

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL.M.C. 1204/2010**

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Reserved on: 22nd March, 2012

Decided on: 1st June, 2012

RAKESH KUMAR GOYAL

..... Petitioner

Through

Mr. Rajeev K. Virmani, Sr. Adv. with
Mr. R.S. Bhatnagar, Adv.

versus

NCT OF DELHI & ANR.

..... Respondent

Through

Mr. A.S. Chandhiok, ASG with Mr.
Satish Aggarwala, Adv.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present petition the Petitioner challenges the order dated 15th January, 2008 summoning the Petitioner for offences under Sections 174/175 IPC and quashing of the criminal complaint No. 8/1 of 2008 titled as “Shri R.K. Chibber Vs. Rakesh Kumar Goyal” pending with the Learned Additional Chief Metropolitan Magistrate, Patiala House Courts, New Delhi.

2. Learned counsel for the Petitioner contends that none of the summons allegedly issued under Section 108 of the Customs Act from 13th July, 2006 to 10th July, 2007 were issued by a person duly authorized by the Central Government in this behalf. The authorization for the first time in favour of a Gazetted officer of Customs was given by the Central Government on 20th February, 2008 and thus even if the Petitioner did not appear before the officer concerned pursuant to the summons issued, no offence under Sections 174/175 IPC is made out and thus the learned Trial Court erred in

taking cognizance on the complaint filed by the Respondent and issuing summons to the Petitioner. It is further contended that by way of retrospective amendment to Section 108 (1) of the Customs Act, an act, which was not an offence when the Petitioner was required to appear and produce documents by various summons and letters, cannot be made an offence with retrospective effect. This violates the Constitutional guarantee provided under Article 20 of the Constitution of India. Reliance in this regard is placed on *Star India Pvt. Ltd. Vs. Commissioner of Central Excise*, (2005) 7 SCC 203 and *Superintendent Narcotics Control Vs. Parash Singh*, (2008) 13 SCC 499. It is next contended that the Customs Act is a self-contained Act and provides penalties and consequences of any non-compliance of its provisions under Section 117 of the Customs Act and thus assuming, though not admitting, that there was non-compliance, no action under Section 174/175 IPC could be taken. Since the Customs Act is a special statute and declares various acts as set out from Sections 132/135-A as offences and the manner of cognizance of the offence is laid down in Section 137 of the Act, the same will prevail over the Indian Penal Code (IPC) unless the offences under IPC are made specifically applicable. Reliance is placed on *Delta Impex v. Commissioner of Customs*, 110 (2004) DLT 209 (DB). Relying on *Enforcement Directorate Vs. M. Samba Siva Rao* (2000) 5 SCC 431 it is submitted that the provisions of the Customs Act would prevail over IPC and any violation of Section 103 of the Customs Act would be punishable as specifically provided therein and not under Section 174/175 IPC. Further even on merits summons were duly complied with and the details sought therein were furnished. Thus, the charge of non-compliance is baseless. Reliance is placed on *Saroj K. Dutta Vs. R.L.*

Thaplial, 2009 (7) AD (Delhi) 274. The filing of the complaint against the Petitioner is mala-fide as the Petitioner had filed a complaint against Dr. John Joseph, Additional Commissioner of the Respondent under whose charge Respondent No.2 the Investigating Officer was functioning, and thus as a counter-blast, the Petitioner is implicated in this complaint. Further, violating the principles of natural justice, the details of the enquiry as requested repeatedly by the Petitioner's company have not been furnished. In the alternative, it is also contended that the complaint for non-compliance of summons dated 12th June, 2006 and 18th July, 2006 is barred by limitation under Section 468 Cr.P.C. The impugned order of cognizance is dated 15th January, 2008 and the notification and amendment by way of Section 69 of the Finance Act 2008 came into force only on 10th May, 2008. Thus, even on the date of issuance of the summons by the learned Trial Court, the Custom Officer was not authorized to summon the Petitioner.

