IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.20385 of 2012

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Firoz Alam, S/O Zahir Ahmad, resident of Mata Asthan, Ward No.29, P.S- Araria, District- Araria.

.... Petitioner/s

Versus

1. The Union of India through Commissioner of Customs, Central Revenue Building, Birchand Patel Path, Patna, Bihar.
2. The Assistant Commissioner of Customs, Division Farbishganj, Distt- Farbishganj, Bihar
3. The Superintendent of Customs, Farbishganj Division, District-Farbishganj, Bihar.
4. The Inspector Customs (Preventive) Cum Seizing Officer, Circle Kishanganj, District- Kishanganj, Bihar.

.... Respondent/s

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Appearance :

For the Petitioner : Mr. Prabhat Ranjan, Advocate
Mr. Chandan Kumar, Advocate

For the Union of India
(Customs) : Mr. Satya Prakash Tripathy, Sr. S.C. (Customs)
Mr. Satyavrat, Advocate

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CORAM: HONOURABLE JUSTICE SMT. ANJANA MISHRA

CAV JUDGMENT

Date: 10-05-2017

By the present application, the petitioner seeks issuance of an appropriate writ, order or direction commanding the respondents to refund a sum of Rs.1,21,620/- (2027 pieces at the rate of Rs.60/- per piece) as the price of 2027 pieces of Goat Skin, which was illegally sold by the respondents without any justifiable cause.

A further prayer has been made through I.A. No.9275 of 2014 for setting aside the order dated 22.11.2013 (Annexure 1 to the interlocutory application), whereby and whereunder the

Assistant Commissioner, Customs (Preventive) Division, Forbesganj, under Letter No.07/EXP/2013, has directed the seizure of 2027 pieces of seized Goat Skin and has absolutely confiscated the same under Section 113(b)/113(c) of the Customs Act, 1962 (hereinafter referred to as `the Act') and further a penalty of Rs.20,000/- under Section 114(iii) has been imposed. By the said order, a further enquiry has been directed to be held by the Central Board of Excise and Customs into the proprieties of the conduct of the respondents of the instant case.

2. The brief facts, from which the present writ application emanates, are as follows:

(i) The petitioner is a registered trader dealing with goats and animal skins in the name and style of "M/s Bishmillah Hide & Skin" in the district of Araria with TIN No.10441081068.

(ii) During the ordinary course of business, the petitioner purchased 13278 pieces of wet salted Goat Skin at the rate of Rs.60/- per piece from one M/s. Rehan Enterprises, District-Darbhanga, Bihar after payment of requisite taxes on 19.09.2012.

(iii) On 22.09.2012, suddenly the District Police raided the declared godown of the petitioner and seized, without any rhyme or reason, the aforementioned 2027 pieces of Goat Skin and thereafter handed over the same to the jurisdictional Customs

Office at Forbesganj.

(iv) Immediately thereafter on 23.09.2012, the petitioner filed a claim before the Assistant Commissioner, Customs, Forbesganj for the release of the goods along with all relevant documents, but the Assistants Commissioner, Customs without verifying the ownership and the claim of the petitioner, placed the goods on auction on 24.09.2012. It appears that a notice dated 23.09.2012 was also issued under Section 150 of the Act, vide Letter No.7615.

(v) On 24.09.2012, vide Letter No.7527, the respondent-authorities, on their own will, decided to withhold the auction for one more day and directed the petitioner to furnish cash security of the full value of the goods and also execute a bond for the release of the said goods, subject to the condition that the Goat Skin will be kept intact and will not be sold or used otherwise and will be preserved in the same condition till finalization of the case.

(vi) Accordingly, the petitioner being aggrieved by the action of the respondents in the issuance of Annexures 4 and 5 has assailed the same before this Court.

3. It has been asserted by the petitioner that from a conjoint reading of Annexure 5 with Annexure 4, it is evident that the same has been issued mechanically and suffers from total non-

application of mind. Furthermore, it appears that the respondent with some ulterior motive was in a hurry to dispose of the highly perishable nature of goods and also because they were also exposing public to an unhealthy pungent smell causing nausea and vomiting.

