

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.12.2015

CORAM:

THE HONOURABLE MR.JUSTICE R.MAHADEVAN

WP.Nos.11898 and 26133 of 2015
MP.No.1 and 1 of 2015

M/s.Prakash Gold Palace P Limited
by its Director P.Mukesh Kumar Jain
Chennai-45

Petitioner in both WPs

Vs.

1.The Commissioner of Customs (Airport & Air Cargo)
Chennai-27

2.The Joint Commissioner of Customs
(Adjudication-Air), Chennai-27

Respondents-WP11898/15

1.The Chief Commissioner of Customs,
Customs House, Chennai

2.The Commissioner of Customs (Airport & Air Cargo)
Chennai-27

3.The Commissioner of Customs (Appeals I)
Customs House, Rajaji Salai, Chennai

4.The Joint Commissioner of Customs
(Adjudication-Air), Chennai-27

Respondents-WP.26133/15

Prayer:- These Writ Petitions are filed to issue a Writ of Mandamus to direct the 1st Respondent to implement the order of the Adjudication Authority in Order-in-Original No.152, dated 12.3.2015 of the Joint Commissioner of Customs (Adjudication-Air), Chennai-27 and to release and deliver 12 kgs of Gold Bullion imported by the Petitioner on 22.08.2014 in WP.NO.11898/15) and to issue a Writ of Certiorarified Mandamus to call for the records of the Commissioner of Customs (Appeals I) Customs House, Rajaji Salai, Chennai in Order in Appeal C.Cus-I.No.402/2015, dated 12.8.2015 and to quash the same and to direct the Respondent Nos. 2 to 4 Department to release 12 kgs of gold bullion under confiscation, respectively. (IN WP.NO.26133/15)

For Petitioner : Mr.B.Kumar,
SC for Mr.T.Sudhan Raj

For Respondents : Mr.Haja Mohideen Gisthi

ORDER

In these Writ Petitions, the Petitioner seeks for a direction to the Customs Authorities to implement the order of the lower adjudicating authority, dated 12.3.2015, by quashing the order of the Appellate Authority, dated 12.8.2015 and consequently, to direct the customs authorities to release the confiscated 12 kgs of gold bars.

2. The facts of case of the Petitioner, in a nutshell, are that the Petitioner Company is in the business of import and export of Gold Bullion, Gold Jewellery, etc. having IEC No.049803602 dated 14.07.1998 and PAN No.AACCA4384Q and its Special Economic Zone (SEZ) licence has been renewed up to 2019. Their employees (authorised officers), namely, Deepak Gheesulal Siroya and Abishek Betala went to Dubai on 19.08.2014, carrying consignment shipping bill/Invoice No.0014643, dated 18.08.2014 and delivered gold jewellery made by the Petitioner to the order of M/s.Kundan Jewellery LLC., Dubai and they were instructed to collect Gold Bullion Bars, weighing 12 kgs from the aforesaid entity and bring it back to India as baggage as per SEZ Rules. As there was no sufficient stock, they had to wait till about 9.00 pm (IST) on 22.08.2014, for such delivery. By the time they received the Gold Bullion and started back, they were not in a position to send the advance intimation by fax to the Respondent Department, as mandated under the Trade Facilitation Notice No.02/07 dated 3.3.2007. On 22.08.2014, on arrival at Chennai Airport, the said officers, who bought 12 kgs of gold Bullion, went to the Customs Authorities and declared the same and wanted clearance on NIL duty, as the imports were made under the scheme for the Jewellery to be manufactured at MEPZ and exported. However, the Customs Authorities have detained the Gold Bullion under DR No.5533/2014-AIU-AIR for violation of Rule 29(5) of SEZ Rules, 2006, dated 22.08.2014. The said DR was issued in the name of the authorised passenger/employee of the petitioner company, as mandated under Clause 3 of Facilitation Notice No.02/2007 dated 03.03.2007 (Air Customs). Hence, the Petitioner filed WP.No.33907/2014 for release of the said consignment, which is pending. While so, a show cause notice dated 07.01.2015, came to be issued, proposing to treat 12 numbers of Gold Bars, weighing 12 kgs to be treated as smuggled goods and proposing confiscation under Section 111 (d)(1) of the Customs Act, 1962 read with Foreign Trade (Development and Regulation) Act, 1992 and proposing to levy penalty under Section 112(a), to which, a reply was submitted. After hearing the Petitioner, the Joint Commissioner of Customs (Adjudication-Air) (lower adjudicating authority), passed the order dated 12.03.2015, dropping all the charges