3. Learned Additional Solicitor General on the other hand contends that since the Petitioner admits having received the summons, the non-compliance thereof attracts Sections 174/175 IPC and thus the complaint and the order summoning the Petitioner cannot be quashed. In view of the amendment in the Financial Act, 2008 retrospectively amending the Section 108(1) of the Act with effect from 13th July, 2006, the contention of the Petitioner that the Custom Officer had no authority to issue summon on 12th June, 2006 and 18th July, 2006 is without merit. Vires of the amendment have not been challenged and in absence thereof, this Court in a petition under Section 482 cannot hold that the Officer was not duly empowered and competent to issue summons for appearance to the Petitioner, consequently,

the Petitioner can be prosecuted for non-compliance of the summons issued by the Customs Officer. The essential requisites of Section 108 of the Customs Act are “either to give evidence” or “to produce a document” or “any other thing in any enquiry”. Thus, these are all procedural aspects for which any retrospective amendment can be made. When an enquiry is conducted the person summoned cannot be informed in advance about the nature of enquiry and it is only on enquiry, offence, if any, committed can be ascertained. Referring to the summons issued and the replies of the Petitioner, it is stated that there was continuous default in appearance which default continues till today and in view thereof this being a continuing offence thus the provisions of Section 468 Cr.P.C. does not apply. The moment the notification giving retrospective effect to the amendment is made, the offence then committed by the Petitioner continues to be offence till date and thus it cannot be said that on the date of offence the officer was not empowered to issue summons. Thus, even if there was any defect earlier, the same stood rectified. Section 117 of the Customs Act has no application to the facts of the present case as the same applies to penalties where no express penalty is provided in the Customs Act. Further Article 20 of the Constitution bars a person from being convicted for any offence except for violation of a law in force at the time of the commission of the alleged offence. Reliance is also placed on *Enforcement Directorate Vs. M. Samba Siva Rao* (2000) 5 SCC 431 wherein it was held that non-compliance of the summons issued under Section 40 of the Foreigners Exchange Regulation Act, 1973 (in short ‘FERA’) is to be viewed seriously. Assuming the contention of the Petitioner to be correct, though not admitting, the procedural irregularity of the Custom Officer having no authority to summon

cannot dilute Section 174 IPC. The proceedings under Section 108 of the Customs Act are judicial proceedings and any person who violates the same is liable to face the rigmarole of Section 174 IPC. As regards the mala fide, nothing has been placed on record to show that there is any mala fide on the part of the Investigating Officer. Referring to various summons issued and the reply of the Petitioner, it is contended that not once did the Petitioner join the enquiry and only on one occasion incomplete documents were sent. In any case the issues raised in the present petition are required to be decided by the Trial Court and are not the matter for consideration in a petition under Section 482 Cr.P.C. Further a person, who does not comply with procedural rigour of the law, cannot seek a relief under Section 482 Cr.P.C.

4. I have heard learned counsel for the parties. Briefly the case of the Respondents is that the Respondent No.2 issued summons to the Petitioner M/s. Bronze Logistics Pvt. Ltd. through its proprietor/ partner/ authorized representative vide its letter dated 12th June, 2006 for giving necessary evidence or producing documents in respect of the enquiry being conducted by Respondent No.2 for the alleged exports by M/s. Bronze Logistics Pvt. Ltd. It may be noted that this summon did not ask for any documents nor directed the presence of Petitioner and the company could be represented through authorized representative. In reply to the said summons, on 16th June, 2006 the Petitioner sent the authorized representative on behalf of the company. In response to the summons, it was replied on behalf of the company that they were surprised and shocked to receive the summons as the company held one Star status and the summons were without any basis and non-speaking. It was further stated that the Director of the company was

out of station and hence was unable to appear on the date and time fixed in the summons and the record was lying with the auditors for the purpose of audits, and thus the company M/s. Bronze Logistics Pvt. Ltd. is not able to produce it. Thereafter on 3rd July, 2006 a fresh summon was issued to M/s. Bronze Logistics Pvt. Ltd. through its Director for giving evidence and producing documents. The summons itself provided that all documents relating to the exports made through Shipping bill Nos. 5880793 and 5880795 both dated 14th November, 2005 be forwarded. Even this summon was replied to by the Petitioner on 18th July, 2006 in the same manner. Again on 3rd November, 2006 a summon was issued to the authorized signatory of M/s. Bronze Logistics Pvt. Ltd. asking him to submit the bank realization certificates (BRCs) in respect of Shipping Bill Nos. 5880793 and 5880795 both dated 14th November, 2005 and seeking copies of the Shipping bills along with copies of the BRC. Again a summon was issued on 10th July, 2007 by Respondent No.2 regarding its satisfaction that the documents required for enquiry were in the possession or under control of the Petitioner and thus his presence was required along with the copies of the BRCs in respect of the goods exported through Shipping Bill No. 5880793 dated 14th November, 2005, copies of the bills relating to goods exported in the last financial year along with attested copies of BRCs and copies of purchase order in respect of goods exported against abovementioned Shipping bills. In response to these summons, the authorized representative of the company of the Petitioner sent a letter stating that the Petitioner was out of station and was expected to return within a fortnight and sent copies of the BRCs and copies of Shipping bill Nos. 5880793 and 5880795. However, the said documents were not complete. Similarly on 2nd April, 2007, 21st May, 2007