4. It was contended that there was an error apparent on the face of Annexure 5 as the same officer while noting that the goods are highly perishable in nature was directing the petitioner to deposit 100% cash security but also at the same time, asking him to execute a bond that he would not dispose of the Goat Skin and will maintain the Goat Skin in the same condition till the finalization of the case, though the same is a highly perishable commodity.

5. Learned counsel for the petitioner further contended that the mechanical approach of the respondents is evident from the fact that the letter, as contained in Annexure 5, neither discloses any amount for the cash security, which has been deliberately left blank. Furthermore, the authorities have recorded that the Goat Skin had been purchased from one Bishmillah Hide & Skin, little realizing that the petitioner himself is the owner of the said M/s Bishmillah Hide & Skin. When the petitioner having not responded to the aforesaid letter (Annexure 5), has come to know that his goods have been sold, without even following the

procedure as prescribed under Section 110-A of the Act. It was further contended that the goods of the petitioner could not be sold under the provisions of Section 150 of the Act for the reasons that the money which was recovered after the sale could not be used for any purpose, for which the sale is authorized under the Act.

6. Learned counsel for the petitioner further contended that the action of the respondents also stands vitiated as no seizure memo was ever given to the petitioner nor was any ground for seizure ever communicated. It was thus stated that it being settled law that the validity of the seizure is to be ascertained on the basis of the materials available with the seizing officer at the time of the seizure, no subsequent information could be of any avail to the respondents. Thus, the loss rendered to the petitioner deserves to be compensated and injury met to him has to be remedied by refunding the sale proceeds of the seized items.

7. Learned counsel for the petitioner further contended that the allegation levelled by the respondents that the petitioner was trying to export illegally also could not be sustained as per Section 11H of the Act as the Goat Skins are not specified goods as described under the Schedule nor were they recovered from any specified area (5 Kms. from border). Furthermore, the notice does not contain the reason assigned or the reasons for action taken

against the petitioner. It was further submitted that the adjudicatory authority, who passed Annexure 5, was also the investigating authority i.e., Assistant Commissioner, Custom, which is wholly irregular and against the settled principle of law. In view of such facts and circumstances, it was contended by the learned counsel for the petitioner that this Court may order the refund of the money, as claimed by the petitioner.

8. In reply to the averments made by the petitioner, learned counsel for the Customs has stated that the present application is not maintainable as the petitioner has an alternative remedy against the final order before the Commissioner (Appeals) CESTAT at Calcutta and the petitioner having come to this Court without exhausting any such remedy, cannot be benefited under Article 226 of the Constitution. It was further contended that the petitioner is a habitual offender as is evident from paragraphs 4 and 4.1 of the adjudicatory order and, therefore, he does not deserve any appropriate remedy under Article 226 of the Constitution.

9. Learned counsel for the Customs has further submitted that the petitioner was indulging in illegal transportation of Goat Skin to Nepal, a buffer State, which has often been supported by India. It was averred that the petitioner was trying to send the goods to Nepal not through the prescribed route but by

means of other ways and that there was syndicate working behind the scene, which was involved in widespread smuggling of Goat Skins. Having been caught on the wrong foot, the petitioner is now trying to take recourse to legal technicalities to succeed in his illegal trade. The petitioner's action suffers from violation of Sections 50 and 51 and also Section 7(b) and Section 7(c) of the Act. He thus submitted that the confiscation of the goods under Section 113(b) and 113(c) of the Act is well established in the case of the petitioner. Thus, having not answered to the repeated show cause notices issued to him, which is evident from paragraph 5 of the adjudicatory order, the respondents issued the impugned orders and confiscation was made of the goods and he was also directed to pay penalty.

