Superintendent, Central Excise, ... vs Bahubali on 5 October, 1978

Equivalent citations: 1979 AIR 1271, 1979 SCC (2) 279, AIR 1979 SUPREME COURT 1271, (1979) 2 SCC 279, 1979 UJ (SC) 77, (1979) ELT 1, (1979) 1 SCR 1104 (SC), (1979) 1 SCR 1104, (1979) 1 SCJ 259, 1979 MADLJ(CRI) 241, 1979 CRI APP R (SC) 421, 1979 SCC(CRI) 447, 1978 CRILR(SC MAH GUJ) 535

Author: Jaswant Singh

Bench: Jaswant Singh, P.S. Kailasam, A.D. Koshal

PETITIONER:
SUPERINTENDENT, CENTRAL EXCISE, BANGALORE

Vs.

RESPONDENT:
BAHUBALI

DATE OF JUDGMENT05/10/1978

BENCH:
SINGH, JASWANT
BENCH:
SINGH, JASWANT
KAILASAM, P.S.
KOSHAL, A.D.

CITATION:
1979 AIR 1271 1979 SCC (2) 279

ACT:
Defence of India Act 1962-Section 1(3) 43-Defence of India Rules 1963-Rules 126, 2(d)(ii) 126P(2) and 126 I-Probation of Offenders Act 1958. Sec. 4, 6-General Clases Act, Sec. 6-Whether provisions of Probation of Offenders Act apply to offences under Defence of India Act and Rules-Whether bar of Defence of India Act apply after it is repealed.

HEADNOTE:
The respondent was charged for violating rule 126 (H), 2(d)(ii) of the Defence of India (Amendment) Rules. 1963 relating to Gold Control and Rule 126-I before the Magistrate First Class, Bangalore and under Sec. 135 of the

Customs Act, 1962 and Rule 126 of the Defence of India Rules.

The Magistrate acquitted the Respondent of the charge under Sec. 135 of the Customs Act but convicted him for the offence under Defence of India Rules and sentenced him to rigorous imprisonment and fine of Rs. 2,000/-.

The Central Excise Department preferred an appeal to the High Court against the acquittal of the Respondent and the Respondent filed a revision challenging his conviction and sentence.

The High Court came to the conclusion that the offence under Rule 126-P(2)(ii) of the Defence of India Rules was proved against the Respondent and that the minimum sentence prescribed was six months.

The High Court however released the Respondent on probation of good conduct for a period of three years under the Probation of Offenders Act 1958 on his furnishing Bond in the sum of Rs. 2,000/- with one surety, over ruling the objection raised on behalf of the department that the provisions of the Probation of Offenders Act, 1958 cannot be invoked in case of offences under the Defence of India Rules which prescribe a minimum sentence of imprisonment.

In an appeal by special leave the Department contended that the provisions of sections 3, 4 and 6 of the Probation of Offenders Act, 1958 are inconsistent with the provisions of Defence of India Rules which prescribe minimum sentence of imprisonment for offences specified therein. Sec. 43 of Defence of India Act 1962 which is a later Act than the Probation of Offenders Act, 1958 and which contains a non-obstante clause must prevail over the provisions of the Probation of Offenders Act.

The Respondent contended:

(1) There is no inconsistency between the provisions of Probation of Offenders Act, 1958 and provisions of Rule 126 (2) of the Defence of India Rules. The provisions of Probation of Offenders Act are based on the combination of the deterrent and reformative theories of the measure of punishment

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in due proportion far from being destructive of the provisions of the Defence of India Act 1962 are supplemental thereto and provide and equivalent to the sentence prescribed therein

(ii) The Defence of India Act, 1962 which was a temporary measure has long since expired. Therefore, Sec. 43 of the Act no longer operates as a bar to the respondent continuing to remain on probation of good conduct.

