

MANHARLAL BHOGILAL SHAH

A

v.

STATE OF MAHARASHTRA

April 5, 1971

[S. M. SIKRI, C. J., G. K. MITTER, K. S. HEGDE, A. N. GROVER AND
P. JAGANMOHAN REDDY, JJ.]

B

Sea Customs Act, 1878, s. 167, items 87 and 81, and s. 187A—If s. 187A confers arbitrary powers on customs officials—If ultra vires Art. 14 of Constitution.

The appellant imported consignments of contraband and prohibited goods. He was prosecuted for an offence under s. 167, item 81, of the Sea Customs Act, 1878, on a complaint by the appropriate authority under s. 187A, and was convicted.

C

On the question whether s. 187-A violated Art. 14 of the Constitution on the grounds; (1) that the Customs authorities had an absolute discretion to proceed either under s. 167(8) in which case there would be only an imposition of a fiscal penalty and confiscation of goods; or to file a complaint in the criminal court under s. 187A for the offence under s. 167 item 81, in which case there could also be a sentence of imprisonment up to two years, and (2) the customs officials have a wide latitude in choosing cases for criminal prosecution,

D

HELD: (1) The proceedings under the Foreign Exchange Regulation Act, 1947, unlike under the Sea Customs Act, could be taken in the alternative and the punishment could also be imposed in the alternative. Any person guilty of contravention of s. 23(1)(a) of that Act could not be made liable for a penalty under s. 23(1) (a) and also to prosecution and imprisonment under s. 23(1)(b). Therefore, s. 23D, which empowers the Director of Enforcement to file complaint *instead* of imposing a penalty under s. 23(1)(a) only if he was satisfied that in the circumstances of a case a penalty under s. 23(1)(a) would be inadequate, was necessary to prevent arbitrary exercise of discretion by the Director under that Act. Such a provision however, is not necessary under the Sea Customs Act, because, if a person is found guilty under s. 167, item 8, and if his case is also covered by item 81, there is no choice in the matter of imposing penalty or punishment. A penalty can be imposed under item 8, and he will also be liable to criminal prosecution under item 81. [363B-F; 364A-B]

E

F

Royal Corporation (P) Ltd. v. Director of Enforcement, New Delhi, [1971] 1 S.C.R. 639, referred to.

G

(2) It cannot be said that s. 187A confers an unguided power on the customs authorities for not filing a complaint against a person although he was liable to a criminal prosecution under s. 167, item 81.

While deciding whether a complaint should be instituted for an offence which is covered both by items 8 and 81 of s. 167, a customs officer must take into account the enormity and magnitude of the contravention, the evidence which is available, and whether the evidence is sufficient to take the matter to a criminal court. The officers who are authorised to make a complaint under s. 187A are senior officials holding responsible positions

H

A and they have to act in a reasonable and bonafide manner. They cannot discriminate between similar cases according to their whim and fancy. The power conferred by the section is to be exercised for effectuating the object and purpose of the Act keeping in view the entire scheme of the Act to ensure that goods do not escape the levy of duty and that the prohibitions and restrictions imposed on importation and exportation are rigidly enforced. [365C-E, G-H ; 366B-C, D-F]

B *Matajog Dobey v. H. C. Dhari*, [1955] 2 S.C.R. 925, 932 and *Nirmala Textiles Furnishing Mills Ltd. v. The Second Industrial Tribunal*, [1957] S.C.R. 335, followed.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 44 of 1967.

C Appeal from the judgment and order dated January 23, 1967 of the Bombay High Court in Criminal Appeal No. 525 of 1965.

R. Jethmalani, S. B. Jaisinghani and *K. Hingorani*, for the appellant.

D *Jagadish Swarup, Solicitor-General, H. R. Khanna, B. D. Sharma* and *S. P. Nayyar*, for the respondent.

The Judgment of the Court was delivered by

E **Grover, J.**—This is an appeal by certificate from a judgment of the Bombay High Court upholding the conviction and sentence of the appellant under s. 167(81) of the Sea Customs Act, 1878, hereinafter called the 'Act' and s. 120-B of the Indian Penal Code read with the aforesaid section and s. 5 of the Import and Export (Control) Act 1947. The main point for determination is whether s. 187-A of the Act is unconstitutional on the ground that it is violative of Art. 14 of the Constitution. The facts to **F** the extent they are necessary may be set out.