10. Responding to the contentions advanced by the learned counsel appearing on behalf of the Customs, the petitioner has categorically stated that Section 11H of the Act relates to the provisions of illegal export and contemplates what specified area is and also what is classified as specified goods. For ready reference, Section 11H of the Act is quoted hereunder:

> *"11H. Definitions.—In this Chapter, unless the context otherwise requires,—*
> *(a) "illegal export" means the export of any goods in contravention of the provisions of this Act or any*

other law for the time being in force;

(b) "intimated place" means a place intimated under sub-section (1), sub-section (2) or sub-section (3), as the case may be, of section 11J;

(c) "specified area" include the Indian customs water, and such inland area, not exceeding one hundred kilometres in width from any coast or other border of India, as the Central Government may, having regard to the vulnerability of that area to smuggling, by notification in the Official Gazette, specify in this behalf:

Provided that where a part of any village, town or city falls within a specified area, the whole of such village, town or city shall, notwithstanding that the whole of it is not within one hundred kilometres from any coast or other border of India, be deemed to be included in such specified area;

(d) "specified date" in relation to specified goods, means the date on which any notification is issued under section 11-I in relation to those goods in any specified area;

(e) "specified goods" means goods of any description specified in the notification issued under section 11-I in relation to a specified area."

11. The petitioner thus submitted that the "specified goods", as per Section 11H(e), means goods of any description specified in the notification issued under Section 11-I in relation to

an specified area. He further submitted that Goat Skins are not specified goods as per the Official Gazette, for which the provisions of the Act could apply for the purpose of checking the illegal export or facilitating the detection of goods which are likely to be illegally exported. In view of the fact that no such notification has been issued specifying the Goat Skins as specified goods, the petitioner could not be subjected to any charge of illegal export, much less of having violated the provisions of the Act.

12. Learned counsel for the petitioner further submitted that the goods were recovered from the petitioner's premises and there is nothing on the record to show that they were meant for illegal export so as to invite the application of Sections 50 and 51 of the Act for taking clearance of export goods. Thus, as a natural corollary, the confiscation proceedings initiated under Section 113 (b) and (c) could not be invoked. Section 113(b) and (c) of the Act are quoted hereunder:

> *"113.* ***Confiscation of goods attempted to be improperly exported, etc****.—The following export goods shall be liable to confiscation:--*
>
> *(a) ……………………………………………………….*
>
> *(b) any goods attempted or to be exported by land or inland water through any route other than a route specified in a notification issued under clause (c) of section 7 for the export of such*

goods;

(c) any goods brought near the land frontier or the coast of India or near any bay, gulf, creek or tidal river for the purpose of being exported from a place other than a land customs station or a customs port appointed for the loading of such goods;"

13. Learned counsel for the petitioner submitted that Section 110 of the Act relates to search for any goods liable to confiscation, if the proper officer has "reason to believe" that such person to whom this Section apply has apprehension that any goods are liable to confiscation. Thus, the words "reason to believe" is crucial to the application of this Section. It is useful to quote Sections 110 (1) and 110(1A) of the Act, which are reproduced hereunder :

*"**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."

14. It was submitted by the learned counsel for the petitioner that as per Notification No.32/05-Cus(NT) dated 11.04.2005, issued under Section 110(1A) of the Act, seizure can be validly made under Section 110 of the Act if the officer making the seizure has reason to believe that any goods are liable to confiscation under the Act. Where seizure has been made on the basis of mere suspicion and/or presumption and the condition precedent for the exercise of power under Section 110 of the Act being absent, the order of seizure cannot be said to be in accordance with law.

15. In the instant case, learned counsel for the petitioner submitted that the "reasonable belief" and the "reason for formation of such belief" crystallize when the seizures are made and any subsequent information or fact coming to the

knowledge of the seizing officer can be of no avail to him and he cannot act on the reason to believe for coming to a conclusion that the goods are liable for confiscation. Thus, the authorities could not place reliance on any subsequent facts or information received by them and such consideration would render the entire proceedings beyond jurisdiction.

16. Learned counsel for the petitioner further contended that the since a valid seizure is a *sine quo non* of the confiscation proceeding, any confiscation proceeding, which followed the illegal seizure, would render the confiscation proceedings also illegal.

