

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 18.04.2017

CORAM

THE HONOURABLE MR. JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR. JUSTICE D.KRISHNAKUMAR

Writ Appeal Nos.702 and 703 of 2016
and
CMP Nos.9238 to 9240 of 2016

1.The Additional Director General,
Directorate of Revenue Intelligence,
No.27, Adarsh Towers,
G.N.Chetty Road,
Chennai - 600 017.

2.The Commissioner of Customs,
Chennai III Commissionerate,
Customs House,
No.60, Rajaji Salai,
Chennai - 600 001.

... Appellants in the
above Writ Appeal

Vs.

M.Rathakrishnan

... Respondent in W.A.
No.702 of 2016

D.Mualidharan

... Respondent in W.A.
No.703 of 2016

PRAYER: Writ Appeals filed under Clause 15 of the Letters Patent against the common order dated 18.2.2016 passed in Writ Petition Nos.36889 and 36890 of 2015 on the file of this Court.

Common prayer in W.P.No.36889/2015 & W.P.No.36890/2015:-

Writ Petitions filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus to call for the records pertaining to the impugned show cause notice dated 08.05.2015 issued in F.No. VIII/48/42/2011-DRI CZU and F. No. VIII/26/331/2011 DRI CZU issued by the 1st Respondent and quash the same

For Appellants : Mr.M.Santhanaraman,
Standing Counsel for the appellants

For Respondents : Mr.Hari Radhakrishnan

JUDGMENT

(Judgment of the Court was delivered by D.KRISHNAKUMAR, J)

As the issue involved in both the above Writ Appeals is identical in nature, they are heard together and taken up for disposal.

2. According to the petitioner in W.P.No.36889 of 2015, he was the Director of M/s.Vee Vee Clearing and Forwarding Pvt.Ltd., Customs Broker, who is engaged in the business of customs clearance and doing business mainly at Chennai. In the course of business, as a clearing agent, one M/s.MAXX Power Tools Pvt.Ltd., Mumbai, had availed their services for clearance of power tools through the Port of Chennai. The officers of the respondent had conducted certain investigation regarding the imports of power tools from China and as part of the said investigation, had examined the consignment imported by M/s. MAXX Power Tools Pvt.Ltd., vide Bill of Entry No.4925207 dated 14.10.2011 filed with Chennai Customs. The said Bill of Entry was filed by another Customs broker, M/s. Pluto Shipping & Logistics Pvt.Ltd., Chennai. On detailed examination, it was found that there was mis-declaration regarding the quantity of the goods imported and on this score, the importer was summoned for questioning in terms of Sec.108 of the Customs Act, 1962. During the investigation, the officers of the respondent also conducted investigation into the imports made by M/s. MAXX Power Tools Pvt.Ltd., where the Bills of Entry were filed through M/s. Vee Vee Clearing & Forwarding Pvt.Ltd.,. In total, seven Bills of entry were filed using the customs broker licence of M/s.Vee Vee Clearing & Forwarding Pvt.Ltd.,. The petitioner was summoned for questioning under Sec.108 of the Customs Act, on 20.4.2015 and his detailed statement was recorded. After a month, he received the show cause notice dated 8.5.2015 impugned in the Writ Petition, issued by the respondent, calling upon him to show cause as to why penalty should not be imposed on him in terms of Sec. 112 and 114 AA of the Customs Act, 1962, for allegedly colluding with the importer in mis-declaring the description and value of the goods imported by M/s. MAXX Power Tools Pvt.Ltd.,. According to the petitioner, as the show cause notice has prejudged and pre-determined his guilt, he has preferred Writ Petition under Article 226 of the Constitution of India.