Allowing the appeal the Court,

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HELD: 1. Rule 126 prescribes a minimum sentence of imprisonment of six months and a maximum of 2 years. Sec. 3 of the Probation of Offenders Act provides that if a person if found guilty of offences mentioned therein under

the India Penal Code and any offence punishable with imprisonment for not more than 2 years, and if such a person has no previous conviction and if the Court is of the opinion that having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation instead of sentencing him to any punishment, the Court may notwithstanding any other law for the time being in force, release him after due admonition. Sec. 4 and 5 deal with other aspects of release in probation. Sec. 43 of the Defence of India Act provides that the provisions of the said Act and Rules made thereunder shall have effect. notwithstanding anything inconsistent therewith contained in any enactment. The incompatibility between sections 3, 4 and 6 of the Probation offenders Act and Rule 126-P(2)(ii) of the Defence of India Rules is patent. The fact that the provisions of the two statutes are inconsistent is reinforced by Sec. 18 of Probation of offenders Act which save provisions of certain statues which prescribe minimum sentence. In view of the inconsistency between two statutes the Probation of Offenders Act must yield to the Defence of India Act.1962 in view of the language of Sec. 43 which embodies a non-obstante clause and which is a later Act. [1109H,1110 A-F].

Kumaon Motor Owners' Union Ltd. & Anr. v. The State of U.P., [1966] 2 SCR 121 referred to.

Arvind Mohan Sinha v. Amulya Kumar Biswas & Ors, [1974] 3 SCR 133 dissented from.

Clauses (a), (b), (c) and (d) of Sec. 1(3) of Defence of India Act, 1962 correspond to clauses (b), (c), (d) and (e) of Sec. 6 of the General Clauses Act. In view of the said provisions liabilities and penalties incurred during the operation of the Defence of India Act are kept alive. In the present case, Criminal liability was incurred by the respondent before the Defence of India Act came to an end and penalty and punishment was also inured and imposed on him while the Defence of India Actwas very much in force Therefore, the benefit of the provision of Probationers of Offenders Act cannot be invoked by the Respondents. [1112 E-G]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 58 of 1972.

Appeal by Special Leave from the Judgment and Order dated 23-7-1971 of the Mysore High Court in Criminal Appeal No. 17 of 1969.

Soli J. Sorabji, Sol. Genl., R. B. Datar and Girish Chandra for the Appellant.

S. S. Javali, A. K. Srivastava and Vineet Kumar for the Respondents.

The Judgment of the Court was delivered by JASWANT SINGH, J.-On the basis of recovery of 30 gold ingots bearing foreign markings effected by the Central Excise and Customs Headquarters Staff, Preventive Branch, Bangalore on April 16, 1964 from the suit case which the respondent was alleged to be carrying on alighting from Guntakal-Bangalore Train No. 85 at Yeshwanthpur Rail way Station without a permit granted by the Administrator as required by Rule 126-H(2) (d) (ii) of the Defence of India (Amendment) Rules, 1963 relating to gold control (hereinafter referred to as 'the D.I. Rules') and without including the same in the prescribed declaration as required by sub-rules (1) and (10) of Rule 126-I of the D.I. Rules, the respondent was proceeded against in the Court of the Magistrate, Ist Class, Bangalore under section 135(ii) of the Customs Act, 1962 and Rules 126-P(2) (ii) and 126-P(1)