17. Having heard learned counsel for the petitioner, it appears that though show cause notice has been issued to the petitioner after the seizure, there is nothing on the record to specify and prove that the goods were, in fact, specified goods liable for confiscation under the Act. The entire seizure and adjudication proceedings have been initiated on a presumption that Goat Skin is a notified item and place of search was a notified area, attracting the jurisdiction of the Customs authority. Thus, the entire proceeding was wholly erroneous and could not be sustained in the eyes of law.

18. The aforementioned reasoning has been supported

by the learned counsel for the petitioner, who has relied on a Division Bench decision of this Court in the case of ***Angou Golmei v. Union of India,*** reported in ***1994(1)PLJR 800,*** wherein this issue has been clearly explained and it has been held as follows:

> *"21. The expression `reasonable belief' or `reason to believe' occurs in several statutes. Reference may be made to section 147(a) of the Income Tax Act, 1961; section 178A of the Sea Customs Act, 1978; section 66 of Gold (Control) Act, 1968 and so on. In* ***Calcutta Discount Col. Ltd. v. Income Tax Officer*** *(AIR 1961 Supreme Court, 372), a case under section 34 of the Income Tax Act, 1922 corresponding to section 147(a) of the Income Tax Act, 1961, the Apex Court held :*
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> *"The expression `reason to believe' postulates belief and the existence of reason for that belief. The belief must be held in good faith; it cannot be merely a pretence. The expression does not (sic) purely subjective satisfaction of the Income Tax Officer."*
>
> *In* ***Sheonath Singh v. Appellate Assistant Commissioner of Income Tax (Central) Calcutta*** *(AIR 1971 Supreme Court 2451) it was held that the words "reason to believe" suggest that the belief must be of an honest and reasonable person based upon reasonable grounds and the officer may act or direct or circumstantial evidence but not on mere*

suspicion, gossip or rumour. It was further held that if the officer concerned acts on material which is relevant then he acts without jurisdiction."

19. Learned counsel for the petitioner has raised further contention that the impugned adjudicatory order dated 22.11.2013, contained in Annexure 1 to the interlocutory application, would also not be sustained as the adjudicating authority, being the Assistant Commissioner, is also the same authority, who issued the show cause notice to the petitioner.

20. This Court finds after a perusal of Annexure 4 and also the adjudicatory order that the Assistant Commissioner, Customs has issued the show cause notice and has passed the order of adjudication, which is clearly contrary to the settled principle of law that "No man can be a judge in his own cause'. Thus, on this ground alone also the adjudicatory order stands vitiated and is fit to be set aside. Moreover, the discussions and the findings, which have been dealt with by the concerned officers, on the basis of the presumption and evidences and the statement of persons recorded, are those persons who have never been named in the show cause notice and cannot be admissible under the Evidence Act.

21. Learned counsel for the petitioner further submitted that the petitioner cannot be subjected to the alternative

remedy of appeal, as has been contended by the respondents, as the orders passed by the authorities are wholly in violation of the principles of natural justice and are also without jurisdiction as they have not been able to prove and satisfy the test of reasonable belief and all actions have been initiated on the basis of the presumption rather than actualities.

22. Under such facts and circumstances, the principles, which have been stated in the case of ***Whirlpool Corporation v. Registrar of Trade Marks***, reported in ***(1998) 8 SCC 1,*** would hold good and the petitioner can well avail the remedy under Article 226 of the Constitution.