3. Similarly, the petitioner in W.P.No.36890 of 2015 is the Director of M/s. Pluto Shipping and Consultancy Pvt.Ltd., customs broker, who is engaged in the business of customs clearance and doing business mainly at Chennai. In the course of business, as a customs clearing agent, one M/s. MAXX Power Tools Pvt.Ltd., Mumbai, had availed the services of the petitioner for clearance of power tools through the Port of Chennai. The officers of the respondent had conducted certain investigation regarding the imports of power tools from China and as part of the said investigation, they had examined the consignment imported by M/s. MAXX Power Tools Pvt.Ltd, vide Bill of Entry No.4925207 dated 14.10.2011 filed with Chennai Customs. The said bill of Entry was filed by using the customs broker licence of M/s. Pluto Shipping & Logistics Pvt.Ltd., Chennai. On detailed examination, it was found that there was mis-declaration regarding the quantity of the goods imported and on this premise, the importer was summoned for questioning in terms of section 108 of the Customs Act, 1962. During the investigation, the officers of the respondent also conducted investigation on the imports made by M/s. MAXX Power Tools Pvt.Ltd., where the Bill of Entry was filed through another Customs Broker, M/s. Vee Vee Clearing and Forwarding Pvt.Ltd.,. In total two Bills of Entry were filed using the customs broker licence of M/s. Pluto Shipping & Consultancy Pvt.Ltd.,. The petitioner/respondent was summoned for questioning under sec.108 of the Customs Act, on 22.4.2015 and his detailed statement was recorded. After a month, he received the impugned show cause notice dated 8.5.2015, issued by the respondent, calling upon the petitioner to show cause as to why penalty should not be imposed on him, in terms of sec.112 and 114 AA of the Customs Act, 1962, for allegedly colluding with the importer in mis-declaring the description and value of the goods imported by M/s. MAXX Power Tools Pvt.Ltd.,. According to the petitioner, as the show cause notice has prejudged and pre-determined his guilt, he preferred Writ Petition under Article 226 of the Constitution of India. सत्यमेव जयते

4. Both the aforesaid Writ Petitions were heard at length by a Writ Court of this High Court and were allowed by a common order dated 18.2.2016 holding that the first appellant/first respondent in the Writ Petitions issued the show cause notices with pre-judged mind and pre-determined the guilt of the petitioners. However, the respondents in the Writ Petitions were given liberty to issue show cause notices afresh, if so advised, but strictly, in accordance with law.

5. Challenging the aforesaid order of the Writ Court, the appellants/revenue are before this Court with these Writ Appeals.

6. Assailing the order of the Writ Court, the learned Standing Counsel for the appellants would submit that the learned single Judge has erroneously quashed the show cause notice and the learned Judge ought to have seen that in the impugned show cause notice, the first respondent/ appellant herein has simply set forth the sequence of facts detected during the course of investigation and also set forth the voluntary statements given by the witnesses, which are admissible as evidence and just because the words "concluded", "revealed" etc., are used which are also based on the outcome of the investigation, the same cannot be termed as pre-determined or pre-conceived. It is pertinent to note that the first respondent/appellant herein is not the adjudicating authority and has simply issued show cause notices based on the facts gathered by them during the course of the investigation on specific intelligence and also the statements recorded from the witnesses to which the witnesses were called upon to show cause before the second respondent/appellant herein who is an independent adjudicating authority. The learned standing counsel also pointed out that the respondents herein were only a Custom Agents acting on behalf of the importer M/s. Maxx Power Tools Pvt.Ltd., and the importer had paid the differential duty which they attempted to save by undervaluing the imported goods and the importers did not challenge the subject show cause notice. It is also contended that the learned Judge failed to notice that the writ petitioners/respondents herein being the agents of the disclosed principal viz., importer of M/s. Maxx Power Tools Pvt.Ltd., the writ petitioners could not challenge the show cause notice on technical grounds, when the importer himself has admitted and paid the differential duty. The learned Judge ought to have appreciated that the respondents/writ petitioners were having fair opportunity before the adjudicating authority to prove their innocence and the contents of the show cause notice would not in any way prejudice the case of the respondents/writ petitioners. In any event, the impugned order of the learned Judge cannot be sustained in law and the same is liable to be set aside.

7. On the contrary, the learned counsel for the respondents would submit that the impugned show cause notice dated 8.5.2015 is vitiated and void for the reasons that it has prejudged the guilt of the respondent at the stage of show cause notice itself. It is settled law that the purpose of show

cause notice is to give an opportunity to the person to put-forth his defence and establish his innocence. Where the guilt of the noticee is pre-judged, then no effective opportunity can be given to the noticee. Further, he would submit that the Hon'ble Supreme Court of India, in the case of Oryx Fisheries Private Limited versus Union of India reported in 2011 (266) E.L.T. 422 (S.C.), has held as follows:-

"31. It is of course true that the show cause notice cannot be read hyper-technically and it is well settled that it is to be read reasonably. But one thing is clear that while reading a show-cause notice the person who is subject to it must get an impression that he will get an effective opportunity to rebut the allegations contained in the show cause notice and prove his innocence. If on a reasonable reading of a show-cause notice a person of ordinary prudence gets the feeling that his reply to the show cause notice will be an empty ceremony and he will merely knock his head against the impenetrable wall of prejudged opinion, such a show cause notice does not commence a fair procedure especially when it is issued in a quasi-judicial proceeding under a statutory which promises to give the person proceeded against a reasonable opportunity of defence.

