IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 08.12.2016

DELIVERED ON : 19.01.2017

Coram

The Honourable Mr.Justice RAJIV SHAKDHER

W.P.No.36866 of 2016

M/s.J.K.Exim,
represented by its Proprietor,
Shri.Kalpesh B.Patel,
No.11-4, 894/N, A R Rahaman Apartment,
Teachers Colony, Keelanatham Village,
Tirunelveli - 627 011. .. Petitioner

Vs.

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

2. The Deputy Commissioner of Customs (SIIB),
Custom House, No.60, Rajaji Salai,
Chennai - 600 001.

3. The Inspector (Prev-SIIB),
Custom House, No.60, Rajaji Salai,
Chennai - 600 001. .. Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Mandamus, directing the respondents to release the goods covered by the seizure mahazar dated 11.02.2016 to the petitioner for the purpose of exportation in terms of Section 110(2) of the Customs Act, 1962 and pass such further order as this Hon'ble Court may deem fit and proper in the circumstances of the case.

For Petitioner : Mr.G.Derrick Sam

For Respondents : Mr.G.M.Syed Nurullah Sheriff
Standing Counsel

ORDER

1. This is a writ petition filed for issuance of a writ of Mandamus or, any other order or, direction of the like kind, to the respondents to release the goods, which are covered by the seizure mahazar dated 11.02.2016, to enable the petitioner to export the goods, in terms of Section 110(2) of the Customs Act, 1962 (in short "the Act").

2. In order to adjudicate upon the instant writ petition, the following facts need to be noticed :

2.1. The petitioner, who claims to be in the business of export of hand knotted woolen carpets, had filed ten (10) shipping bills with the respondents.

2.2. It is alleged by the respondents that via these shipping bills, the petitioner sought to clear for export, instead, hand woven carpets.

2.3. Out of the ten (10) shipping bills, seven (7) shipping bills carried the date 06.11.2015, while the remaining three (3) were dated 07.11.2015.

2.4. The total cumulative value of the consignment, which was covered by these ten (10) shipping bills, was pegged, by the petitioner, at Rs.3,10,30,857/-.

2.5. Against each of these shipping bills, the petitioner had claimed duty draw back, which, cumulatively, amounted to Rs.27,12,946/-.

2.6. It appears that the respondents noted discrepancies, as indicated above, in the shipping bills and the consignment and, accordingly, detained the subject goods.

2.7. While there is no specific date of detention of the subject goods available in the record, it is the common case of parties before me that the subject goods were detained in November 2015.

3. In this connection, I may only note that the petitioner relies upon a letter dated 26.11.2015, issued to him by the respondents, whereby, he was asked to make himself available for examination.

3.1. There appears to be a slight discrepancy in the letter. While the letter is dated 26.11.2015, it adverts to the fact that the petitioner attempted to export the subject goods on 30.11.2015.

3.2. Be that as it may, as indicated above, it is the common ground that the goods were detained in November 2015. The most plausible date available is 30.11.2015, when, even according to the respondents, examination of the detained goods was carried out.

3.3. The record shows that the respondents drew two sets of samples from the detained goods, each of which were sent to the Textile Committee for testing. As per the stand of the respondents, samples were sent to the Textile Committee on 07.01.2016, for obtaining its opinion, with regard to composition, description, GSM and more particularly, as to whether the subject goods, i.e., carpets were hand knotted or woven.

3.4. It appears that the respondents also summoned, one, Shri.S.Rajagopalan, the Managing Partner of M/s.All Win Shipping Services, for recording his statement under Section 108 of the Act. Mr.S.Rajagopalan, was, evidently, summoned, on account of the fact that he had acted as the Customs Broker for the petitioner.

3.5. This apart, the statement of the Proprietor of the petitioner, i.e., Kalpesh B. Patel, was also recorded on 15.062016, 16.06.2016, 25.06.2016 and 26.06.2016.

3.6. I may only record that, on the other hand, the respondents' stand is that the petitioner's statement was recorded on 29.12.2015, 25.05.2016 and 26.05.2016.