and finally on 10th July, 2007 similar summons were issued, however the Petitioner did not comply with the same and every time it was stated that the Petitioner was out of the town and not available. Referring to the earlier summons dated 25th July, 2007 the Deputy Commissioner of Customs Department wrote another letter on 21st August, 2007, which was replied to on 5th September, 2007 asking Respondent No.2 to apprise them of the nature and basis of the so-called investigation against the Petitioner's company. Thus, non-compliance of the summons issued repeatedly by Respondent No.2 resulted in filing of the complaint before the Learned ACMM and passing of the order dated 15th January, 2008 summoning the Petitioner for offence under Sections 174/175 IPC.

5. The primary contention of the Petitioner is that at the relevant time Respondent No.2 had no authority to summon the Petitioner and since it did not have the authority to summon at the relevant time, the non-compliance of the summons cannot be made an offence. The retrospective operation of the amendment cannot create an offence retrospectively. It would be appropriate to reproduce Section 108 of the Customs Act.

“108. POWER TO SUMMON PERSONS TO GIVE EVIDENCE AND PRODUCE DOCUMENTS.

(1) Any gazetted officer of customs shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making in connection with the smuggling of any goods.

(2) A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain

description in the possession or under the control of the person summoned.

(3) All persons so summoned shall be bound to attend either in person or by an authorised agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such documents and other things as may be required :

Provided that the exemption under section 132 of the Code of Civil Procedure, 1908 (5 of 1908), shall be applicable to any requisition for attendance under this section.

(4) Every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code, 1860 (45 of 1860).”

6. It may be noted that prior to the amendment on 13th July, 2006 Section 108 of the Customs Act enabled any Gazetted officer of Customs to summon any person to give evidence. By Section 25 of the Taxation Laws Amendment Act, 2006 Section 108 of the Customs Act was amended with effect from 13th July, 2006 and it entitled a Gazetted officer of Customs specifically empowered by the Central Government in this behalf to summon a person, to give evidence or produce documents. By M.F.(D.R.) Notification No. 8/2008-Cus.(N.T.) dated 20th February, 2008 Central Government empowered all Gazetted officers of the Customs for the purpose of Section 108 of the Customs Act. By Section 69 of the Finance Act, 2008 Section 108 (1) of the Act was amended so as to remove the words “duly empowered by the Central Government in this behalf”. This Finance Act came into force on 10th May, 2008 however the amendment was made

retrospectively with effect from 13th July, 2006. It would be thus evident that when the summons were issued, Respondent No.2 was not empowered by the Central Government to summon a person, to give evidence or produce documents under Section 108 of the Customs Act. This empowerment was conferred on 20th February, 2008, and thereafter the words “duly empowered by the Central Government in this behalf” were deleted on 10th May, 2008 with retrospective effect from 13th July, 2006.

7. The issue before this Court is whether this retrospective amendment brought by Section 69 of the Finance Act though procedurally can empower an officer to summon retrospectively, however can retrospectively create an offence for non-compliance of the summons issued under Section 108 of the Customs Act. All the summons issued to the Petitioner i.e. on 12th June, 2006, 3rd July, 2006, 3rd November, 2006, 10th January, 2007, 2nd April, 2007, 21st May, 2007 and finally on 10th July, 2007 were issued when Respondent No.2 was not duly authorized to issue summons. Even on the date when the cognizance of the offences under Sections 174/175 IPC was taken by the Learned ACMM on the complaint of Respondent No.2, the Respondent No.2 was not authorized to issue summons to a person to give evidence or to produce documents. The retrospective amendment by Section 69 of the Finance Act, 2008 can ex-post facto ratify the acts of officers in issuing summons under Section 108 of the Customs Act, however cannot make them liable for the offence for the non-compliance thereof because when the non-compliance of the summons was done the same was not an offence. It is well settled that by a retrospective amendment no offence can be created as the same is contrary to Article 20 of the Constitution of India.

