# IN THE HIGH COURT OF JUDICATURE AT BOMBAY
## CIVIL APPELLATE JURISDICTION

## WRIT PETITION NO. 12728 OF 2015

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| **SHRI Rajendra Vitthal Shinde** | **}** | **Petitioner** |
| **Versus** | | |
| **Union of India and Anr.** | **}** | **Respondents** |

Mr. Anil Balani i/b. Mr. Yadav P. R. for the Petitioner.

Mr. Pradeep S. Jetly for the Respondents.

**CORAM :- S. C. DHARMADHIKARI &**
**B. P. COLABAWALLA, JJ.**

**DATED :- DECEMBER 22, 2015**

**P.C.** :-

This Writ Petition under Article 226 of the Constitution of India discloses as to how the Respondents, despite clear legal pronouncements, go on insisting that they can stop the running business activities by freezing the bank accounts of the concerned persons and attaching their movable and immovable properties.

2) The Petitioner is before us complaining that he permanently resides at the address mentioned in cause title at Navi Mumbai and is carrying on lawful business activities. He is challenging the legality and validity of the proceedings initiated by the second Respondent to this Writ Petition. The details of

these proceedings are set out in para 3 and it is stated that what the communications mentioned therein seek to do is to restrain the Petitioner from dealing with his immovable properties and freezing of his bank accounts.

3) A certain consignment stated to be 7.12 metric ton of red sanders, concealed in the cement blocks and bricks of fly ash for export came to be seized by the Respondent No. 2 to this Writ Petition. The Respondents, particularly Respondent No. 2 is Senior Intelligence Officer in the Directorate of Revenue Intelligence, Mumbai Zonal Unit.

4) Mr. Balani, learned Counsel appearing for the Petitioner would submit that this matter was mentioned urgently, as not only the Petitioner came to be arrested on the allegations that he was engaged in smuggling of red sanders and certain endangerous species of wild flora and fauna, but on production before competent Court, he came to be enlarged on bail on 17th October, 2015. By letters commencing from 19th August, 2015, the second Respondent has restrained the Petitioner from dealing with his immovable properties, more particularly mentioned in para 7 and the communications/letters of 19th August, 2015 and 20th August, 2015, copies of which are at Annexures 'B' to 'E' to the Writ Petition.

5) By another communication Annexure 'F', the bank accounts of the Petitioner have been frozen. The bank accounts stated to be of the Petitioner and his group companies, details of which are mentioned in the list at Annexure 'F', stand frozen and attached.

6) The Petitioner addressed two letters on 29th October, 2015 and 8th November, 2015 requesting the Assistant Director of Directorate of Revenue Intelligence to de-freeze the bank accounts and allow to operate the same. There is no response to this request.

7) The Petitioner claims that his legitimate business activities are of distribution of coca-cola at Thane and South Mumbai and distribution of HUL products at Panvel. He has authorized service station of Tata Motors at Kalamboli. He is engaged in distribution of ITC products at Ulhasnagar and he is also having sea food processing and export business. Since all properties are frozen and attached, it is impossible for the Petitioner to carry on his day to day business. The Petitioner's specific contention and as elaborated by Mr. Balani is that there are no proceedings in the offing. There is no show cause notice nor any penalty is adjudged or imposed so far. Therefore, this attachment and freezing of properties hampers him and not only

he gets affected but those depending upon him, namely 475 workers/staff would be unable to earn their livelihood. The Petitioner claims that there is no liability of the Department. The goods which are seized are in the custody of the Respondents. No interest of the Revenue is prejudicially affected. On the other hand, the mandate of Articles 14 and 19(1)(g) is violated.

8) On such a Petition, we had given time to Mr. Jetly on Monday (21st December, 2015) to take instructions and posted the matter today. We had indicated in advance that we would pass final orders on the Writ Petition today.

9) Mr. Jetly has relied upon the provisions of the Customs Act, 1962. He would submit that this is a clear case of smuggling of red sanders in this country. This is a prohibited activity. The Petitioner is believed to be actively involved in the same. That is how the seizure of goods and action under section 110 of the Customs Act, 1962 was taken.

10) Mr. Jetly would rely upon Chapter XIV of the Customs Act, 1962 to submit that penalty in terms of the provisions of this Chapter can be imposed. He relied upon sections, 120, 121 and 122 falling in this Chapter.