3.7. In the interregnum, though, i.e., on 17.06.2016, the petitioner claims that he received information, for the first time, that the subject goods were seized via a Seizure Mahazar, dated 11.02.2016. The reason, given by the respondents for seizure of the subject goods, was that there was mis-classification and over invoicing of the subject goods by the petitioner.

3.8. I must note here that the petitioner appears to have via, his Advocates, written two letters to the respondents. The first letter is dated 15.06.2016, while the second letter is dated 17.06.2016. These letters, were, apparently, written on behalf of the petitioner, by his Advocates, to seek release of the subject goods, as continued detention of the subject goods was, purportedly, in violation of the Circular issued by the Central Board of Excise and Customs (in short "CBEC), in Circular No.01/2011-Customs, dated 04.01.2011.

3.9. Insofar as the letter dated 17.06.2016 was concerned, that was replied to, by the Deputy Commissioner of Customs (Export), vide a letter dated 20.07.2016, whereby, he, while reiterating the reasons for the seizure of the subject goods, called upon the petitioner to approach the Special Intelligence and Investigation Branch (SIIB) for further correspondence.

4. The petitioner, as it appears, filed a writ petition under Article 226 of the Constitution, seeking issuance of a direction from this Court to quash the seizure mahazar, dated 11.02.2016, issued by respondent No.3. This writ petition was numbered as : W.P.No.21797 of 2016.

4.1. During the pendency of the writ petition, on 05.08.2016, the Additional Commissioner of Customs, SIIB, Commissionerate III, Chennai, issued a show cause notice dated

05.08.2016, to the petitioner.

4.2. The aforementioned writ, however, came up for hearing before this Court on 21.09.2016. Hon'ble Mr.Justice T.S.Sivagnanam, vide order of even date, i.e., 21.09.2016, disposed of the writ petition, with the following operative direction, in the light of the fact that a show cause notice dated 05.08.2016, had already been issued to the petitioner :

> "..... 4. Accordingly, the challenge to the seizure mahazar is held to be not maintainable, and this writ petition is closed, granting liberty to the petitioner to file fresh writ petition seeking for appropriate direction for exportation of the goods. No costs. Consequently, connected Miscellaneous Petitions are closed."

5. I must also record that the aforesaid order appears to have been passed, in the writ petition, in the background of two letters of the petitioner, which were received by the respondents.

5.1. The first letter is dated 24.02.2016, whereby, the petitioner sought permission to re-export the goods. The second letter is dated 29.03.2016, whereby, the petitioner sought provisional release of the subject goods.

5.2. The facts pertaining to aforementioned letters emanate from the assertions made by the respondents in paragraph 8 of the counter-affidavit.

5.3. According to the respondents, the first letter dated 24.02.2016, was not replied to, as according to them, and perhaps, rightly so, the request was meaningless, as there was no event of import, which had occurred in the first place, and therefore, was no question of granting permission for re-export.

5.4. Insofar as the second letter was concerned, the respondents, vide their letter dated 19.05.2016, informed the petitioner that his request for provisional release of subject goods had been denied by the competent authority, as it involved a fraud, as contemplated under Para 2.2(c)(iii) of Chapter XV of Customs Manual.

6. The petitioner, however, being aggrieved, and, perhaps, re-energized by the liberty given by this Court, filed the instant petition on 18.10.2016.

6.1. On 21.10.2016, Hon'ble Mr.Justice T.S.Sivagnanam, issued notice in the writ petition. Pursuant to issue of notice, as indicated above, a counter-affidavit was filed by the respondents.

6.2. The matter came up before me, for hearing, on 08.12.2016. Upon hearing arguments, judgement was reserved in the matter.

7. On behalf of the petitioner, arguments were advanced by Mr.G.Derrick Sam, while on behalf of respondents, submissions were made by Mr.G.M.Syed Nurullah Sheriff.

7.1. Insofar as Mr.Sam was concerned, he, broadly, argued on the following lines :

(i).That the subject goods had been detained, admittedly, in November 2015. The show cause notice was issued on 05.08.2016. Therefore, the petitioner was entitled to unconditional release of goods in consonance with the provisions of Section 110(2) of the Act.

