IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 03.08.2017
CORAM:
THE HON'BLE MR.JUSTICE T.S.SIVAGNANAM

W.P.Nos.4834 and 4916 of 2017
and
W.M.P.Nos.5152 and 5056 of 2017

1. OmPrakash Triloki Chandwani ..Petitioner in W.P.No.4834 of 2017

2. Pritpal Singh Kalsi ..Petitioner in W.P.No.4916 of 2017

Vs.

1. Principal Commissioner of Customs (I),
New Customs House, GST Road,
Meenambakkam, Chennai-27.

2. Additional Commissioner of Customs (Airport),
Anna International Airport,
New Customs House, GST Road,
Meenambakkam, Chennai-27. ..Respondents in both WPs

Prayer in W.P.No.4834 of 2017: Writ petition filed under Article 226 of the Constitution of India praying for a issuance of Writ of Certiorarified Mandamus calling for the records of the 2nd respondent herein made in Order-in-Original No.170/ 09.12.2016, quash the same and direct the 2nd respondent to return the 23 Nos. of gold bar weighing 23,000 gms.

Prayer in W.P.No.4916 of 2017: Writ petition filed under Article 226 of the Constitution of India praying for a issuance of Writ of Certiorarified Mandamus calling for the records of the 2nd respondent herein made in Order-in-Original No.170/09.12.2016, quash the same insofar as it seeks to impose personal penalty of Rs.66 lakhs under section 112 (a) of the Customs Act, 1962 on the petitioner.

For Petitioners : Mr.B. Sathish Sundar

For Respondents : Mr. T.R. Senthil Kumar
Special Panel Counsel [R1] & [R2]

O R D E R

Heard Mr.B. Sathish Sundar, learned counsel for the petitioners and Mr.T.R. Senthil Kumar, learned Senior Central Government Standing Counsel appearing for the respondents.

2. With the consent of either side, the writ petitions are taken up for disposal.

3. The petitioners are aggrieved by an Order-in-Original passed by the 2nd respondent dated 09.12.2016. The 2nd respondent has, by the impugned order, ordered absolute confiscation of 23 number of gold bars totally weighing 23,000 grams by exercising powers under Section 111 (d) and 111 (e) of the Customs Act; ordered absolute confiscation of the seized material object of no commercial value viz. the black colour "Kata" cloth pouch and the Biege colour "Salvatore Ferragamo" Tweed pouch used for packing the smuggled gold bars; imposed a penalty of Rs.66,00,000/- on the petitioner in W.P.No.4834 of 2017 under section 112(a) of the Act and penalty of Rs.1,00,000/- under Section 114AA of the Act and imposed a penalty of Rs.66,00,000/- on the petitioner in W.P.No.4916 of 2017.

4. As against the impugned order, the petitioners have an effective alternative remedy by way of an appeal to the Commissioner of Customs (Appeals), Chennai. However the petitioners, without availing such remedy, have approached this Court, challenging the impugned order on the ground of violation of principles of natural justice. Therefore, this Court will test the correctness of the impugned order only on the ground as to whether there was any violation of the principles of natural justice and will not go into the merits of the matter.

5. The show cause notice was issued on 13.06.2015 proposing penalties which have now been imposed on the petitioners. On receipt of the show cause notice, the petitioners through their counsel sent representation on 16.02.2016 requesting to furnish the relied upon documents and on obtaining copies of relied on documents, they will submit their reply to the Superintendent of Customs (Adjudication-Air), who, by his communication dated 27.02.2016, addressed to the petitioners' counsel enclosed a copy of Mahazar and copy of the Voluntary statements and with regard to other documents, the counsel was informed that he can examine the documents referred to in show cause notice at the time of the personal hearing and the personal hearing was fixed on 09.03.2016. Much earlier, the petitioners were detained under the COFEPOSA Act and such detention was challenged by them in HCP Nos.2020 and 2053 of 2015.

6. On receipt of the copy of the Mahazar and the voluntary statements the petitioners through their counsel sent a letter dated 04.03.2016 informing the second respondent that the petitioners have been detained under the COFEPOSA Act by order dated 22.07.2015 and they are in judicial custody in Central Prison, Puzhal, Chennai and the noticees desired to be heard in person at the time of personal hearing and therefore requested that the personal hearing may be adjourned, as the counsel is unable to contact his clients.

7. Further, as mentioned earlier, request was made to furnish the relied upon documents as early as possible and after receiving the same, they will supply additional reply to the show cause notice. It appears that there was no further reply sent to the petitioner counsel, but the second respondent, the Superintendent of Customs (Adjudication - Air) vide communication dated 09.03.2016 informed of the personal hearing date as 18.03.2016. In the mean time, the Habeas Corpus petitions challenging the detention of the petitioners under the Cofeposa Act were allowed by the order dated 27.04.2016.