against Petitioner. As against the same, an appeal was filed by the Respondent Department in No.C4-I/172/O/ 2015-Air before the Commissioner of Customs (Appeals-I), Chennai (Appellate Authority), who on considering the objections of the Petitioner, by the impugned order dated 12.08.2015, ordered for confiscation of the goods and imposed penalty. Hence, the above Writ Petitions have been filed for the reliefs as stated above.

3. The averments of the Respondent Department as set out in the counter affidavit, inter alia, are that on arrival of two passengers Abhishek Betala and Deepak Gheesulal Siroya on 12.8.2014 from Dubai, the Customs Officers verified their customs declaration forms and found that Abhishek Betala was in possession of 12 kgs gold bars in his hand bag, without declaration and that though the other passenger declared about 12 kgs of gold bars in his declaration form, he was not in his possession of the same. Investigation revealed that there was no prior intimation with regard to the import/hand carry of the said gold bars as a personal baggage. The said passengers failed to adhere to the rules provided in Rule 29(5) of the SEZ Rules, 2006 and in the absence of valid permit or authorization, the said gold bars were detained for further investigation and necessary action under the Act. Thereafter, a show cause notice was issued to the Petitioner, proposing to confiscate the goods under Section 111(d)(i) of the Act and penalty under Section 112(a) of the Act. The Petitioner participated in the adjudication proceedings. The lower adjudicating authority, by order dated 12.3.2015, dropped all the charges levelled against the passenger and the Petitioner, by considering all the above facts. In the appeal, without considering the above facts, the appellate authority passed the impugned order, dated 12.8.2015, for confiscation of the goods and imposed penalty on Abhishek Betala and the Petitioner as well. There is an effective alternative remedy under Section 129(DD) of the Act. The communication of the appeal papers and the opportunity to file cross objection is to be treated as adequate serving of notice. Therefore, there is no violation of principles of natural justice. In such facts, these Writ Petitions are not maintainable.

4. The learned Senior Counsel for the Petitioner, praying to implement the order dated 12.3.2015, by quashing the order dated 22.8.2014, contended that the lower adjudicating authority concluded that there was no violation of the provisions of the Act, but the order of the Appellate Authority is in clear violation of principles of natural justice and the mandate of Section 128A(3) of the Customs Act, 1962, which provides for the procedure to be adopted by the authority in exercising the appellate powers. The learned Senior Counsel further contended that the Petitioner was not put on notice, before passing the order of confiscation and imposing penalty and that there are enough materials to show that the Petitioner was the consignee of the gold bars in

question supplied by the Kundan Jewellery, Dubai to the Petitioner for the purpose of making jewellery and for subsequent re-export and in these circumstances, prayed for quashing of the impugned order dated 12.8.2015 as contrary to Section 51 of the SEZ Act, which provides for overriding effect and consequently for release the confiscated goods.

5. The learned Standing Counsel for the Respondents reiterated the averments made in the counter affidavit and supported the impugned order of confiscation and penalty.

6. This Court heard the learned counsel on either side and considered their rival submissions and also perused the materials placed on record, including the relevant provisions of the Act and Rules.

