IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.17950 of 2013

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Dau Lal Sarda, son of Late Mohan Lal Sharda, Proprietor M/S Adras Traders, 2nd Floor, UCO Bank Building, H B Road, Fancy Bazar, P.S. Fancy Bazar, District Guwahati, Assam

.... Petitioner/s

Versus

1. The Union of India, through the Commissioner of Customs, Central Revenue Building, Beer Chand Patel Path, Patna
2. The Additional Commissioner, (Adjudication), Customs Head Quarters, Central Revenue Building, Beer Chand Patel Path, Patna
3. The Assistant Commissioner, Customs (P) Division, Farbishganj, Bihar

.... Respondent/s

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Appearance :

For the Petitioner : Mr. Prabhat Ranjan, Advocate

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

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CORAM: HONOURABLE JUSTICE SMT. ANJANA MISHRA

ORAL JUDGMENT

Date: 15-02-2017

The present writ application has been filed for issuance of a writ in the nature of *certiorari* for quashing Adjudication Order No.31-Cus/ADC/FBG/2013 dated 31.05.2013 passed by the Additional Commissioner (Adjudication), Customs (Headquarters), Patna (Respondent No.2), as contained in Annexure 3, whereby and whereunder 23430 Kgs. of cut betel nuts belonging to the petitioner have been confiscated under Section 111(d) of the Customs Act, 1962 (hereinafter referred to as "the Act") and a penalty of Rs.2,00,000/ (Two lacs) has been imposed on him in terms of Section 112(b) of the Act.

2. Learned counsel for the petitioner informs this Court that the petitioner had come to this Court earlier at the time when the seizure had taken place by filing a writ petition, bearing CWJC No.20981 of 2011, and this Court, vide order dated 17.01.2013, Annexure 2 to the writ application, while allowing the release of the seized goods, had stated that the Court was not considering the issues raised in the writ petition on its merits. Subsequent thereto, the impugned order, contained in Annexure 3, has been passed on 31.05.2013, by which confiscation has been directed and a penalty of Rs.2,00,000/- (Two lacs) has been imposed upon the petitioner.

3. Being aggrieved by the aforesaid order passed by the adjudicating authority, being the Additional Commissioner (Adjudication), Customs (Headquarters), Patna (Respondent No.2), the petitioner seeks to set aside the same and also prays for quashing the order, by which penalty has been imposed upon him.

4. The short facts, which gave rise to the present case, are that the petitioner firm, being M/s. Adras Traders, having its office at UCO Building, H B Road, Fancy Bazar, Guwahati, Assam, had booked the consignment of betel nuts from Guwahati to Delhi/Amritsar in VPH No.01900 of Capital Express (Train No.13247) up to Katihar Railway Station and from where it was to be further transported via Amrapali Express (Train No.15707) to

Delhi/Amritsar. On 09.11.2011, the Preventive Team of Customs (P) Division, Forbesganj reached Katihar and served detention order under Section 106 of the Act on the Railways and other concerned authorities. The said VPH No.01900 was detained and searched. It was found that the readymade garments of Chinese origin were concealed behind the bags of cut betel nuts. The goods were off-loaded from the VPH at about 23.00 hours of 09.11.2011 and an inventory was made at about 12.29 P.M. on 10.11.2011 and the detained Wagon No.01900 was vacated and released to the TNC of N.F. Railway, Katihar on 10.11.2011 at 12.40 hours by the Customs officials.

5. On thorough examination, it was found that 22,110 Kgs. of cut betel nuts, having a gross weight of 23,430 Kgs. and miscellaneous readymade garments of made in China origin of various nature having a total value of Rs.49,95,100/-, were seized on 10.11.2011 under Section 110 of the Act after following the proper procedures. The said seizures were made as the Customs had reasons to believe that they were being imported illegally into India violating the provisions of Sections 7, 11, 46 and 47 of the Act read with Section 3(2) of the Foreign Trade (Development & Regulation) Act, 1992, which rendered the goods and packages liable for confiscation under Section 111(d), 118 and 119 of the

Act.

6. The said goods were seized as claimed in the name of Shri Sandeep Kumar Tarar (Noticee No.1) as his name was found as the consignor and consignee on the `MANIFEST' handed over by the Railway authority at Katihar Railway Station at the time of seizure. As per the `MANIFEST', the goods were covered under the Railway Receipt No.500774 dated 08.11.2011 and the details of the goods mentioned are "379 Pkg Dry nut & Electronic & R. Goods", "weight 22,560 kg.", "Consignor Sandeep and Consignee Sandeep". The consignment notes No.10178 & 10179 dated 08.11.11 of M/s Scorpion Cargo, 117/118, T.V. Estate, S.K. Ahire Marg, Worli, Mumbai-400030, were also handed over to the customs officers by the Railway authority at Katihar Railway Station. It appeared that the R. goods in the consignment note No.10178 stood for readymade garments, which were of Chinese origin and were the part of the consignment and the consignor and consignee as per this note was some Mr. Amar and in the consignment note No.10179 which stood for dry nut, the consignor and consignee was one Mr. K. Chowdhury.

