IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3629 OF 2017

M/s. Aadarsh Prints & Anr. .. Petitioners
Vs.
The Union of India & Ors. .. Respondents

...

Mr. Prakash Shah, a/w. Mr. Ajay Singh and Mr. Jas Sanghavi, i/b. M/s. PDS Legal, Advocate for the Petitioners.

Mr. Pradeep S. Jetly, Advocate for the Respondents.

...

CORAM : S.C. DHARMADHIKARI AND PRAKASH D. NAIK, JJ.

DATED : APRIL 3, 2017.

P.C. :

By this petition, under Article 226 of the Constitution of India, the petitioners are seeking a writ of mandamus or any other writ, order or direction in the nature thereof, ordering and directing the respondents to forthwith remove the seal placed by them on the petitioners' factory premises on 21st March, 2017, allow free access to the factory premises and unconditional use of the machine, which has been seized by the respondents.

2 This Writ Petition was mentioned urgently and we allowed the above request on 29th March, 2017.

3 After hearing both the sides, briefly, on 29th March, 2017, we passed the following order:

> *"1. This writ petition challenges an action and which according to the Petitioners' counsel Mr.Shah is of sealing of premises.*
>
> *2. Our attention is invited to Customs Act, 1962 by Mr. Shah and particularly Section 110 thereof. He would submit that the power and which flows from several provisions contained in Chapter XIII of the Customs Act, 1962, titled as Searches, Seizure and Arrest denote that seizure contemplated is of goods. It is upon satisfaction that they are liable to be confiscated under the Customs Act. It is only upon such satisfaction that goods may be seized. There is no power under the Act to seal the immovable property. Mr. Shah would submit that law envisages sealing and seizing to be two distinct powers. They cannot be assumed only because there is power of seizure. In this case, there is seizure of an immovable property and that is impermissible in law.*
>
> *3. For meeting these contentions, Mr.Jetly would seek time. At his request, we place this*

matter and high on board on Monday, 3rd April 2017.

4. *On our pointed query as to how from page 22 of the paper book can one decide whether it is only a sealing of a machine/goods and not of the premises, Mr. Jetly on taking instructions from the official of Customs present in Court makes a statement that it will not show correct position as it is only a photograph. The correct position is that there is no sealing of any immovable property much less of any room, but there was an attempt to seize the machine/imported goods and the seal at best is placed on the same.*

5. *We accept the statement made by Mr. Jetly, on instructions, as an undertaking to this Court that if there is any seal placed on any door, immovable property or room, the same shall no longer be placed there but will be removed. That is our understanding of the statement made by him. Without prejudice to the rights and contentions of both sides, we allow seizure of the machine and if at all any seal is placed thereon, that shall continue till 3rd April 2017.*

Stand over to 3rd April 2017, high on board."

4 Before we proceed further, we would like to narrate some facts, which the petitioners have set out and which are based on the uncontroverted documents emanating from the Customs Department itself.

5 The first petitioner claims to be a Partnership Firm, registered under the Indian Partnership Act, 1932. It is engaged in the business of printing on packaged items in its factory premises. The second petitioner is a Partner of the first petitioner-Firm. The Union of India, the Commissioner of Customs (Preventive), the Deputy Commissioner of Customs (Preventive) and the Superintendent of Customs are the Respondents before us, because the petitioners claim that, in the normal course of business, they had applied for a duty free import of second-hand offset printing machine. They applied to the Director General of the Foreign Trade under the EPCG Scheme. This Scheme, stated as *“Export Promotion Capital Goods Scheme”*, is a part and parcel of the Foreign Trade Policy for 2009-2014.

6 The petitioners claim that an EPCG license was issued on 18th August, 2011 for import of this machine and free of

Customs Duty. There was an export obligation, which was required to be fulfilled. Reliance is placed on the Condition Sheet attached to the EPCG license; especially, Condition No.4 thereof, which is part and parcel of this license. That condition reads as under:

> *"4. Authorization holder may also discharge export obligation, indicated in Para 2 above, by way of direct export/through third party export. In all such cases, name of the Exporter, name of EPCG authorization holder, date and number of EPCG authorization should also be indicated in Shipping Bills."*

7 It is the case of the petitioners' that this condition has to be complied with within a period of six years. That period is yet to come to an end. The petitioners state that the said period would come to an end only in August 2017.