11) Mr. Jetly would support the impugned action and submit that this is not a case on par with those dealt with by this Court in several orders and directions. In those matters, the duty liability was not crystallised and ascertained. Yet, the coercive measures were initiated and the demand was pursued without passing a speaking order. In those peculiar circumstances, the orders releasing the bank accounts from attachment came to be passed.

12) However, in the present case, the authority has found the Petitioner's involvement and which is apparent from the record. The criminal case is pending. In these circumstances, he would rely upon a Division Bench Judgment of this court delivered in the case of *Nitin Shirsat vs. union of India* reported in **2015(325) ELT 561 (Bom)**. He would also rely upon the prior judgment that too of a Division Bench of this Court in the case of *Shri Krishna Chaitanya enterprises vs. Union of India* reported in **2014 (36) STR 1238** and a Hon'ble Supreme Court judgment in the case of *Commissioner of Customs, New Delhi vs. Euroasia Global* reported in **2009 (236) ELT 627**.

13) The relevant sections that Mr. Jetly relies upon are reproduced hereinbelow:-

"**110. Seizure of goods, documents and things.** - (1) If the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods:

Provided that where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer.

(1A) The Central Government may, having regard to the perishable or hazardous nature of any goods, depreciation in the value of the goods with the passage of time, constraints of storage space for the goods or any other relevant considerations, by notification in the Official Gazette, specify the goods or class of goods which shall, as soon as may be after its seizure under sub-section (1), be disposed of by the proper officer in such manner as the Central Government may, from time to time, determine after following the procedure hereinafter specified.

(1B) Where any goods, being goods specified under sub-section (1A), have been seized by a proper officer under sub-section (1), he shall prepare an inventory of such goods containing such details relating to their description, quality, quantity, mark, numbers, country of origin and other particulars as the proper officer may consider relevant to the identity of the goods in any proceedings under this Act and shall make an application to a Magistrate for the purpose of -

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of the Magistrate, photographs of such goods and certifying such photographs as true; or

(c) allowing to draw representative samples of such goods, in the presence of the Magistrate, and certifying the correctness of any list of samples so drawn.

(1C) Where an application is made under sub-section (1B), the Magistrate shall, as soon as may be, allow the application.

(2) Where any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized:

Provided that the aforesaid period of six months may, on sufficient cause being shown, be extended by the

Commissioner of Customs for a period not exceeding six months.

(3) The proper officer may seize any documents or things which, in his opinion, will be useful for, or relevant to, any proceeding under this Act.

(4) The person from whose custody any documents are seized under sub-section (3) shall be entitled to make copies thereof or take extract therefrom in the presence of a officer of customs.

**119. Confiscation of goods used for concealing smuggled goods.** - Any goods used for concealing smuggled goods shall also be liable to confiscation.
*Explanation* – In this section, "goods" does not include the conveyance used as a means of transport.

**120.Confiscation of smuggled goods notwithstanding any change in form, etc.**
(1) Smuggled goods may be confiscated notwithstanding any change in their form.
(2) Where smuggled goods are mixed with other goods in such manner that the smuggled goods cannot be separated from such other goods, the whole of the goods shall be liable to confiscation:

Provided that where the owner of such goods proves that he had no knowledge or reason to believe that they included any smuggled goods, only such part of the goods the value of which is equal to the value of the smuggled goods shall be liable to confiscation.

**121. Confiscation of sale-proceeds of smuggled goods.** - Where any smuggled goods are sold by a person having knowledge or reason to believe that the goods are smuggled goods, the sale-proceeds thereof shall be liable to confiscation.

**122. Adjudication of confiscations and penalties.** - In every case under this Chapter in which anything is liable to confiscation or any person is liable to a penalty, such confiscation or penalty may be adjudged, -

(a) without limit, by a Commissioner of Customs or a Deputy Commissioner of Customs;

(b) Where the value of goods liable to confiscation does not exceed five lakh rupees, by an Assistant Commissioner of Customs or Deputy Commissioner of Customs;

(c) where the value of the goods liable to confiscation does not exceed fifty thousand rupees, by a gazetted officer of customs lower in rank than an Assistant Commissioner of Customs or Deputy Commissioner of Customs.

**122A. Adjudication procedure.** -
(1) The adjudicating authority shall, in any proceeding under this Chapter or any other provision of this Act, give an opportunity of being heard to a party in a proceeding, if the party so desires.

