Act shall be held in abeyance till the expiry of thirty days after the fresh determination/decision of the Director General, Archaeological Survey of India taken within the parameters outlined above. The Competent Authority/Director General, Archaeological Survey of India shall afford the Petitioner an opportunity of being heard.

15. Parties to bear their respective costs.