8. A plain reading of Section 108 of the Customs Act shows that the offence is attracted only if a summon being issued by the officer duly authorized in this behalf is intentionally disobeyed. Thus, violation or avoidance of summons issued by an officer who is not authorized or competent to issue the same cannot sustain a conviction under Section 174/175 IPC. Dealing with this issue in *Shiam Lal Vs. Emperor, 15 (1914) Crl.L.J. 595* it was held that:

“Shiam Lal has been convicted under Section 174 of the Indian Penal Code and sentenced to a fine of Rs. 30. The case has been submitted to this Court by the Additional Sessions Judge with the recommendation that the conviction and sentence be set aside. It appears that a decree was transferred to the Collector by the Civil Court for execution inasmuch as the property to be sold was ancestral property. In the course of the proceedings held in this execution case a Tahsildar, who is an Assistant Collector of the second Class, issued a summons to Shiam Lal to attend his Court in order to enable the Tahsildar to ascertain whether there was any incumbrance on the property ordered to be sold. Shiam Lal did not attend and thereupon he was prosecuted and sentenced as stated above. In order to sustain a conviction under Section 174 it must be shown that the summons issued was issued by a public servant legally competent as such public servant to issue the same and the accused intentionally omitted to attend in pursuance of the summons. In this case under the rules framed by the Local Government in regard to the sale of ancestral land, the Collector is empowered to summon any person whom he thinks it necessary to summon for the purpose of ascertaining the matters to be specified in the proclamation of sale and under rule 44 he can delegate his powers only to an Assistant Collector of the first Class. He could not delegate his authority to an Assistant Collector of the second class and, therefore, the Tahsildar, was not legally competent to issue the summons which Shiam Lal did not obey. Furthermore, in this case there

is nothing to show that the non-compliance with the summons was intentional. Under these circumstances the conviction of Shiam Lal was illegal. I accordingly set it aside and direct that the fine imposed on him, if paid, be refunded.”

9. In *Khota Ram and Ors. Vs. Emperor*, 6 (1907) Crl.L.J. 107 it was held:

“There is nothing in the Revenue Act authorizing the issue of such summons. Section 149 of that Act only provides for the attendance of persons within the limits of the estate within which they reside.

Queen-Empress v. Subanna (1) shows that in the Madras Presidency there is an act III of 1869, giving power to issue summons for attendance of persons for purposes connected with the Revenue administration, but there is no such Act in the Punjab.

Crown v. Kashi Ram (2) and *Crown v. Kuria* (3), show that arbitrators cannot be such be required to attend Court, and *Ghulam Khan v. Empress* (4) decided that it had not been shown that the attendance of a lambardar for the purpose of appointing a village chaukidar could be legally enforced.

We are of opinion that the Tahsildar was not legally competent to issue summons for the attendance in Court of those munsifs, and we set aside the convictions and sentences. The fines, if paid, will be refunded.”

10. It is well settled that though by a retrospective legislation, the Legislature can confer a procedural competency on an officer, however an act or omission is not punishable as an offence unless it existed on the day when it was committed. In *Rao Shiv Bahadur Singh and Anr. Vs. State of Vindhya Pradesh AIR 1953 SC 394*, the Constitution Bench of the Hon’ble Supreme Court held:

“7. The next and the only serious question that arises in this case is with reference to the objections raised in reliance on Art. 20 of the Constitution. This question arises from the fact that the charges as against the two appellants, in terms, refer to the offences committed as having been under the various sections of the Indian Penal Code as adapted in the United States of Vindhya Pradesh by Ordinance No. 48 of 1949. This Ordinance was passed on 11-9-1949, while the offences themselves are said to have been committed in the months of February, March and April, 1949, i.e., months prior to the Ordinance. It is urged therefore that the convictions in this case which were after the Constitution came into force are in respect of an ex post facto law creating offences after the commission of the acts charged as such offences and hence unconstitutional. This contention raises two important questions, viz., (1) the proper construction of Article 20 of the Constitution and (2) whether the various acts in respect of which the appellants were convicted constituted offences in this area only from the date when Ordinance No. 48 of 1949 was passed or were already so prior thereto.

8. Article 20(1) of the Constitution is as follows :

"No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."