8 In respect of this import, the petitioners have relied upon the Bill of Entry dated 14th October, 2011, evidencing execution of a Bond in the sum of Rs.17,87,500/-, being the duty saved on the said import. The petitioners submit that they have also furnished a Bank Guarantee for the said sum.

9 This condition, as reproduced above, is claimed to have been complied with by the petitioners. They have set out this fact in paragraph No.6 of the petition in great details and they have relied upon Annexure-B to the petition, which is a copy of Redemption Letter dated 7th October, 2014. Then, by accepting this compliance on 4th December, 2014, the second respondent returned the Bank Guarantee so also the Bond duly cancelled.

10 Now, in 2016, certain investigations, allegedly, initiated by the Customs, Nhava Sheva, in relation to the import of this second-hand printing machine have commenced. The statement of the Partner of petitioner No.1 was recorded. No show-cause notice for duty demand and/or penalty has been issued to the petitioners, but, suddenly, the Deputy Commissioner of Customs (Preventive), respondent No.3 herein, issued a search warrant. That search warrant dated 21st March, 2017, issued by respondent No.3-Deputy Commissioner of Customs (Preventive), enabled respondent No.4-Superintendent of Customs (SIIB-X) to carry out the aforesaid act.

11 The petitioners, after completion of the search, have executed a 'Supratnama'. The seized goods have been handed

over to the Partner of petitioner No.1-Firm for safe custody.

12 This writ petition has been filed challenging sealing of the factory premises, seizure of the machine and refusing any utilization thereof. It is submitted that, at Annexures “G” and “H”to the Petition, the petitioners have confirmed the aforesaid development. They have recorded the same in their letters addressed to the respondents.

13 The respondents, having not denied the essential factual position, seek to justify it by, firstly, urging that the petitioners have failed to comply with the export obligation on the goods imported under the Export Promotion Capital Goods Scheme at ‘zero duty’, claiming exemption under paragraph 5 of the Foreign Trade Policy 2009-14, read with Notification No.102/2009-Cus dated 11th September, 2009. It was a facility available to an exporter/manufacturer, subject to fulfillment of the export obligations. Further, the Notification obliges parties like the petitioners to use the capital goods imported, as above, and fulfill its export obligations. One M/s. Ridhhi Enterprises, in collusion with the petitioners, showed third party exports in their Shipping Bills filed by them on behalf of the petitioners. The

petitioners were successful in obtaining clearance of these export obligations and filed a certificate evidencing export obligations being discharged, namely, Export Obligation Discharge Certificate, *(for short, "EODC"),* and on the basis thereof, they have got the Bank Guarantee and Bond duly cancelled. Now, the fraud has been exposed during the investigations. The petitioners are, *prima facie,* found guilty of this fraud and having cheated the revenue. The Revenue must be allowed to unearth the fraud completely.

14. For the present, only duty obligation and payment thereof to the tune of Rs.17,87,489/- is computed. The investigations are underway. The investigation would reveal as to how the fraud systematically perpetrated by the parties like the petitioners results in a huge loss of revenue. The investigation presently reveals that the goods covered under these Shipping Bills were manufactured at the factory premises of M/s. Riddhi Enterprises and not by using the capital goods imported by the petitioners. This fact is confirmed from the statement of one Kamal Kishor Parekh, Partner of M/s. Riddhi Enterprises. He has admitted that the export goods against the EPCG licenses were manufactured in their factory using indigenous machines and not

by utilizing the capital goods imported under the EPCG license, namely, 'offset machine'.

15 It is in these circumstances that the fraud, as revealed from the further statement of the petitioners' Partner Shri. Vipul Shah, has enabled the respondents to seal the factory premises of the petitioners and seize the machine as well.