23. Learned counsel for the petitioner has also drawn the attention of this Court to a decision of this Court in the case of ***Yogendra Prasad v. Union of India,*** reported in ***2004(4) PLJR 675***, wherein this Court has held that the allegation against the petitioner that he was a habitual offender cannot be sustained and the seizure cannot be justified referring to the fact of the earlier case. In the said case at paragraph 6, it has been held as follows :

> *"6. On behalf of the petitioner it is alleged that the customs officials were bent upon harassing him; his goods, duly imported into the country on payment of customs duties and after observing all the legal formalities, were frequently seized and subjected to long-drawn confiscation proceedings. In*

*support of the allegation counsel for the petitioner produced an earlier decision of this Court, dated 20.2.2001 in Cr.W.J.C. No.464 of 2000 (**Anatilal Prasad vs. Union of India & Ors**.) and another analogous case. In that case the Polythene carry-bags sold by the petitioner unit to two other persons had been similarly seized by the customs officials and challenging the seizure the two buyers from the petitioner had come to this court. In the decision in that case there is a reference to some earlier seizures in which the resultant confiscation proceedings had failed. In the case of **Anatilal Prasad** the seizure was held to be bad, illegal and without jurisdiction. **But the facts of an earlier case cannot form the basis to assail a subsequent seizure; so far as the validity of the impugned seizure is concerned it can only be judged on the basis of undisputed facts and not on the basis of the allegations made by the petitioner.** This court would, therefore, discount the assertion being made by the petitioner that at the time of inspection by the customs officials, apart from the challan, a copy of the Bill of Entry too was produced by the driver of the bus."*

24. I have heard learned counsel for the petitioner and the learned counsel appearing on behalf of the Customs and also perused the materials on record. The contention of the petitioner that the goods were not notified goods form the basis of his

challenge to the action of the respondents. This Court had issued a specific query to the Customs authorities to justify as to whether the goods, so seized by its authorities, were specified goods and had been seized from specified routes. The counter affidavit filed by the respondents does not, in any way, substantiate this fact and a perusal of the adjudicatory order indicates that it was seized from the godown. There is also no satisfaction expressed by the authorities at the time of seizure that they had "reason to believe" that the goods so seized were liable for confiscation. Thus, the very initiation of the proceedings against the petitioner seems to be without jurisdiction.

25. Furthermore, the petitioner has categorically submitted that he could not be forced to participate in the proceedings, which was without jurisdiction and was liable to be refunded the amount, which was the cost of his goods, which had been taken in hot haste by the authority without following the due process of law. The action of the respondents clearly stood vitiated on this count also and there being no cogent reason to initiate the proceedings against the petitioner, he could not be compelled to participate in the auction and/or subject himself to the confiscation proceeding which was wholly without jurisdiction and was being conducted by the same authority, who

had ordered the seizure in his case. Thus, imposition of a penalty after confiscation of the Goat Skins, which had been illegally auction sold by the authorities, could not be sustained as by no stretch of imagination the same authority, who issued the show cause notice, proceed to pass the final orders, in the present case. Such action clearly reveals the mechanical manner in which the authorities have been functioning and is indicative of the non-application of mind and also is deemed to be vested with ulterior motives.

26. This Court also holds that the goods, which had been seized by the authorities, had been sold even without following the procedure as prescribed under Section 110(1A) of the Act. It is also strange how the authority has proceeded to auction sale the property of the petitioner and coerce him into depositing security amount for release of the same under the condition that he would preserve it till disposal of the case is also arbitrary. This is more so evident because the authority was fully conscious of the fact that the goods so seized were of highly perishable nature and that the petitioner could not satisfy such condition.

27. Thus, the entire proceedings against the petitioner having been conducted in gross violation of the statutory

provisions of the Act stands vitiated, more so because the petitioner has been subjected not only to irreparable loss and injury but has also been denied the basic principle of *audi alteram partem,* leading to much harassment and injury by the illegal acts of the respondents.

28. In the result and for the reasons stated above, the impugned order dated 23.09.2012, as contained in Annexure 4, and the impugned order dated 22.11.2013, as contained in Annexure 1 to the interlocutory application, are held to be bad in law and are thus set aside.

29. This Court, considering the facts that the whole proceedings against the petitioner stands vitiated as being without jurisdiction, also allows the prayer of the petitioner for refund of Rs.1,21,620/-, being the price of 2027 pieces of Goat Skins, which has been illegally sold by the respondent-authorities.

30. The writ application is, thus, allowed. However, in the facts and circumstances, there shall be no order as to costs.

(Anjana Mishra, J)

PNM

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