7. The authorised officers of the Petitioner, namely, Abhishek Betala (Employee (1) for the sake of convenience) and Deepak Gheesulal Siroya (Employee (2) for the sake of convenience) had arrived at Chennai Airport from Dubai on 22.08.2014. On verification of the handbag carried on by the Employee (1) and his declaration form, the bag was found to contain 12 kgs of gold bars and in his declaration form, it was declared as 'Nil'. In the declaration form of the Employee (2), it was declared as "12 Kgs of gold bars" and he was not carrying any hand baggage and any gold bars as well. Hence, after detaining the goods, by the show cause notice dated 7.1.2015, the Employee (1) and the Petitioner Company were called upon to show cause as to why the seized gold bars should not be treated as the goods attempted to be smuggled and hence, confiscated under Section 111(d) and (1) of the Act read with Foreign Trade (Development & Regulation Act, 1992) and imposed penalty under the provisions of Section 112 of the Act. The Petitioner also sent a reply dated 18.2.2015, clarifying each and every aspect. The lower adjudicating authority, after considering the entire case records including the show cause notice, statements of the said Employees as well as the other customs house agents, video clippings of the incident and the provisions of the SEZ Act and Rules and also the Customs Act, dropped the proceedings against the Employee (1) and the Petitioner. However, on the appeal preferred by the Respondent Department, the Appellate Authority, by the impugned order dated 12.08.2015, valuing the impugned goods at Rs.3,38,54,000/-, confiscated the same and imposed a penalty of Rs.1,00,00,000/- each on the Employee (1) and the Petitioner and as there was no proposal for penalty against the Employee (2) in the show cause notice, no penalty was imposed on him.

8. The main contentions of the Petitioner are that the impugned order of the Appellate Authority is in clear violation of principles of natural justice and the mandate of Section 128A(3) of the Customs Act, 1962 and the impugned order has been passed without proper appreciation of the

evidence and material, including the CCTV footage and contrary to the provisions of Section 51 of the Act, which provides for overriding effect over the other laws.

9. On the other hand, it is the case of the Respondents that since the Employee (1) was not an authorised passenger as per the provisions of the Rule 29(5) of SEZ Rules 2006, which mandates for prior intimation in advance to be given to the authorised officer, the goods were confiscated and penalty was imposed.

10. At this juncture, it is relevant to refer to the discussions made by the lower adjudicating authority. It is observed by the lower adjudicating authority that it is seen from the CCTV footage that they declared the gold bars in the hand bag to the officer on the scanning machine at the very first available opportunity and put the hand bag to the scanning machine near the door frame metal detector and the gold bars were declared in the declaration form of the Employee (2). They did not even try to cross the green channel and they passed through the red channel only. The show cause notice has been issued to the Employee (1), whose name is not mentioned in the detention receipt and the Petitioner Company only. For failure in complying with the provisions of the Rule 29(5) and the facility circular, dated 3.3.2007, action can be initiated only under Section 22 or any other relevant provisions of the SEZ Act. Further, in terms of Section 51 of the SEZ Act, the provisions of this Act shall have overriding effect on any other law. The Petitioner is allowed to import duty free gold freely without any restriction as per the provisions of the Foreign Trade Policy and SEZ Rules, 2006. As confiscation of gold under Section 11 (d) and (1) is not sustainable, no penal action can be taken. Observing so, the lower adjudicating authority, dropped the proceedings against the Employee (1) and the Petitioner Company.

11. Section 128(A)(3) of the Customs Act reads as follows:-

"SECTION 128A: Procedure in appeal:- (1) The Commissioner (Appeals) shall give an opportunity to the appellant to be heard if he so desires.

(2) The Commissioner (Appeals) may, at the hearing of an appeal, allow the appellant to go into any ground of appeal not specified in the grounds of appeal, if the Commissioner (Appeals) is satisfied that the omission of that ground from the grounds of appeal was not wilful or unreasonable.

(3) The Commissioner (Appeals) shall, after making such further inquiry as may be necessary, pass such order, as he thinks just and proper,

confirming, modifying or annulling the decision or order appealed against:

Provided that an order enhancing any penalty or fine in lieu of confiscation or confiscating goods of greater value or reducing the amount of refund shall not be passed unless the appellant has been given a reasonable opportunity of showing cause against the proposed order :

Provided further that where the Commissioner (Appeals) is of opinion that any duty has not been levied or has been short-levied or erroneously refunded, no order requiring the appellant to pay any duty not levied, short-levied or erroneously refunded shall be passed unless the appellant is given notice within the time-limit specified in section 28 to show cause against the proposed order.

12. Rule 28(5) of the SEZ Rules, 2006 reads as under:-

(5) The goods imported by the Unit or Developer shall be allowed to be transferred from the port or airport to the Special Economic Zone without examination by the Customs Authorities at the port or airport, as the case may be.

