

(1988) 04 BOM CK 0061**Bombay High Court****Case No:** Writ Petition No. 2377 of 1987 with Writ Petition No's. 2378 to 2392 of 1987

Shah and Co.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision: April 19, 1988**Citation:** (1988) 37 ELT 503**Hon'ble Judges:** S.C. Pratap, J**Bench:** Single Bench**Judgement**

@JUDGMENTTAG-ORDER

1. Pursuant to her earlier undertaking given to this court on 11th March, 1988, learned Advocate Miss Reshma Ruparel has since filed her appearance for the petitioners in all these petitioner and the same has been taken on record. M/s. Kanatwala & Co. Advocate and solicitors, are, therefore, as earlier indicate, now discharged as Advocates for the petitioners.
2. Pursuant to court's suo notice, proceeding how come up for considering the affidavit of advocate Nitin Kantawala filed to show that there is as against him, no case for criminal contempt, before that, however, a brief resume of the facts and circumstance may be useful.
3. The main relief claimed in these petitioners relates to refund of duty paid. At the hearing the reasoning had contended that the petitioners had filed three writ petitioners and, pursuant to orders thereon, obtained refund : that even so the petitioners filed the present petitioners claiming refund once again of those very amounts : Whereas earlier refund was founded on bills of entries cash numbers, claim in the present petitions was on bills of entries themselves, thus making it difficult to co-relate the two claims : and that the petitioners has also obtained refund from customs in favour of various other concerns by having exhibits to petitioners, on which refund orders were made, substituted to included other claims.

4. Holding prima facie that the petitioners sole proprietor Kumar Prabhulal Shah (for short Shah) -

- (a) made claim which he knew to be false and made fraudulently and dishonestly
- (b) attempted to obtain Court's order for money not due : and
- (c) perjured himself by false statement

The learned Judge seized of the matter directed issue of notice to Shah to show cause why he should not be prosecuted for offences u/s 191 and 209 of the penal code as also for attempt to commit offence u/s 110 of the penal code. The said Shah then personally present in court voluntarily made statement admitting the fact that out of claims made in the present group of petitioners, he had received refund in respect of eight claims and that with regard to the remaining eight, he had already made claims in the earlier petitions. However, all this according to him, was done inadvertently.

5. The above notice to Shah was made absolute and criminal proceeding have accordingly been filed against him. The same are pending, later on, proceeding for criminal contempt have also been filed against him and the same also are pending. We are, however, not concerned here with these criminal as also contempt proceeding against Shah.

6. We are only concerned with contempt notice to advocate Nitin Kantawala and his detail affidavit in reply thereto. Considering the said affidavit in the context particularly that action in contempt is a quasi-criminal proceeding. I am of the view that this is a case where benefit of doubt should go to Kantawala. While advocate and their staff are all certainly expected to be careful in the performance of their duties and the discharge of their responsibilities towards the litigants as also the courts, mistakes can and do occur, if the alleged misconduct is intentional, action must follow. But if it is unintentional, if can be condoned. And if it is not certain, one way or the other, then the benefit of that uncertainty may go to the concerned persons or party.

7. There is no dispute that at the relevant time petitions after petitions were being filed in large numbers by different Advocates claiming refund of duty paid and that in several of these petitions refunds were being directed at the stage of admission itself. Many of these petitions partook an almost uniform format. Advocate Nitin Kantawala himself had also been filing many such petitions. Coming then in his seventeen pages detailed affidavit, he states.

"... I say that my firm had prepared a regular format for such petitions as numerous such petitions had to be filed. In the circumstances, I used to ask the clients concerned to prepare a statement claiming refund which formed part of the annexures to such petitions. The said statement was prepared by the respective petitioners themselves from their own record and copies of refund applications

rejection orders were also annexed."

"... I say that in the year 1986 my firm had filed about hundred such petitions in connection with refund applications which had been rejected or in respect whereof of records were passed. I used to accept the documents given to me and the statements of claims prepared by the respective petitions as correct. I had filed about eight to ten petitions under instructions of the petitioner in similar fashion. In 1987 also my firm had filed diverse petitions on behalf of several clients."