This Article, in its broad import has been enacted to prohibit convictions and sentences under ex post facto laws. The principle underlying such prohibition has been very elaborately discussed and pointed out in the very learned judgment of Justice Willes in the well known case of ‘Phillips v. Eyre’, (1870) 6 Q.B. 1, at pp 23 and 25 (D), and also by the Supreme Court of U.S.A. in ‘Calder v. Bull’ (1798) 3 Dallas 386; 1 Law Ed 648 at p. 649 (F).]. In the English case it is explained that ex post facto laws are laws which voided and punished what had

been lawful when done. There can be no doubt as to the paramount importance of the principle that such ex post facto laws, which retrospectively create offences and punish them are bad as being highly inequitable and unjust. In the English system of jurisprudence repugnance of such laws to universal notions of fairness and justice is treated as a ground not for invalidating the law itself but as compelling a beneficent construction thereof where the language of the statute by any means permits it. In the American system, however, such ex post facto laws are themselves rendered invalid by virtue of Art. 1, Ss. 9 and 10 of its Constitution. It is contended by the learned Attorney-General that Art. 20 of the Constitution was meant to bring about nothing more than the invalidity of such ex post facto laws in the post-Constitution period but that the validity of the pre-Constitution laws in this behalf was not intended to be affected in any way.”

11. Thus, by revival of the procedure the officer can be made competent to issue summons however it cannot make the act an offence which was not an offence when it was allegedly committed in view of the want of competency of the officer issuing summons. No offence having been committed at the time when it is alleged, the Petitioner cannot be prosecuted for an offence by giving retrospective competence to the officer issuing summons.

12. The contention of the Learned Additional Solicitor General that this Court will not decide the issue regarding the competency of the officer to issue summons at the relevant time and thus the violation thereof being an offence as the same would be an issue to be decided during trial and in exercise of its power under 482 Cr.P.C. this Court by considering the same will not quash the criminal proceedings pending before the Learned Trial Court deserves to be rejected. In *State of Haryana & Ors. Vs. Bhajan Lal &*

Ors. 1992 Supp(1) SCC 335 the Court considered in detail and summarized the legal position by laying down the following guidelines to be followed by the High Court in exercise of its inherent powers to quash criminal complaint.

“102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extra-ordinary power under Article 226 or the inherent powers Under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

1. Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima-facie constitute any offence or make out a case against the accused.
2. Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers Under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.
3. Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.
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104. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the Court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the F.I.R. or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice.”

13. It may be noted that the competence of issuing summons by the officer is sine-qua-non for a valid summon. In the absence of a valid summon the violation thereof cannot be an offence and even taking the allegations in the complaint as they are, no offence is made out. In such a situation this Court is duty bound to exercise its jurisdiction under Section 482 Cr.P.C. and not relegate the Petitioner to the trial.

14. Learned Additional Solicitor General has contended that since the offence committed by the Petitioner is a continuing offence as the Petitioner has not joined the enquiry till date and as on date the officer is competent to summon the Petitioner, the same is a continuing offence. The offence being a continuing one and the amendment in the Act having been introduced since the Petitioner has till date not complied with the summons he is liable to be prosecuted for offences under Sections 174/175 IPC. In this regard, it may be noted that the summons were sent to the Petitioner for joining enquiry on 2nd April, 2007, 21st May, 2007 and 10th July, 2007. No summons has been sent thereafter. A summon to appear is issued for a particular date and unlike a warrant, a summon is not a continuous mandate directing the

Petitioner to appear on a particular date or thereafter at any time. Thus, I find no force in the contention of the learned Additional Solicitor General that the offence under Sections 174/175 IPC is a continuing offence.

15. Further the contention that non-conferring of the authorization on Respondent No.2 was a procedural defect, which could be cured is not disputed. However, a retrospective procedural amendment cannot make the non-compliance of a procedural provision a substantive offence.

16. In view of the aforesaid discussion and the fact that the Respondent No.2 was not authorized to issue summons for appearance on the dates when the summons were issued, the Petitioner cannot be prosecuted for offences under Sections 174/175 IPC. Consequently, the criminal complaint No. 8/1 of 2008 under Sections 174/175 IPC titled as “Shri R.K. Chibber Vs. Rakesh Kumar Goyal” pending with the Learned Additional Chief Metropolitan Magistrate, Patiala House Courts, New Delhi and the order dated 15th January, 2008 summoning the Petitioner for offences under Sections 174/175 IPC are hereby quashed.

17. Petition is disposed of.

(MUKTA GUPTA)
JUDGE

JUNE 01, 2012
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