8. It appears that the petitioners' counsel and petitioners appeared for the personal hearing during which they requested for the relied upon documents. This has been recorded in the impugned order in paragraphs 109 and 110. However while dealing with the said request at paragraph 127, the second respondent has stated that all the relied upon documents were given to the noticees(petitioners) even at the time of considering the Cofeposa Act detention. The correctness of the said stand has to be tested in the writ petitions.

9. The Division Bench while quashing the order of detention has held that a copy of the declaration card was neither placed before the detaining authority nor supplied to the detenu inspite of specific request made by the petitioners vide representation dated 29.09.2015. The finding rendered by the Hon'ble Division Bench is to the following effect.

> 21. The next contention raised by the learned Senior Counsel for the petitioners is that the detention order is being passed as if the detenu I Om Prakash attempted to bring 23 Kilograms of gold without proper declaration and it is also mentioned in the grounds of detention, however the declaration card was neither placed before the detaining authority nor supplied to the detenu despite asked for in the representation dated 29.09.2015. In the counter affidavit, it is stated that the documents relied upon were supplied to the detenu. However, in the rejection order

> dated 28.10.2015, nothing is mentioned about supply of declaration card.

10. The second respondent cannot get over the above finding as it is the finding recorded by the Court of law. This finding is contrary to the finding recorded by the second respondent in paragraph 127 of the impugned order stating that all the relied upon documents were given to the petitioners even at the time of detention under the COFEPOSA Act. This is sufficient to hold that there is no violation of principles of natural justice. As noted above in the communication dated 27.02.2016, the Superintendent of Customs informed the petitioners' counsel that they can examine the documents referred to in the show cause notice at the time of personal hearing. This opportunity has not been given though the counsel pointed out that most of the documents requested from the department have not been supplied to them and this seriously hampers the defence of the case. It has been noted by the second respondent in paragraph 110 of the Order-in-Original. However, there is nothing on record to show that the documents were supplied or the petitioners were permitted to peruse the documents.

11. Learned Senior Standing counsel appearing for the Respondent contended that the modus operandi is very clear as per the statement given under the Section 108 of the Customs Act that there is collusion between both petitioners and a clear case of concealment and the petitioner did not declare the gold jewellery and the gold bullion. In this regard, the learned Senior counsel appearing for the petitioner in W.P.4834 of 2017 has mentioned that earlier this Court has not examined the impugned order on the merits of the matter but only examined the impugned order only as to whether it satisfies the principles of natural justice. The Hon'ble Supreme Court in the case of Kothari filaments Vs Commissioner of Cus.(Port), Kolkata, 2009 (233) E.L.T. 289 (S.C.) held that

> the Customs Act does not prohibit application of the principles of natural justice. The Commissioner of Customs either could not have passed the order on the basis of the materials which were known only to them, copies whereof were not supplied or inspection thereto had not been given. He, thus, could not have adverted to the report of the overseas enquiries. A person charged with mis-declaration is entitled to know the ground on the basis whereof he would be penalized. He may have an answer to the charges or may not have. But there cannot be any doubt whatsoever that in law he is entitled to a proper hearing which would include supply of the documents. Only on

knowing the contents of the documents, he could furnish an effective reply.

12. As has pointed out earlier, the petitioners have not been permitted to peruse the documents which have been relied on the show cause notice though in paragraph 26 of the counter affidavit filed by the Assistant Commissioner of the Customs on behalf of the respondents, it is stated that the documents were given to the petitioner by detaining him under COFEPOSA Act. The same is not acceptable in the light of the fact that the Division Bench has clearly rendered a finding that the copy of the declaration card was not furnished to the petitioner inspite of such representation. In the rejection order dated 28.10.2015 passed by the detaining authority nothing is mentioned about the supply of the detention copy. Therefore the statement made in counter affidavit is of little worth and it does not substantiate that principles of natural justice have been complied with and thus for the above reasons the impugned order is liable to be set aside for De novo jurisdiction. Accordingly the writ petition is allowed, the impugned order is set aside and the matter is remanded back to the second respondent for fresh consideration, who shall fix a date for the appearances of the petitioners along with authorized representatives and on which date they shall be permitted to peruse the documents relied on by the second respondent after which the petitioners shall be given three days time to submit their additional objections if any and personal hearing has to be afforded and the second respondent shall pass fresh orders on merits. No costs. Consequently connected miscellaneous petitions are also closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To

1. Principal Commissioner of Customs (I),
New Customs House, GST Road,
Meenambakkam, Chennai-27.

2. Additional Commissioner of Customs (Airport),
Anna International Airport,
New Customs House, GST Road,
Meenambakkam, Chennai-27.

+4 ccs to M/s.B.Sathish Sundar Advocate sr 55479
+2 ccs to M/s.T.R.Senthil kumar Advocate sr 55472

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