(i) of the D.I. Rules. On a consideration of the evidence adduced in the case, the Magistrate ac quitted the respondent of the charge under section 135 of the Customs Act but convicted him for the commission of an offence under Rule 126-I(1) and (10) read with Rule 126-P(2)(ii) of the D.I. Rules and sentenced him to rigorous imprisonment for six months and a fine of Rs. 2,000/-. On appeal, the II Additional Sessions Judge, Bangalore being of the opinion that the offence committed by the respondent fell within the purview of Rule, 126-P(2) (i) of the D.I. Rules convicted him under that Rule and sentenced him to simple imprisonment till the rising of the Court maintaining the fine of Rs. 2,000/-. Both the parties felt dissatisfied with the aforesaid judgment and order of the II Additional Sessions Judge. While the Central Excise Department preferred an appeal to the High Court under section 417(3) of the Code of Criminal Procedure against the acquittal of the respondent of the offence under Rules 126-H(2) (d) of the D.I. Rules read with Rule 126 P(2) (ii) of the Rules, the respondent filed a revision challenging his conviction and sentence as stated above. By judgment and order dated July 23, 1971, the High Court allowed the appeal against acquittal holding that the facts and circumstances proved in the present case clearly brought the case within the mischief of Rule 126- P(2) (ii) of the D.I. Rules which prescribed a minimum sentence of six months but directed that the respondent be released on probation of good con duct for a period of three years under the Probation of offenders Act, 1958 on his furnishing a bond in the sum of Rs. 2,000/- with one surety of the similar amount to the satisfaction of the trial court undertaking to maintain peace and be of good behaviour during the aforesaid period overruling the objection raised on behalf of the Department that the provisions of the Probation of Offenders Act, 1958 cannot be invoked in case of offences under the D.I. Rules which prescribe a minimum sentence of imprisonment in view of section 43 of the Defence of India Act, 1962. Aggrieved by the aforesaid Judgment and order of the High Court, the Superintendent of Central Excise, Bangalore applied under Article 134(1)(c) of the Constitution for a certificate of fitness to appeal to this Court which was reused. The Superintendent of Central Excise thereupon made an application under Article 136(1) of the Constitution for special leave to appeal to this Court which was allowed. Hence this appeal.

The learned Additional Solicitor General, who has appeared at our request to assist us, and counsel for the appellant have contended that the impugned order directing the release of the respondent on probation of good conduct in purported exercise of the power under the Probation of Offenders Act, 1958 is invalid and cannot be sustained. They have vehemently urged that since the provisions of

sections 3, 4 and 6 of the Probation of offenders Act, 1958 are inconsistent with the provisions of Rule 126-P(2) and other rules contained in Part XIIA of the D.I. Rules which prescribe minimum sentence of imprisonment for offences specified therein, the provisions of those rules must prevail in view of the non-obstante clause contained in section 43 of the Defence of India Act, 1962 which is later than the Probation of offender Act, 1958.

Mr. Javali has, on the other hand, tried to justify the aforesaid order of the High Court by submitting that there is no inconsistency between the provisions of the Probation of offenders Act, 1958 and the provisions of Rule 126-P(2) of the D.I. Rules and that the provisions of Probation of offenders Act, 1958 which are based on a combination of the deterrent and reformative theories of the measure of punishment in due proportion far from being destructive of the provisions of the Defence of India Act, 1962 are supplemental thereto and provide an equivalent to the sentences prescribed therein. He has further contended that in any event since the Defence of India Act, 1962 which was a temporary measure has long since expired, section 43 thereof can no longer operate as a bar to the respondent continuing to remain on probation of good conduct.

On the submissions of the learned counsel for the parties, two questions fall for determination-(1) whether in view of the provisions of section 43 of the Defence of India Act, 1962, the respondent was entitled to be released on probation of good conduct under the Probation of offenders Act, 1958 and (2) whether the bar to the respondent's invoking the benefit of the provisions of the Probation of offenders Act has been removed by the expiry of the Defence of India Act.

For a proper determination of the aforesaid two question," it is necessary to advert to Rule 126-P(2) (ii) of the D.I. Rules, sections 3, 4 and 6 of the Probation of offenders Act, 1958 and section 43 of the Defence of India Act, 1962 insofar as they are relevant for the purpose of this case:

> "126-P. Penalities.-(1) ..... (2) Whoever,-
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> (i).....
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> (ii) has in his possession or under his control any quantity of gold in contravention of any provision of this Part, ...shall be punishable with imprisonment for a term of not less then six month and not more than two years and also with fine."

3. When any person is found guilty of having committed an offence punishable under section 379 or section 380 or section 381 or section 404 or section 420 of the Indian Penal Code or any offence punishable with imprisonment for not more than two years, or with fine, or with both under the Indian Penal Code or any other law, and no previous conviction is proved against him and the court by which the per son is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient so to do, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him to any punishment or releasing him on probation of good conduct under section 4 release him after due admonition.