32. Therefore, while issuing a show-cause notice, the authorities must take care to manifestly keep an open mind as they are to act fairly in adjudging the guilt or otherwise of the person proceeded against and specially when he has the power to take a punitive step against the person after giving him a show cause notice.

33. The principle that justice must not only be done but it must eminently appear to be done as well is equally applicable to quasi judicial proceeding if such a proceeding has to inspire confidence in the mind of those who are subject to it.

8. The learned counsel for the respondents further relying on the Judgment of the Apex Court in the case of Siemens Limited vs. State of Maharashtra reported in 2007 (207) ELT 168 (SC) wherein it has been held that if the authorities have already determined the liability of a party and if only the question which remains for its consideration is quantification thereof, then the notice issued does not remain in the realm of a show cause notice, and that the notice is vitiated.

9. The learned counsel for the respondents further submitted that this High Court, in similar circumstances, has set aside the show cause notice issued to a customs agent on the ground that it has prejudged and pre-determined the issue. He placed reliance on the decision rendered by this Court in the case of Bharat Marine Co. vs. Commissioner of Customs, Chennai, in W.P.No.21941 of 2014, wherein this Court has relied on a decision of the Division Bench of Andhra Pradesh High Court in the case of SBQ Steels Ltd., vs. Commissioner of Customs, Central Excise and Sales Tax, Guntur, reported in 2014 (300) E.L.T. 185 (A.P.) wherein the High Court of Andhra Pradesh took exception even to use of the words "it is clear" in the show cause notice.

10. In the light of the aforesaid reasons and decisions, the learned counsel for the respondents submitted that the impugned show cause notice was liable to be set aside and accordingly, the Writ Court has set aside the impugned notice and there is no infirmity or illegality in the order of the Writ Court and hence, the Writ Appeal is liable to be dismissed.

11. Heard the learned standing counsel for the appellants and the learned counsel for the respondent and perused the material on record.

12. It is the case of the respondents that the show cause notices issued by the first appellant against them lacks bona fide and the guilt of the respondents is prejudged and pre-determined at the stage of notice itself. Therefore, seeking to quash the impugned show cause notice, the respondents filed Writ Petition Nos.36889 and 36890 of 2015, respectively, before this Court. The learned counsel for the respondents referred to Paragraphs 24 and 31 of the impugned show cause notice before the Writ Court to contend that the guilt of the writ petitioners/respondents herein were pre-judged and pre-determined. Paragraph 5 of the order of the Writ Court dated 18.2.2016, is usefully extracted hereunder:-

5. Mr.Hari Radhakrishnan, learned counsel appearing for the petitioners relied upon paragraph Nos. 24 and 31 of the show cause notices dated 08.05.2015 wherein, the first respondent has stated as follows:-

"24.As per para 23 supra the reasoning advanced by the importer is

contrary to what has been stated by the CHA/s Cs. Hence it can be concluded that to clear the imported consignment by mis-declaration of description coupled with 3 undervaluation, port-hopping has been resorted to by the importer in collusion with the CHAs/CBs. "

"31. In the instant case, the investigation done by CZU-DRI has revealed that M/sMaxx Power Tools Pvt. Ltd whose Directors Shri Fakri Master, Shabbir Stuterwala with the aid of M/s.Pluto Shipping & Consultancy Pvt. Ltd., M/s. Pluto Shipping & Logistics Pvt. Ltd and Vee Vee Clearing & Forwarding Pvt. Ltd. have actively colluded in mis-declaring the description and value of goods imported thereby them, in the bill of entry examined by CZU-DRI."

Further, in the same paragraph it has been stated as follows: - "... Their accomplices in this arrangement were S/Shri M.Rathakrishnan and D.Muralidharan, who actively connived with and were instrumental in getting the impugned electrical operated power tools illegally imported by wilful mis-declaration of the value of the imported goods and its description by not declaring the actual quantity, brand and cleared the same."

13. Further, relying on the decision in Oryx Fisheries Private Limited versus Union of India reported in 2011 (266) E.L.T. 422 (S.C.), the Writ Court has set aside the Show Cause Notices issued against the writ petitioners/respondents herein and allowed the Writ Petitions preferred by the respondents.