The appellant carried on business in the name of *M/s. Jaihind Ex-Import Coporation* as its sole proprietor. He also carried on business as a partner in another firm run under the name and style of *Alram Optics (India) Corporation*. The offices of the two **G** firms were situate at New Charni Road, Bombay. According to the case of the prosecution the appellant with the object of defrauding the Government of customs duty payable on certain goods and with a view to evading prohibition imposed on the import of such goods was a party to criminal conspiracy, some of the other parties being *M/s. O. & K. Heydegger* and *M/s. Winter Optics in West Germany*. The conspiracy was stated to have **H** been entered into for the purpose of acquiring possession of contraband goods such as spectacle frames, welding glasses etc. The import of spectacle frames was totally prohibited and the import

of welding glasses was greatly restricted. It was alleged that in pursuance of the conspiracy the appellant imported three consignments by three different ships; the first one arrived by s.s. Bialystock and the other two came on September 22, 1960 and March 5, 1960 by two other ships s.s. Fraunfels and s.s. Laurenskerk. Out of the four cases which arrived in the first consignment two cases contained contraband goods. As regards the other two consignments one case in each consignment contained goods the import of which was prohibited. The *modus operandi* was highly ingenious and interesting but we need not recapitulate the same.

The defence of the appellant was that it was owing to the mistake of shippers that the cases containing contraband goods arrived. It may be mentioned that no bill of entry was lodged by the appellant regarding the cases which contained contraband goods of the first consignment and the other consignment which were not got cleared. The learned Presidency Magistrate found the appellant guilty and sentenced him to six months' rigorous imprisonment and a fine of Rs. 1000 for each of the four charges directing the substantive sentences to run concurrently. The appellant filed an appeal to the High Court and the State preferred a petition for revision for enhancement of the sentence. The High Court dismissed both the appeal and the revision. The High Court further directed that the contraband goods should stand confiscated in favour of the Government of India.

During the pendency of the appeal in this court a petition was filed on behalf of the respondent (Cr. Misc. Petition No. 362/70). It was prayed therein that a constitutional point as to the vires of s. 187A read with s. 167(81) of the Act be allowed to be raised. Thereupon the Division Bench made an order that the appeal be placed before a larger bench. The question being one of constitutional validity of s. 187A of the Act counsel for the appellant has addressed arguments before us with our permission on the aforesaid point. It has been contended *inter alia* that the offences of smuggling of goods and in particular the acts with which the appellant has been charged could be dealt with by the customs authorities by proceeding under s. 167(8) of the Act as well as in the alternative or in addition by instituting a prosecution in a criminal court by filing a complaint under s. 187A read with s. 167(81) of the Act. The former can result only in the imposition of a fiscal penalty not exceeding three times the value of the goods and confiscation of the goods themselves. The latter can result in a sentence of imprisonment upto two years or fine or both. Thus it has been left to the unfettered and unguided discretion of the customs authorities to proceed against certain persons under s. 167(8) and others under s. 167(81) or under both the sections. In a large number of cases no criminal prosecutions

A were filed at all and proceedings under s. 167(8) alone were taken which resulted in imposition of penalties. This leads to discrimination and has actually resulted in discrimination.

B We may now refer to s. 187A of the Act. It provides that no court shall take cognizance of any offence relating to smuggling of goods punishable under item 81 of the Schedule to s. 167 except upon complaint in writing made by the Chief Customs Officer or any other officer of customs not lower in rank than an Assistant Collector of Customs. Items 8 and 81 of s. 167 to the extent they are material are as follows:—

| C | Offences | Section of this Act to which offence has reference | Penalties |
|----------|---|--|---|
| D | 8. If any goods the importation of which is for the time being prohibited or restricted by or under Chapter IV of this Act, be imported into or exported from India contrary to such prohibition or restrictions; or If any attempt be made so to import or export any such goods; or....." | 18 & 19 | Such goods shall be liable to confiscation; and any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods or not exceeding one thousand rupees." |
| E | 81. If any person knowingly, and with intent to defraud the Government of any duty payable thereon, or to evade any prohibition or restriction for the time being in force under or by virtue of this Act with respect thereto acquires possession or, or is in any way concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any goods which have been unlawfully removed from a warehouse or which has not been paid or with respect to the importation or exportation of which any prohibition or restriction is for the time being in force as aforesaid; or....." | General | Such person shall on conviction before a Magistrate be liable to imprisonment for any term not exceeding two years, or to fine, or to both." |
| G | | | |