Explanation.-For the purposes of this section, previous conviction against a person shall include any previous order made against him under this section or section 4.

4. (1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, in- stead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour;

Provided that the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.....

6. (1) When any person under twenty one years of age is found guilty of having committed an offence punishable with imprisonment (but not with imprisonment for life), the court by which the person is found guilty shall not sentence him to imprisonment unless it is satisfied that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it would not be desirable to deal with him under section 3 or section 4, and if the court passes any sentence of imprisonment on the offender, it shall record its reasons for doing so. (2) For the purpose of satisfying itself whether it would not be desirable to deal with section 3 or section 4 with an offender referred to in sub-section (1), the court shall call for a report from the probation officer and consider the report, if any, and any other information available to it relating to the character and physical and mental condition of the offender.

43. Effect of Act and rules, etc., inconsistent with other enactments.-The provisions of this Act or any rule made thereunder or any order made under any such rule shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act." It would be noticed that whereas Rule 126-P(2) (ii) of the D.I. Rules which is mandatory in character makes it obligatory for the Court to impose a minimum penalty of six months rigorous imprisonment and fine on a person found guilty of any of the offences specified therein, sections 3 and 4 of the Probation of offenders Act, 1958 vest in the Court a discretion to release a person found guilty of any of the offences specified therein on probation of good conduct after due admonition if no previous conviction is proved against him and if it is of opinion that having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient so to do. [It would also be seen that section 6 of the Probation of offenders Act, 1958 puts a restriction on the power of the Court to award imprisonment by enjoining on it not to sentence an offender to imprisonment if he is under 21 years of age and has committed an offence punishable with imprisonment but not with imprisonment for life except where it is satisfied that having regard to

the circumstances of the case including the nature of the offence and character of the offender it would not be desirable to deal with him under sections 3 and 4 of the Probation of offenders Act, 1958. The incompatibility between sections 3, 4 and 6 of the Probation of offenders Act, 1958 and Rule 126-P(2) (ii) of the D.I. Rules is, therefore, patent and does not require an elaborate discussion. The view that the aforesaid provisions of the Probation of offenders Act, 1958 are inconsistent with the provisions of the D.I. Rules which cast an obligation on the Court to impose a minimum sentence of imprisonment and fine is reinforced by section 18 of the Probation of offenders Act, 1958 which saves the provisions of (1) section 31 of the Reformatory School Act, 1897 (Act No. 8 of 1897), (2) Sub-section (2) of section 5 of the Prevention of Corruption Act, 1947 (Act No. 2 of 1947), (3) the Suppression of Immoral Traffic in Women and Girls Act, 1956 (Act No. 104 of 1956) and (4) of any law in force in any State relating to juvenile offenders or borstal schools, which prescribe a minimum sentence.

The provisions of the Probation of offenders Act, 1958, being therefore, obviously inconsistent with Rule 126-P(2)

(ii) of the D.I. Rules under which the minimum penalty of six months imprisonment and fine has to be imposed, the former have to yield place to the latter in view of section 43 of the Defence of India Act, 1962 which is later than the Probation of offenders Act, 1958 and embodies a non-obstante clause clearly overriding the provisions of the enactments which contain inconsistent provisions including those of the Probation of offenders Act to the extent of inconsistency. The result is that the provisions of rules made and issued under the Defence of India Act prescribing minimum punishment which are manifestly inconsistent with the aforesaid provisions of the Probation of offenders Act are put on par with the provisions of the enactments specified therein so as to exclude them from applicability of the Probation of offenders Act. We are fortified in this view by a decision of this Court in Kumaon Motor owners' Union Ltd. & Anr. v. The State of Uttar Pradesh(1) where it was held that looking to the object behind the Defence of India Act, 1962 which was passed to meet an emergency arising out of the Chinese Invasion of India in 1962, section 43 of the Defence of India Act which is couched in emphatic language must prevail in case of apparent conflict between section 43 of the Defence of India Act on the one hand and section 68-B of the Motor Vehicles Act, 1939 on the other.