7. In view of the confiscation made by the Customs Department, on 16.11.2011 an application was filed by M/s Adras Traders through their Counsel requesting them to verify the papers

with regard to the betel nuts and release them forthwith. It was further stated through their authorized representative/Counsel that the application was restricted to the consignment of betel nuts only which was being carried in the parcel van.

8. Summons under Section 108 of the Act was issued to the claimant of seized betel nuts, M/s Adras Traders, UCO Bank Building, H B Road, Fancy Bazar, Guwahati and also to the lease-holder of the said Railway Parcel Van, Shri Sandeep Kumar Tarar, Ulubari, G.S. Road, Guwahati, being Noticee No.2 and Noticee No.1 respectively, but the same were returned by the postal authority stating “incomplete address” and “not known” respectively.

9. Since the aforementioned goods were not released in favour of the petitioner on a representation made by them through their Counsel, the petitioner came to this Court in CWJC No.20981 of 2011, which was disposed of on 17.01.2013. In the said writ application, this Court, while directing release of the seized goods on payment of reasonable value for the Bank guarantee, directed the authorities to release the seized goods and also made it clear that this Court has not considered the issues raised in the said writ application on merits. Subsequently, the goods were released in favour of the petitioner on furnishing Bank

guarantee and thereafter, the present order (Annexure 3) has been passed, which is being assailed in the present writ application.

10. Learned counsel for the petitioner submits that the order impugned in the present writ application is wholly illegal and arbitrary inasmuch as though there being a finding in his favour that the goods were not to be confiscated and there was no sufficient material to proceed to confiscate the goods in question under the relevant provisions of the Act, yet the adjudicating authority without going back to its finding has proceeded to confiscate the same and also imposed a penalty of Rs.2,00,000/-, which is against the settled principle of law.

11. Learned counsel for the petitioner has further drawn the attention of this Court to Section 110 of the Act, under which the goods are purported to have been seized, stating that Section 110 does not permit such an action as there is no reason to believe that the goods were liable for confiscation. Section 110 of the Act is being quoted hereunder for ready reference :

> *"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.

[(1-A) 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.

(1-B) Where any goods, being goods specified under sub-section (1-A), 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 proceeding 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.

(1-C) Where an application is made under sub-section (1-B), 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 an officer of customs."

(Underlining is mine)

12. Learned counsel for the petitioner submits that for the goods to be liable for confiscation, two factors need to be fulfilled, which, as per Section 110, are reasonability and secondly,

it should also be confiscable. Learned counsel for the petitioner thus submits that there was no reason to believe that the goods in question was liable to be confiscated as they were not of foreign origin nor, under such circumstances, could they be confiscated. It is further submitted that the procedure followed for confiscation was wholly in contravention of Section 110 of the Act and such illegal confiscation could not be made in the manner, as has been done in the present case.

13. Learned counsel for the petitioner has further urged before this Court that in the case of non-notified goods, the onus to prove the same lay on the Department, which they have failed to prove. He further submits that over and above, there is glaring violation of the principles of natural justice and also non-compliance of the statutory provisions. The impugned order is wholly illegal and arbitrary and against the statutory provisions, thus, warranting intervention under Article 226 of the Constitution of India. In this connection, learned counsel for the petitioner has referred to a decision of the Division Bench of this Court in the case of ***Angou Golmei v. Union of India***, reported in ***1994(1) PLJR 800***. It is relevant to quote paragraphs 21 and 27 of the said judgment, which are as under:

> *"21. The expression `reasonable belief' or `reason to believe' occurs in several statutes.*

Reference may be made to section 47(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 Co. 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:*

*"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 on 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 irrelevant then he acts without jurisdiction."*

xxxx xxxx xxxx xxxx

"27. Having, thus, given my anxious considerations to the contentions made, on the materials brought on record, I am constrained to

hold that so called belief of the officials was at the most mere suspicion, far away from belief which could be said to be reasonable. The condition precent for the exercise of power under section 110 of the Customs Act being absent, the impugned seizure cannot be said to be in accordance with law."