(2) The adjudicating authority may, if sufficient cause is shown, at any stage of proceeding referred to in sub-section (1), grant time, from time to time, to the parties or any of them and adjourn the hearing for reasons to be recorded in writing:

Provided that no such adjournment shall be granted more than three times to a party during the proceedings."

14) A bare perusal of section 110 of the Customs Act, 1962 would reveal as to how that authorises and empowers proper officer to direct seizure of goods, documents and things and if he has reason to believe that any goods are liable to confiscation under the Customs Act, 1962. Thereafter, the steps enumerated in the sub-sections follow. In terms of section 119, what we find is that confiscation of goods used for concealing smuggled goods is permissible. Confiscation of smuggled goods notwithstanding any change in form is permissible in terms of section 120 reproduced above. By section 121, confiscation of sale proceeds of smuggled goods is permissible.

15) By section 122 and which we have reproduced above, the person liable to a penalty can be proceeded against and

pertinently the words are that such confiscation or penalty may be adjudged. Then, by section 122A, there is an adjudication procedure. If Mr. Jetly has been instructed to state that the Respondents are inclined to impose penalty on the Petitioner, then, that penalty or the sum in respect thereof has to be declared. The words “adjudged” or “adjudication of confiscation of penalties” have been advisably inserted in this provision and would disclose the intent of the legislature. The legislature, therefore, mandated adjudication of confiscation and penalties and that is by the adjudication procedure set out in section 122A, which was inserted by Act 23 of 2004 with effect from 10th September, 2004. That mandates the adjudicating authority to give an opportunity of being heard to the party in the proceeding, if the party so desires. If that is the adjudication procedure and what we are being informed is that an adjudication of penalty would take place, then, we do not see how without any order being made in pursuance thereof or any sum crystallised or ascertained, the coercive measures initiated and undertaken can continue. The word “adjudication” means to make a formal judgment on a disputed matter. From 17th August, 2015 and onwards, such freezing and attachment orders have been in force. The Petitioner has been requesting for months thereafter to release his properties or at least his bank accounts so that he can carry on legitimate business activities. We need not express any opinion as to the nature of activities the Petitioner indulges in or whether they are legitimate or not. Even if the Petitioner is alleged to have indulged in smuggling, he has to be proceeded against in accordance with law. If he has to be punished under the Act and criminal proceedings have been launched, which are pending, then, they would take their own course. Similarly, if all authorities under the Customs Act, 1962 are empowered to take other steps, then, they ought to be taken to their logical conclusion. The logical and legal conclusion is that on adjudication ascertainment of the sum of penalty, if, any in this case. We would therefore not find any justification in law for the steps that Respondent No. 2 has taken and is continuing till date. In the given facts and circumstances, we do not think that any of the judgments relied upon by Mr.Jetly are applicable.

16) In the Hon'ble Supreme Court's decision in the case of *Euroasia Global* (supra) the intelligence collected revealed that the person indulged in fraudulent import of PVC Cloth. He mis-declared the value and description. The person was visiting China regularly. The modus operandi has been set out in para 3(a) of the order passed in this case. There, the Hon'ble Supreme Court found that a search of the residential house of the

concerned person resulted in recovery of cash. The wife of the person informed the DRI that this constitutes sale proceeds of imported goods. That amount was seized and on the reasonable belief in terms of section 110 that they reflect and represent the proceeds of smuggled goods. The High Court released this amount which was seized and on grounds which the Hon'ble Supreme Court found to be completely unsustainable. Therefore, it stayed the order passed by the High Court.

17) We have no doubt about the legal provisions and the powers vested in the authorities under the Customs Act, 1962. We have referred to the very provisions to which the Hon'ble Supreme Court makes reference. The amount was seized and upon the satisfaction arrived at by the DRI. That should not have been released pending adjudication was the order passed and that too unconditional release of the sum was found to be unsustainable. This order, therefore, renders no assistance to Mr. Jetly.

18) In the case of *Shri Krishna Chaitanya Enterprises* (supra) a communication to the bank resulted in filing of the Writ Petition. That attached the bank account of the Petitioner for defaulting in payment of Service Tax liability to the tune of Rs.88.10 lacs. That amount of Service Tax was collected by the

Petitioner from his clients, but not deposited with the Government. The Petitioner denied this position and said that he has paid the Service Tax in the sum of Rs.1 crore and odd. That sum is therefore inclusive of the amount referred by the Department. There was no show cause notice and no adjudication order and hence, the complaint was that the freezing of bank account is illegal.