The decision of this Court in Arvind Mohan Sinha v. Amulya Kumar Biswa & ors.(2) on which strong reliance is placed by Mr. Javali cannot be usefully called in aid on behalf of the respondent in view of the fact that the attention of the Court does not seem to have been invited in that case to section 43 of the Defence of India Act, 1962 which contains a non-obstante clause. This is apparent from the following observations made in that case "The broad principle that punishment must be proportioned to the offence is or ought to be of universal application save where the statute bars the exercise of judicial discretion either in awarding punishment or in releasing an offender on probation in lieu of sentencing him forthwith."

The above observations also clearly show that where there is a statute which bars the exercise of judicial discretion in the matter of award of sentence, the Probation of offenders Act will have no application or relevance. As Rule 126-P(2) (ii) of the D.I. Rules manifestly bars the exercise of

judicial discretion in awarding punishment or in releasing an offender on probation in lieu of sentencing him by laying down a minimum sentence of imprisonment, it has to prevail over the aforesaid provisions of the Probation of offenders Act, 1958 in view of section 43 of the Defence of India Act, 1962 which is later than the Probation of offenders Act and has an overriding effect.

For the foregoing, we are of the view that though generally speaking, the benefit of sections 3, 4 and 6 of the Probation of offenders Act, 1958 which, as observed by Subba Rao, J. (as he then was) in Rattan Lal v. State of Punjab(3) is a milestone in the progress of the moderns liberal trend of reform in the field of peonage, can be claimed subject to the conditions specified therein by all offenders other than those found guilty of offences punishable with death or life imprisonment unless the provisions of the said Act are excluded by section 18 thereof, in case of offences under a special Act enacted after the Probation of offenders Act which prescribes a minimum sentence of imprisonment, the provisions of the Probation of offenders Act cannot be invoked if the special Act contains a provision similar to section 43 of the Defence of India Act, 1962. Accordingly, we uphold the contention advanced on behalf of the appellant that recourse to the provisions of the Probation of offenders Act, 1958 cannot be had by the Court where a person is found guilty of any of the offences specified in Rule 126-P(2) (ii) of the D.I. Rules relating to gold control which prescribes a minimum sentence in view of the emphatic provisions of section 43 of the Defence of India Act. The question No. 1 is accordingly answered in the negative.

This takes us to the consideration of the second question, viz., whether the bar to the respondent's invoking the benefit of the provisions of the Probation of offenders Act has been removed by the expiry of the Defence of India Act. The argument advanced by Mr. Javali in support of his contention in relation to this question cannot be countenanced in view of the fact that it overlooks the clear and unequivocal language of causes (a), (b), (c) and

(d) of sub-section (3) of section 1 of the Defence of India Act, 1962 which correspond to clauses (b), (c), (d) and (e) of section 6 of the General Clauses Act, the effect whereof is to keep alive all liabilities and penalties incurred during the operation of the Defence of India Act. As in the instant case, not only was the criminal liability in respect of the aforesaid offences under Rule 126-P(2)(ii) of the D.I. Rules duly made under the Defence of India Act, 1962 incurred by the respondent before the Defence of India Act came to an end but the penalty or punishment prescribed therefor was also incurred and imposed on him while the Defence of India Act was very much in force, the benefit of the aforesaid provisions of the Probation of offenders Act, 1958 cannot be invoked by the respondent and he has to suffer the imprisonment awarded to him by the trial court in view of the unambiguous language of section 1(3) of the Defence of India Act. The second contention urged by Mr. Javali is, therefore, rejected and question No. 2 (supra) is also answered in the negative.

For the foregoing reasons, we allow the appeal and set aside the impugned judgment and order. As however, the matter was disposed of by the High Court on a preliminary point namely, whether the Court which finds a person guilty of any of the offences specified in Rule 126 P(2)(ii) of the D.I. Rules is competent to release him on probation of good conduct on his executing a bond under the Probation of offenders Act, 1958 and the revision filed by the respondent was not disposed of on merits, we remit the case to the High Court with the direction to admit the revision to its original

number and dispose of the same on merits according to law.

P.H.P Appeal allowed and case remitted.