(Underlining is mine)

Learned counsel has also referred to a decision of the Supreme Court in the case of **Whirlpool Corporation v. Registrar of Trade Marks,** reported in **(1998) 8 SCC 1.**

14. Learned counsel for the petitioner further submits that the impugned order has been passed without giving any show cause notice to the petitioner, which is wholly illegal. Coming back to the impugned order, learned counsel for the petitioner has drawn the attention of this Court to the finding, which has been recorded by the adjudicatory authority, which is quoted hereunder :

"In this regard, I find that the provisions contained under Notification No.9/96-Cus pertain to prohibition of import of goods other than those manufactured/produced in Nepal into India, which is specific to import from Nepal. However, I find that there is no evidence on record to suggest that the consignment in question had been smuggled from Nepal. It is observed that the courier/leaseholder had booked the consignment

from Assam on the train at Guwahati. Even if the goods are found to be smuggled in nature, in the absence of any evidence that they had crossed India from Nepal, violation of provision specific to imports from Nepal cannot be invoked. Hence, I find that the provisions of Notification no.09/96-Cus dated 22.01.1996 issued under Section 11 of the Customs Act, 1962 cannot be invoked in this case."

15. Learned counsel for the petitioner submits that though no notice or show cause was served, the adjudicatory authority has further gone to arrive at the presumption that the betel nuts are of foreign origin and liable for confiscation under Section 111(d) of the Act as they have been brought into India without following the procedures prescribed under Sections 46 and 47 of the Act.

16. Learned counsel for the petitioner has further referred to the order passed by the adjudicatory authority and submitted that since the notice was never issued or served on the petitioner, there is no question of his evading the adjudicatory authority and it was in his interest to present his case before the adjudicatory authority.

17. Learned counsel for the Customs, however, submits that though it has been urged by the learned counsel for the

petitioner that the provisions of the Act are not invokable, the impugned orders passed by the adjudicatory authority are wholly valid and no fundamental right of the petitioner has been abridged and the right to trade has also not been infringed. He further submits that the petitioner had violated certain norms and used unfair practice for conducting his trade and had also violated the sales tax and other laws. It is further submitted that Sections 46 and 47 of the Act have been clearly violated and, therefore, the goods so seized are liable for confiscation.

18. With regard to the submissions of the petitioner that the principle of *audi alteram partam* has been violated, learned counsel for the Customs submits that there was no non-observance of the principles of natural justice as show cause notice has been served on the petitioner, which had been returned as not found. He further submits that there being no violation of the principles of natural justice, the remedy for the petitioner lay by way of statutory appeal under Section 129-A of the Act. Thus, the writ application is fit to be dismissed on this score also.

19. In reply to the contentions urged by the learned counsel for the Customs, my attention has been drawn to Section 124 of the Act, which is quoted hereunder:

*"124. **Issue of show cause notice***

> ***before confiscation of goods, etc.****—No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person—*
>
> *(a) is given a notice in [writing with the prior approval of the officer of Customs not below the rank of [a Deputy Commissioner of Customs], informing] him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;*
>
> *(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and*
>
> *(c) is given a reasonable opportunity of being heard in the matter:*
>
> *Provided that the notice referred to in clause (a) and the representation referred to in clause (b) may at the request of the person concerned be oral."*

20. The language as contained in Section 124 clearly reveals that no order confiscating any goods or imposing any penalty on any person can be made under this Chapter unless the owner of the goods has been given a reasonable opportunity of being heard in the matter. This Court is of the considered opinion that the aforementioned provision is thus mandatory and cannot be

bypassed by the authority concerned.

21. With regard to the contention advanced by the learned counsel for the Customs that the goods were of foreign origin, the findings which have been arrived at by the adjudicatory authority, clearly state that there is no evidence on record to suggest that the consignment in question had been smuggled from Nepal. Thus, in view of such finding arrived at by the authority itself, the second ground urged also fails as the onus to prove the goods to be of foreign origin lay on the Department, which has made such a seizure.

22. So far as the violation of Sections 46 and 47 of the Act are concerned, as has been alleged against the petitioner, in view of the findings arrived at that there was no evidence that it was of foreign origin, the said provision could be attracted only in the case of goods coming in from a third country. It has been further observed in the impugned order itself that as per Notification No.09/96-Cus dated 22.01.1996, issued under Section 11 of the Act, the goods are freely importable on payment of applicable Customs duty after following the procedures prescribed under the Act and, therefore, it having been asserted by the Customs Department that they had no information that the consignment in question had been smuggled from Nepal, there is

no scope of invocation of the provisions of Sections 46 and 47 of the Act. Thus, the confiscation made by the authorities by the present impugned order also cannot be sustained and warrants interference by this Court.

23. Having heard learned counsel for the parties and after consideration of all facts and circumstances and the provisions of law, I find that the impugned order cannot be sustained on any count. The confiscation thus directed vide Annexure 3, contained in Adjudication Order No.31-Cus/ADC/FBG/2013 dated 31.05.2013, is wholly illegal and is set aside so far as it relates to the petitioner. Consequently, the fine imposed upon the petitioner is also without jurisdiction and is automatically set to naught.

24. 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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