19) In para 6, the Division Bench noted the request of the Petitioner and on his own that without prejudice to the rights and contentions and since the business has been completely paralysed, he was ready and willing to give Bank Guarantee. On furnishing such Bank Guarantee, the conditional release of bank account was ordered. There is no principle of law laid down, but in the peculiar facts the Division bench, on the undertaking, released the bank account.

20) As far as *Nitin Shirsat's* case is concerned, the Division Bench found that the Petitioner therein cannot rely upon absence of adjudication, non application of mind and any outer limit for issuance of show cause notice, so as to obtain release of their bank account. All such contentions were negated in the light of the affidavit filed in reply by the Deputy Commissioner of Customs. In that case, goods liable to confiscation were

confiscated on the reasonable belief. Once again, paras 4, 5 and 6 deal with the power of the authorities and even to of freezing of the bank account. We are not at all disputing this legal position. The matter before the Division Bench revealed sufficient material establishing linkage between the moneys with the bank account and the modus operandi to obtain benefit of drawback. Thus, the Bench found that expeditious adjudication would serve the ends of justice and there was no need to direct release of bank accounts. Hence, it directed that the adjudication be completed in a time frame.

21) Even before us, that request is made by Mr. Jetly. He stated on instructions that the show cause notice would be promptly issued and an adjudication order will be passed in accordance with law. This Court, therefore, should not release the bank accounts.

22) None prevented the authorities from August, 2015 or at least from the date the Petitioner requested to issue the letter or notice calling upon him to remain present and answer the allegations. The statements now made by Mr. Jetly, on instructions, are after a copy of this Petition was served on the Respondents. We are mindful of the seriousness of the allegations and the rampant smuggling of red sanders. However, we are not

directing that the immovable properties which are attached shall stand released from attachment. All that we are taking care of is the grievance of the Petitioner that by these coercive measures his business has come to a standstill. He is unable to make payments nor the act of the Respondents enables the workers and staff of the Petitioner and duly employed by him to earn their livelihood. In these circumstances, we continue the freezing and attachment of the immovable properties subject however to a limited liberty to the Petitioner to deal with the said properties in his ordinary and usual course of business. There will be no transfer, alienation or parting with possession thereof in any manner until an adjudication order in accordance with law is passed. Similarly, the Petitioner is free to operate his bank accounts and the sums therein can be released by the banks so as to enable the Petitioner to meet the liabilities in his business activities and in relation to the deals, which are disclosed in para 10 of the Writ Petition. The Petitioner, therefore, will be able to carry on his day to day business activities and for that purpose, the bank accounts shall be permitted to be operated. Save and except this limited permission and liberty, we are not inclined to accept all the requests as made in the prayer clauses of the Petition. We are mindful of the fact that in such matters an early adjudication serves the larger interest of public. We direct that within a period of three months from today, the authorities shall issue show cause notice and pass the adjudication order in accordance with law. All contentions in relation thereto are kept open.

23) Final request of Mr. Jetly is that there are 32 bank accounts which have been seized and in which the sum available is Rs.36 lacs, which may not be sufficient to meet the penalty, which would be adjudged and therefore, while releasing the bank accounts, this Court should impose a condition to furnish Bank Guarantee in favour of the Respondents, at least to the extent of the sum available to his credit.

24) The request of Mr. Jetly is to continue this guarantee and keep it alive for the period within which the show cause notice would be adjudicated and the order to be passed. This request is opposed by Mr. Balani and he submits that having found that there is no justification for ordering attachment of the bank accounts, this Court should not accept this request. We have heard the Counsel on this point and find that in the absence of adjudication or the penalty being adjudged in accordance with law, the request as made by Mr. Jetly cannot be accepted. That would be directing an attachment of the bank accounts in an

indirect manner. What is prohibited directly cannot be achieved indirectly. In these circumstances, the request is rejected.

25) The Writ Petition is disposed of in the above terms. There would be no order as to costs.

**(B.P.COLABAWALLA, J.)** **(S.C.DHARMADHIKARI, J.)**