13. Rule 29(5)(i) of the SEZ Rules, 2006 reads as under:-

(5) The units may import goods including precious goods namely gold or silver or platinum or gem and jewellery as personal baggage through an authorized passenger subject to the following procedure, namely:-

(i) the authorized passenger bringing the precious goods shall declare the goods with the customs authorities at the airport in the arrival hall in the declaration form as specified by Commissioner of Customs in charge of the airport along with a duly acknowledged copy of intimation submitted to the authorized officer;

PROVIDED that the goods may be examined with the prior permission of the Assistant or Deputy Commissioner of Customs in writing in case there is specific adverse information or intelligence.

14. The crucial question lost at sight off by the Appellate Authority is relating to the Employee (2), declaring in his declaration form as "12 kgs of gold bars" and not

carrying any hand bag or any gold bars and to the CCTV footage relied on by the adjudicating authority and relating to non issuance of detention receipt to the Employee (1) and the Petitioner Company.

15. Admittedly, the Petitioner is a SEZ Unit and was the consignee of the seized 12 kgs of gold bars as per the invoice dated 21.08.2014 and during the investigation, totally 12 kgs of gold bars were seized. In this regard, a show cause notice under Section 124 of the Customs Act was issued to the Employee (2). Further, the Employee (2), who declared in the quantity column as "12 kgs", should have also carried 12 kgs of gold bars, but strangely, nowhere in the impugned order of the Appellate Authority, it is stated about the Employee (2) carrying, 12 kgs and not issuing a show cause notice to the Employee (2), though the detention receipt was issued in his name. But, it was merely stated that though the Employee (2) declared the goods in his declaration form, but he was not carrying any hand bag and not carrying any gold bars. Therefore, it is also not known as to what happened to that 12 kgs of gold bars as declared in his declaration form and the prior intimation required for the same if any. Further, though it is stated that the Employee (2) has also played a significant role in the commission of the offence and hence, he is also liable for penalty, but strangely saying that as there was no proposal against the Employee (2) in the show cause notice, penalty was not imposed on him. If the Employee (2) was not carrying any hand baggage, then authority should have searched for the said goods as per his declaration form and accordingly, he should have been dealt with. It is also not known about the action taken as to the compliance of other rules and regulations and procedures in this regard. Further, the detention receipt was given in the name of Employee (2) only. If really the Employee (1) had carried the gold bars without declaration form, there is no necessity to give the detention notice to the Employee (2) who was having proper declaration form, but without hand baggage and without any gold bars. Further, according to the Employee (1), the details of the baggage were known only to Employee (2). If at all the detention notice to be issued, it ought to have been issued in the name of the Employee (1) only. Therefore, issuance of show cause notice in name of the Employee (2) and the Petitioner alone is clouded with suspicious circumstances. Further, while dropping the charges against the Employee (2) relying on the show cause notice, discriminating the Employee (1) alone relying on the same show cause notice is untenable, that too when the detention receipt was issued in the name of the Employee (2). Therefore, it is crystal clear that there was non application of mind and a procedural error crept on the part of the Authorities, while ordering for confiscation and penalty, which can also be termed as deliberate attempt for the reasons best known to them.

16. Though it is stated in the order of the Appellate Authority, a letter dated 15.5.2015 was sent to the Employee (1) alone calling for his objection, no evidence is produced on the side of the Respondents to prove that an opportunity of being heard or given a notice to the Petitioner Company, as mandated under Section 128A (3) of the Customs Act, thereby violating the principles of natural justice. However, both the Employee (1) and the Petitioner Company were made liable to pay the penalty.

17. According to the Respondent Department, the invoice was recovered from the Employee (1) and he did not produce the same voluntarily and there was no proper explanation to the question put to the Petitioner as to whether the Petitioner Company is a SEZ Unit or not or their performance as SEZ Unit and even there was no written contract between the SEZ Unit and the seller of the gold in Dubai.