"... I say that in respect of the said petitions also I had in good faith accepted the statements prepared by the said Shah as correct. I say that when any clients like the petitions had give correct papers all along for a period covering eight to ten months, a confidence and trust had been created in my mind that the petitioner would be giving correct and genuine particulars. I never suspected that he would be giving incorrect particulars or papers for filing petitioners I say that the petitioners never disclosed to me as to whether amounts had already been received in respect of some claims of refund or that the papers and particulars given to me had already been earlier processed in customs for duty refund and/or had been made the subject matter of earlier petitions. I say that the said petitions were filed by my firm under instructions of the petitioner under the bona fide belief that the same were covering genuine claims. I as an Advocate trusted the petitioner."

And still further -

"...I further say that all refunds are made by cross-order cheques made out in the name of the concerned importers who have to issue receipts in advance and at no time were any such cheques sent to the advocates concerned, in any events no such refund amounts were recovered by my firm at any time".

To continued -

"... I had filed the above petitions under instructions of the petitioner honestly believing that the instructions and the documents given by the petitioner were correct and actionable and trusted them as regards the said statements and documents given to me by them. The said petitions would never have been filed had I been told that the amounts therein claimed had been received or that orders for refund had been passed in respect thereof. There never was any intention or attempt on my part to interfere with the course of justice and in any events, my apology for the bonafide error in filing the said petitions under the circumstances mentioned above may be accepted."

He ends his affidavit praying -

"... to accept my unconditional apology in the matter for such bona fide error occurring in the matter in the aforesaid circumstance."

8. Question is : Has the learned Advocate made out a case for discharging the notice against him ? Experience does show that when several petitions of similar nature are being filed, a formal is generally prepared and "blanks" like titles, figures, dates, numbers, amounts, etc., are filed in. Experience also shows that when there is common challenge and common question and petitions filed in groups. The same are sometimes also taken up in groups, admitted in groups and even heard in groups. Similar orders sometimes in terms even of minute of the order then follow on similar petitions. There is in this behalf trust and confidence reposed by the court in the Bar and by the Bar in the litigants. If in this process a discovery is later made that in some matters, things were not above board, it cannot be concluded that the person necessarily responsible for it is the Advocate. Conclusion cannot and does not necessarily follow that the discovered mistake was one a priori in existence to the knowledge of the Advocate. The Advocate here has explained his position in his detailed affidavit, several portions whereof have been extracted supra. This affidavit comes from a senior members of the Bar having over the years large practices in the field of customs and excise. There is no good reasons why his statements on affidavit of (i) having acted in good faith, (ii) in bona fide belief and honesty believing the instructions and documents given to him by the litigant and (iii) absence on his own part of any intention to interfere with the course of justice, should not be accepted.

9. His defence is plausible and probable. That he should have been careful goes without saying. It is a case of utter lack of due care and attention. It is undoubtedly a mistake and a serious one at that. One may even go to the extent of observing that there is doubt. But there is no certainly, in other words one is not sure. And there in the facts and circumstances, ends the inference of a judicial mind. As is settled in the field of criminal and quasi-criminal jurisprudence, there is a definite distance to be travelled between "may" and "must" between "reasonable doubt" and "beyond reasonable doubt" and there is a vital distinction between the two indeed as much vital as between acquittal and conviction.

10. Such then is the emerging situation. Though the learned Advocate does not, as he would have "wished" come out of if with high honours he cannot, in all fairness to him. Be denied benefit of reasonable doubt by a court of justice, equity and goods conscience. He has also tendered his unconditional apology. In all the circumstances these suo motu proceedings against him are dropped.

11. As earlier noted proceeding have been already instituted against the concerned party Kumar Prabhulal Shah both under the criminal law of the land as also under the contempt of Court's Act Nothing herein said or observed can affect hearing and adjudication thereof on merits and in accordance with law.

12. At this stage, learned Advocate Miss Reshma Ruparel for the petitioners states that so far as the main writ petitions are concerned, nothing survive therein, she, therefore, request that these petitions may be allowed to be withdrawn. I see no

good reason not to grant this request. The petitioners cannot be compelled or forced to go on with these petitions against their will and decision to the contrary. Besides criminal as also contempt proceedings have been already taken against Kumar Prabhulal Shah and the same are proceeding according to law. Withdrawal of these present petitions cannot the least affect the pending criminal or contempt proceedings. These petitions are, therefore, allowed to be withdrawn.

13. The probationary and senior Master is, however, directed to keep all these petitions in her safe custody along with writ petitions No. 174 of 1987 and copy of writ petitions No. 744 of 1987 to abide by such orders as may be made inter alia in the pending criminal and/or contempt proceeding against Kumar Prabhulal Shah.