H Even though item 8 of s. 167 does not employ the word "knowingly" which is to be found in item 81 international smugglers are bound to be covered by both the items. The argument on behalf of the appellant is based on there being no guidelines in s. 187A in the matter of filing a complaint for an offence under item 81. It is suggested that if there is an option to the officers mentioned therein to file a complaint or not to file the complaint then there will be clear infringement of Art. 14. Counsel for the appellant

has gone to the extent of submitting that the power to give sanction or to make a complaint without any guidelines would itself be hit by Art. 14. A

Our attention has been invited to *Ravala Corporation (P) Ltd. & Ors. v. Director of Enforcement, New Delhi*⁽¹⁾, in which one of the points canvassed was that s. 23(1)(b) of the Foreign Exchange Regulation Act 1947 as amended by the Foreign Exchange Regulation (Amendment) Act 1957 was violative of Art. 14 of the Constitution inasmuch as it provided for punishment severer than the punishment or penalty provided for the same acts under s. 23(1)(a) of that Act. It was pointed out in the judgment of this court that two different proceedings could be taken for contravention of certain provisions of the aforesaid Act. Under s. 23(1)(a) a person was liable to a penalty only and that penalty could not exceed three times the value of foreign exchange in respect of which contravention had taken place or Rs. 5,000 whichever was more. That penalty could be imposed by adjudication made by the Director of Enforcement in the manner provided in s. 23(D) of the said Act. The alternative punishment provided by s. 23(1)(b) upon conviction by a court was a sentence of imprisonment for a term which could extend to two years or with fine or with both. The argument that the section laid down no principles for determining when a person concerned should be proceeded against under s. 23(1)(a) and when under s. 23(1)(b) and that it was left to the arbitrary discretion of the Director of Enforcement to decide which proceeding should be taken was repelled by relying on the provisions of s. 23D. Under that section the Director of Enforcement was first to hold an inquiry for the purpose of adjudging whether there had been contravention under s. 23(1)(a) and if he was satisfied that the person had committed a contravention he could impose a penalty provided thereby. According to the proviso, however, if at any stage of the enquiry he was of the opinion that having regard to the circumstances of the case the penalty would not be adequate he was bound to make a complaint in writing to the court instead of imposing any penalty himself. B
C
D
E
F

Counsel for the appellant has laid great emphasis on the absence of any such provision in the Act as was to be found in s. 23D of the Foreign Exchange Regulation Act 1947. But it is significant that under the aforesaid enactment the proceedings could be taken in the alternative and the punishment also could be imposed only in the alternative and any person guilty of contravention could not be made liable for a penalty provided by s. 23(1)(a) as also imposed a sentence of imprisonment under G
H

(1) [1971] 1 S. C. R. 639.

A s. 23(1)(b). According to the provision of s. 167, items 8 and 81 of the Act there is no choice in the matter of imposing penalty or punishment. If a person is found guilty a penalty can be imposed under item 8 and he will also be liable to criminal prosecution and conviction if his case is covered by item 81 of that section.

B In numerous Acts provisions are found according to which no court can take cognizance unless either sanction is granted by the competent authority for the prosecution of an accused person or a complaint in writing is made by an officer or authority empowered in that behalf. Nothing is indicated or expressly stated in most of the provisions as to the circumstances in which sanction should be withheld or granted or a complaint should be instituted or not. One of such provisions came up for examination in *Gokulchand Dwarkadas Moraka v. The King* (1). Under clause 23 of the Cotton Cloth and Yarn Control Order 1943 no prosecution for contravention of any of the provisions of the Order could be instituted without the previous sanction of the Provincial Government etc. It was laid down that in order to comply with the provisions of clause 23 it must be proved that the sanction was given in respect of the facts constituting the offence charged. Counsel for the appellant has relied a great deal on the following observations of their lordships:

E "They can refuse sanction on any ground which commends itself to them, for example that on political or economic grounds they regard a prosecution as inexpedient."

F It is argued that if the same wide latitude is given to the customs officers mentioned in s. 187A they can import even political or economic considerations for not filing a complaint although a person is liable to criminal prosecution for an offence under s.167(81). We consider it unnecessary to pronounce, with respect, on the correctness or otherwise of the above observations. We have no doubt that the authorities concerned are expected to take into account the changed conditions obtaining after the enforcement of our Constitution which guarantees fundamental rights including Art. 14. They are bound to examine the facts of a particular case and then decide whether prosecution should be launched or not.