18. Admittedly, the goods in questions were consigned to the Petitioner as is evident from the invoice dated 21.08.2014 and both the Employee (1) and Employee (2) are the authorised officers of the Petitioner Company, as seen from the various letters of the Petitioner Company. Even according to the Respondents, the Petitioner and the seller at Dubai are related parties. It is also seen from the invoice dated 21.08.2014 given by the seller in Dubai to the Petitioner Company that only the Employee (2) was authorised to carry by hand the 12 kgs of gold bars and that the said goods were supplied free of cost against the gold jewellery to be manufactured and to be re-exported to Dubai. Therefore, according to the said invoice, the Employee (2) was the authorised passenger. However, according to the Petitioner, on the instructions of the Employee (2), the Employee (1) carried the gold bars, since they were travelling all the times together in a single e-ticket under the name of Employee (2) only. Since they had taken air tickets already in advance and they had to rush to the airport urgently and since it was late at night i.e. 9.30 a.m to catch the flight, they were unable to give prior intimation as mandated and it was the only reason for not giving such prior intimation and it is only a procedural mistake.

19. Further, according to the Petitioner, as they were travelling together on a common ticket, their baggages were pooled together and the gold bars were kept in the hand bag belonged to the Employee (1) and the Employee (2) also declared as 12 kgs in his declaration form and the act of not giving prior intimation is not contumacious, calling for penal action and mere procedural lapse and technical violation will not attract confiscation and penalty.

20. It is the contention of the respondents that the local importer for whom the personal carriage of gem and

jewellery parcel was brought should give prior intimation to Air Customs Officials vide Tel.No.044-22560246 and Tele Fax No.044-2256 1919. In this regard, the Petitioner explained that they contacted the officials over phone, but however, since it was late hours, they were not able to speak over phone and intimate about the baggage carried by their passengers. It is also seen from the letter dated 25.8.2014, of Sankara Kumar of M/s.J Square Logistics (Customs Broker R312), that the Petitioner contacted him over phone at 9.30 p.m. to give the required intimation and he replied that it was not possible to intimate since it was already late night and advised the Petitioner not to bring the gold bars. The Petitioner also stated in their letter dated 11.9.2014 that though they tried to contact over phone and through fax, they were not able to contact the officials to give intimation and the phone was continuously ringing and their Customs Agent also could not contact because of the late hours.

21. At this juncture, it is relevant to extract hereunder Sections 20 to 22 of the SEZ Act:-

20. Notwithstanding anything contained in any other law for the time being in force, the Central Government may, by notification, specify any officer or agency to carry out surveys or inspections for securing of compliance with the provisions of any Central Act by a Developer or an entrepreneur, as the case may be, and such officer or agency shall submit verification and compliance reports, in such manner and within such time as may be specified in the said notification

21(1) The Central Government may, by notification, specify any act or omission made punishable under any Central Act, as notified offence for purposes of this Act.

(2) The Central Government may, by general or special order, authorise any officer or agency to be the enforcement officer or agency in respect of any notified offences or committed in a Special Economic Zone.

(3) Every officer or agency authorised under subsection (2) shall have all the corresponding powers of investigation, inspection or search or seizure as is provided under the relevant Central Act in respect of the notified offences.

22. The agency or officer, specified under section 20 or section 21, may, with prior intimation to the Development Commissioner concerned, carry out the investigation or search or seizure in the Special Economic Zone or in a Unit if such agency

or officer has reasons to believe (reasons to be recorded in writing) that a notified offence has been committed or is likely to be committed in the Special Economic Zone:

Provided that no investigation, search or seizure shall be carried out in a Special Economic Zone by any agency or officer other than those referred to in sub-section (2) or sub-section of section 21 without prior approval of the Development Commissioner concerned.

Provided further that any officer of agency, if so authorised by the Central Government, may carry out the investigation, inspection, search or seizure in the Special Economic Zone or Unit without prior intimation or approval of the Development Commissioner.