16 We have perused the affidavit-in-reply filed by the respondents.

17 Mr. Shah, appearing on behalf of the petitioners, states that the petitioners proceed on the basis of denials.

18 Having heard both sides, we find that there is partial compliance of the statement, which was recorded by this Court on 29th March, 2017. Now the lock placed on the outer door of the room, where the machine was installed, has been removed. *Prima facie*, this re-enforces this Court's view in arriving at a conclusion that the respondents proceeded to place a lock and seal on the immovable property, namely, the outer door of the factory premises, where the machine was installed. Thus, we do

find the act of locking the immovable property instead of movable property, against the provisions of Section 110 of the Customs Act, 1962 and against the Scheme of the Act. Particularly, at this stage, we find that the documents, emanating from the Customs Department, are of the year 2014. The petitioners have relied upon the Redemption Letter dated 7th October, 2014, a copy of which is annexed at page No.17 of the paper book. It indicates that the petitioners have paid in full, in proportion, the duty amount under the export obligation stipulated in the license. The export obligation has been discharged against the very authorization and in terms of paragraph No.5.13 of the Hand-Book of procedure. Thus, the Foreign Trade Development Officer makes this endorsement and duly forwards a copy thereof to the Assistant Commissioner of Customs EPCG Cell.

19 In turn, on 4th December, 2014, the Office of the Commissioner of Customs (Export), Jawaharlal Nehru Custom House, Sheva, Tal. Uran, Dist. Raigad, by relying upon the communication from the Foreign Trade Development Officer, duly cancelled the Bank Guarantee executed by the petitioners. The Bond in the sum of Rs.17,85,500/- executed by the petitioners also stood cancelled. The endorsement made in this

communication, which is appearing on page No.18 of the paper-book, is that, *"if it is discovered later on that, any of the information or documents submitted by the petitioners are incorrect, manipulated or fraudulent, then, in that event, the petitioners shall be responsible for all its consequences, including payment of full amount of customs duty foregone plus interest @ 18% p.a. from the date of importation of first consignment"*.

20 From the letter dated 4th December, 2014 till the issuance of Search Warrant dated 21st March, 2017 and from the investigation carried out in the month of November and December 2016, we do not find any document or any act, which would enable us to hold that the Customs Department has doubted fulfillment of the export obligations by the petitioners. We are of the opinion that if the petitioners were involved in a systematic fraud, by conniving and in collusion with M/s. Riddhi Enterprises, two years period was enough and, in this case, to unearth such a fraud. If the fraud is perpetrated by the petitioners and the capital goods were never utilized by the manufacturer, then, we do not see any reason as to why, after completion of two years, those documents were never questioned, nor the petitioners or third party or any other party interrogated.

That is why when in 2017 the Customs Department has woken up and is questioning the export fulfillment, then, the step that it has taken even before concluding that the petitioners are liable to make good the amount of customs duty, interest and penalty of sealing of the premises was drastic. If the seizure is resorted vide the power conferred in that behalf, then, even that power has been exercised purportedly in this case after the documents emanating from the Customs Department themselves were holding the field for two years and more. That is why if the proper officer had reason to believe that any goods are liable to be confiscated under the Customs Act, 1962 and has seized them, then, how, the respondents can insist that they will pass a provisional release order only on a bond from the petitioners and in a proper form. Additionally, this Court must impose such conditions as it may deem fit in the facts and circumstances of the case.

21 It is this part and which is insisted by Mr. Jetly and by relying upon the affidavit-in-reply, which we do not find to be justified. Merely because an affidavit-in-reply has been filed alleging that a fraud has been perpetrated and to the extent indicated, we cannot allow the respondents to disown all the

documents of 2014. We do not now allow them to question the compliance made by the petitioners of Condition No.4. If the compliance is not in accordance with this condition, then, the documents, which have been issued on 7th October, 2014 and 4th December, 2014, would have to be ignored with their contents by a proper legal procedure. Now, adjudication will have to take place. That must follow a demand being raised. The demand being raised means there should be specific allegations. It is not as if the affidavit-in-reply would suffice and would meet the requirement of law.

22 In the circumstances, we allow this writ petition by directing the respondents that the seized machine shall be released on the petitioners' executing a Bond in favour of the respondents and by imposing an additional condition, namely, until the respondents take recourse to law and for a reasonable period, namely, till 31st July, 2017, the petitioners shall not transfer or dispose of the machine, but, it shall be retained by them in safe custody. They must abide by the 'Supratnama' and also by the additional condition imposed on them. A Bond shall also be executed by them. It is based on all these conditions, that they would be entitled to the release of the goods.

23 We clarify that we have not accepted any of the contentions as far as merits of the impugned seizure. The adjudication shall proceed, irrespective of any of the finding in this order. Our order will not influence the commencement or conclusion of the procedures in furtherance of the seizure.

(PRAKASH D. NAIK, J.) **(S.C. DHARMADHIKARI, J.)**