G Even if any policy or guidelines have to be found they can certainly be discovered from the object, purpose and scheme of the Act. The preamble reads: "Whereas it is expedient to consolidate and amend the law relating to the levy of Sea Customs duties it is enacted as follows". Chapter IV deals with prohibitions and restrictions

H (1) A. I. R. 1948 P. C. 82.

on importations and exportation and Chapter V, with levy of and exemption from customs duties. Elaborate provisions have been made to ensure that goods do not escape the levy of duty and that the prohibitions and restrictions which have been imposed on importation and exportation are rigidly enforced. Chapter XVI provides for offences and penalties and s. 167 therein is an omnibus section which contains 81 items dealing with offences and penalties. Chapter XVII contains procedural provisions relating to offences, appeals etc. Section 187A appears in this Chapter.

The procedural provisions must be read in the light of the object and purpose of the Act. While deciding whether a complaint should be instituted for an offence which is covered both by items 8 and 81 of s. 167 a customs officer must take into account the enormity and magnitude of the contravention and the evidence which is available. It is possible that in certain cases the evidence may not be sufficient for taking the matter to a criminal court and in view of the entire facts a complaint may not be lodged for contravention of offence under item 81 but in all cases the customs officers have to act in a reasonable and *bona fide* manner and they cannot just discriminate between similar cases according to their whim and fancy. For if that is done it is always open to a person against whom complaint has been instituted to challenge their exercise of discretion in appropriate proceedings. We are fortified in the view that we are taking by the following observations in *Matajog Dobay v. H. C. Bhari*⁽¹⁾, where the argument that Section 197 of the Criminal Procedure Code vested an absolutely arbitrary power in the Government to grant or withhold sanction at their sweet will and pleasure was considered :

“If the government gives sanction against one public servant but declines to do so against another, then the government servant against whom sanction is given may possibly complain of discrimination. But the petitioners who are complainants cannot be heard to say so for there is no discrimination as against any complainant. It has to be borne in mind that a discretionary power is not necessarily a discriminatory power and that abuse of power is not to be easily assumed where the discretion is vested in the government and not in a minor official.”

The officer who is authorised to make the complaint under s. 187A of the Act is the Chief Customs Officer or any other officer of customs not lower in rank than the Assistant Collector of Customs authorised by the Chief Customs Officer. These officers cannot be regarded to be minor officials and they hold responsible positions

(1) [1955] 2 S. C. R. 925,932.

A in the hierarchy of customs authorities. In *Niemla Textiles Finishing Mills Ltd. v. The 2nd Industrial Tribunal*⁽¹⁾ the validity of the Industrial Disputes Act 1957 including s. 10 was challenged, *inter alia* on the ground that the appropriate government had unregulated and arbitrary power to discriminate between different parties and it was open to it to refer the industrial dispute to a Board for promoting the settlement or a Court of Inquiry or the Industrial Tribunal and that there were no guidelines as to which class of cases were to be referred to one or the other. It was pointed out by this court that the purpose sought to be achieved by the said Act had been well defined in the preamble to it. The provisions sufficiently indicated the purpose and scope of the enactment as also the industrial disputes which might arise between the employers and their workmen which had to be referred for settlement to the various authorities under the Industrial Disputes Act. The achievement of one or other objects in view by such reference to the Board of Conciliation or Court of Enquiry or Industrial Tribunal must guide and control the exercise of the discretion and there was no question of the government being in a position to discriminate between one party and the other. In our judgment the ratio of this decision appositely applies to the present case. The object and purpose of the Act has already been noticed as also its scheme and the relevant provisions. The power conferred by s. 187A has to be exercised for effectuating the object and purpose of the Act keeping in view the entire scheme. It cannot, therefore, be said that any unguided discretion or power has been conferred of the nature which would come within the inhibition of Art. 14. The principal contention of the learned counsel for the appellant based on Art. 14 must fail.

F On the merits counsel for the appellant has brought to our notice the various facts and circumstances relating to the case. We are satisfied that the High Court rightly upheld the conviction for the offences in question but taking into consideration every aspect of the matter we consider that the sentence of imprisonment already undergone by the appellant together with the fine which has been imposed apart from the order relating to the confiscation of goods will serve the ends of justice.

G The appeal is consequently allowed only to the extent that the sentence of imprisonment for each offence is reduced to one already undergone. In all other respects the appeal shall stand dismissed. The bailbonds of the appellant, who was ordered to be released on bail, shall stand discharged.

V.P.S.

Appeal allowed in part.

(1) [1957] S. C. R. 335.