22. Section 51 (1) of the SEZ Act reads as follows:-

51(1) The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

23. As per Section 28(5) of the SEZ Rules, since the goods in questions were to be transported to the Petitioner Company, which is admittedly a SEZ Unit, the same ought not to have been confiscated and ought to be allowed to be carried to SEZ Unit of the Petitioner from the airport. Further, as per Section 22 of the Act, an investigation or search ought to have been conducted in the SEZ Unit of the Petitioner, if the authority is of the opinion that a notified offence was committed. But, only based on the telephonic information, the entire proceedings had been done. Further, the provisions of Section 51 of the SEZ Act has got overriding effect over other laws, in case if there is any contradiction or inconsistencies or conflicts between the SEZ Act and the other Acts. It is seen that there are inconsistencies between the SEZ Act, Section 51 of which has overriding effect and the other provisions of the Act relied on by the Respondents and hence, the provisions of the other Acts relied on by the Respondents can be overruled by Section 51 of the SEZ Act. In other words, the implication of section 51 of the SEZ Act is that anything inconsistent to the provisions of the SEZ Act will not be considered. As stated above, there is also a discrepancy relating to issuance of detention receipt. Since there was no case made out for confiscation of the goods as per Rule 29(5) of the SEZ Rules, earlier show cause notice was dropped. If at all any proceedings to be initiated, that

can be initiated only under the provisions of the SEZ Act and Rules.

24. Even according to the Respondents, Section 51 can be enforced only when the goods are meant for SEZ Unit. In the case on hand, it is seen that the gold bars in question were consigned to the Petitioner Company, which is admittedly a SEZ Unit. Hence, Section 51 can be made applicable to the case on hand.

25. Coming to the issue of non consideration of CCTV footage by the Appellate Authority, it has been observed by the Honourable Supreme Court in Criminal Appeal No.142 of 2015 by judgement dated 20th January 2015 that with the advancement of information technology, scientific temper in the individual and at the institutional level is to pervade the methods of investigation. With the increasing impact of technology in everyday life and as a result, the production of electronic evidence in cases has become relevant to establish the guilt of the accused or the liability of the defendant. Electronic documents are admitted as material evidence. With the amendment to the Indian Evidence Act in 2000, Sections 65A and 65B were introduced into Chapter V relating to documentary evidence. Section 65A provides that contents of electronic records may be admitted as evidence if the criteria provided in Section 65B is complied with. The computer generated electronic records in evidence are admissible at a trial if proved in the manner specified by Section 65B of the Evidence Act. Sub-section (1) of Section 65B makes admissible as a document, paper print out of electronic records stored in optical or magnetic media produced by a computer, subject to the fulfilment of the conditions specified in sub-section (2) of Section 65B. Secondary evidence of contents of document can also be led under Section 65 of the Evidence Act.

26. In the case on hand, the CCTV footage was concealed by the Appellate Authority for the reasons best known to them. Though the burden lies upon the passenger to establish his defence, the Appellate Authority ought to have considered the said electronic evidence also, before penalising the Petitioner. Production of scientific and electronic evidence in court as contemplated under Section 65B of the Evidence Act is of great help to the adjudicating authority.

27. Therefore, the order of the lower adjudicating authority cannot be simply brushed aside, wherein the charges levelled against the Employee (1) and the Petitioner were dropped, after considering the implication of Section 51 of the SEZ Act and also the electronic evidence of CCTV footage. Further, there is also a statutory compliance provided under Section 128A(3) of the Customs Act, which the Appellate Authority failed to comply with. Hence, the matter deserves

reconsideration and re adjudication, as long as the SEZ Act and the Rules and the Acts relied on by the Respondents are inconsistent with each other.

28. In view of the above, the impugned orders are set aside and the matter is remanded back to the Appellate Authority for passing appropriate orders afresh. The Appellate Authority is directed to consider the matter afresh and pass orders, after giving an opportunity to the Petitioner, on merits and in accordance with law, within a period of eight weeks from the date of receipt of a copy of this order.

29. With the above directions, these Writ Petitions are disposed of. No costs. Consequently, the connected MPs are closed.

Srcm

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

To:

- 1.The Chief Commissioner of Customs, Customs House, Chennai
 - 2.The Commissioner of Customs (Airport & Air Cargo), Chennai-27
 - 3.The Commissioner of Customs (Appeals I), Customs House, Rajaji Salai, Chennai
 - 4.The The Joint Commissioner of Customs, (Adjudication-Air), Chennai-27
- + 4 CCS TO Mr.T.Sudhan Raj, ADVOCATE SR 68551, 68552
- + 1 CC TO Mr.S.Haja Mohideen Gisthi, ADVOCATE SR 69014

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