14. After going through impugned notice and the order of the Writ Court, and after considering the rival submissions, the contention of the appellants that the first appellant is only an investigating authority whose role ends upon issuing a show cause notice on conclusion of investigation and he is not the adjudicating authority and therefore, the words used in the show notices such as "concluded", "revealed" etc., would not prejudice the case of the respondents, has to be countenanced and such words should be read in entirety. In the instant case, the investigating authority/first appellant is confined to investigating the case and submitting a report to the

adjudicating authority and the first appellant cannot adjudicate the case as contemplated under the Act. As such, the investigating authority and the adjudicating authority are two different persons. Therefore, the decision relied on by the Writ Court in the case of Oryx Fisheries Private Limited versus Union of India reported in 2011 (266) E.L.T. 422 (S.C.), wherein the investigating authority and the adjudicating authority was one and the same person, is not applicable to the facts of the present case. Therefore, the contention of the respondents herein that the investigating authority has pre-determined and pre-judged cannot be accepted. Hence, the grounds raised by the writ petitioners/respondents are liable to be rejected. Further, the respondents have challenged the show cause notice and whether the same can be examined in the Writ Petitions has to be considered by this Court in the light of the following decision.

15. Moreover, a Writ against a show cause notice is not maintainable.

(I) In Union of India v. Kunisetty Satyanarayana, reported in AIR 2007 SC 906, the Hon'ble Apex Court, at paragraphs 13, 14 and 16, held as follows:

"13. It is well settled by a series of decisions of this Court that ordinarily no writ lies against a charge sheet or show-cause notice vide Executive Engineer, Bihar State Housing Board v. Ramdesh Kumar Singh and Ors. [JT 1995 (8) SC 33], Special Director and Anr. v. Mohd. Ghulam Ghouse and Anr. [AIR 2004 SC 1467], Ulagappa and Ors. v. Divisional Commissioner, Mysore and Ors. [2001(10) SCC 639], State of U.P. v. Brahm Datt Sharma and Anr. [AIR 1987 SC 943] etc.

14. The reason why ordinarily a writ petition should not be entertained against a mere show-cause notice or charge-sheet is that, at that stage, the writ petition may be held to be premature. A mere charge-sheet or show-cause notice does not give rise to any cause of action, because it does not amount to an adverse order which affects the rights of any party unless the same has been issued by a person having no jurisdiction to do so. It is quite possible that after considering the reply to the show-cause notice or

after holding an enquiry the authority concerned may drop the proceedings and/or hold that the charges are not established. It is well settled that a writ lies when some right of any party is infringed. A mere show-cause notice or charge-sheet does not infringe the right of any one. It is only when a final order imposing some punishment or otherwise adversely affecting a party is passed, that the said party can be said to have any grievance.

16. No doubt, in some very rare and exceptional cases the High Court can quash a charge-sheet or show cause notice if it is found to be wholly without jurisdiction or for some other reason if it is wholly illegal. However, ordinarily the High Court should not interfere in such a matter."

(ii) In Ministry of Defence vs. Prabhash Chandra Mirdha, reported in 2012 (11) SCC 565, the Hon'ble Apex Court has held as follows:-

"Ordinarily a writ application does not lie against a chargesheet or show cause notice for the reason that it does not give rise to any cause of action. It does not amount to an adverse order which affects the right of any party unless the same has been issued by a person having no jurisdiction/competence to do so. A writ lies when some right of a party is infringed. In fact, charge sheet does not infringe the right of a party. It is only when a final order imposing the punishment or otherwise adversely affecting a party is passed, it may have a grievance and cause of action. Thus, a chargesheet or show cause notice in disciplinary proceedings should not ordinarily be quashed by the Court."

16. The aforesaid decisions were followed by a Division Bench of Madurai Bench of this High Court in Writ Appeal No.342 of 2016 dated 8.3.2016 in M.Sankara Subramanian Versus the Director General of Police and others, wherein one of us was a party to the decision (viz., S.MANIKUMAR, J.).

17. In the light of the above discussions and decisions, we set aside the order passed by the Writ court and the impugned show cause notice issued by the first appellant is sustained with liberty to the respondents to submit their reply to the show cause notice dated 8.5.2015 within a period of six weeks from the date of receipt of a copy of this order and on receipt of the said reply, the first appellant is directed to consider the same on merits and in accordance with law. Accordingly, the Writ Appeals are allowed. No order as to costs. Connected Miscellaneous Petitions are closed.

Sd/-

Asst.Registrar (CS VI)

/true copy/

Sub Asst. Registrar

asvm

To

1.The Additional Director General,
Directorate of Revenue Intelligence,
No.27, Adarsh Towers,
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2.The Commissioner of Customs,
Chennai III Commissionerate,
Customs House,
No.60, Rajaji Salai,
Chennai - 600 001.

+2ccs to M/s.M.Santhanaraman,Advocate sr.23980

+1cc to M/s.Hariradhkrishnan,Advocate sr.26596

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W.A.Nos.702 and 703 of 2016
and

CMP Nos.12403 and 12404 of 2016

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