(ii).That there was no duty element involved in the matter. Even, if, the case of the respondents were to be accepted, in totality, which is, that the goods were hand woven carpets and not hand knotted woolen carpets, as declared by the petitioner, all that would happen, would be that the petitioner would be entitled to duty draw back, only in the sum of Rs.2,41,850/-, as against the sum of Rs.27,12,946/-, that is, the claim made by the petitioner qua the shipping bills. Besides, reduction in duty draw back, if, the case made out by the respondents is upheld by the concerned adjudicatory forum, the petitioner may be liable to, perhaps, fine and penalty. In any event, none of these factors, justify the continued detention of the subject goods, and the refusal on the part of the respondents, to release the subject goods, to the petitioner.

(iii).That the subject goods are neither prohibited nor banned goods. At the highest, the respondents case is that the petitioners have mis-declared the description and the value of the goods. Assuming without admitting that even, if, the said charge levelled by the respondents, at this stage, is taken to be correct, detention of the subject goods is not justified on the ground that the purported investigation, would have logically came to an end, with the issuance of show cause notice dated 05.08.2016. In support of this submission, reliance was placed on CBEC's circular dated 01.04.2011.

(iv).The respondents' stand that the seizure took place only on 11.02.2016, and not November 2015, is not correct.

(v).The detention of goods is no different from seizure, which is why, the Legislature, has made a provision for imposing conditions and adequate levy, seeking security under Section 110-A of the Act, even before issuing a show cause notice.

(vi).The period of issuance of show cause notice of six (6) months under the provision of Section 110(2) of the Act, can be extended, by a further period not exceeding six (6) months by the Commissioner of Customs, upon sufficient cause being shown in that behalf. In support of this submission, learned counsel relied upon the judgment of the Kerala High Court in the matter of M.Mohammed V. Collector of Customs and Commissioner of Excise, Cochin, 1999 (110) E.L.T. 451 (Ker.).

(vii).Furthermore, reliance was also placed by the learned counsel for the petitioner on the following judgements :

(1) Santosh Handloom V. Commissioner of Customs (Import), 2016 (331) E.L.T. 44 (Del.) and
(2) Sree Rajendra Textiles V. Commissioner of Customs, Tuticorin, 2012 (280) E.L.T. 21 (Mad.)

7.2. On the other hand, Mr.Sheriff, submitted that the subject goods could not be released to the petitioner, as there was mis-declaration, both with regard to, description, as well as value of the subject goods. The contention was that the subject goods have been declared as hand knotted woolen carpets, as against hand woven carpets.

7.3. Furthermore, according to the learned counsel for the respondents, the market value of the goods was declared by the petitioner as Rs.3,10,30,857/-, against which, duty draw back of Rs.27,12,946/- was claimed, whereas, market inquiries had revealed that the value of the subject goods was a sum equivalent to Rs.24,93,291/-, against which, the petitioner was entitled to duty draw back only to a sum equivalent to Rs.2,41,850/-.

7.4. Therefore, according to the counsel for the respondents, since, the re-determined market price of the subject goods was less than the duty draw back claimed by the petitioner, the petitioner was not entitled to even the re-determined duty draw back, i.e., the sum of Rs.2,41,850/-. In support of this submission, learned counsel relied upon the provisions of Section 76(1)(b) of the Act.

7.5. It was the submission of the counsel for the respondent that the petitioner was made aware of the Textile Committee's report dated 07.01.2016, as during the course of his interrogation, on 25.05.2016, he was asked to explain the discrepancy. The said statement has been signed by the petitioner, and therefore, the petitioner cannot now say that he was not given a copy of the report of the Textile Committee.

7.6. It was also the submission of the counsel for the respondents that the detention of goods could not be equated with seizure. The detention of the subject goods, as in this case, was made to ascertain as to whether or not the declaration made by the petitioner was correct. It was submitted that upon samples being taken on 30.11.2015, when a mahazar of even date was drawn up, the said samples were sent for testing to the Textile Committee. It was further submitted that it was only after respondents had received the report of the Textiles Committee on 07.01.2016, that the seizure was carried out vide mahazar dated 11.02.2016. Therefore, according to the counsel for the respondents, the show cause notice issued on 05.08.2016 was within the time limit prescribed under Section 110(2) of the Act.

7.7. In other words, it was the contention of the learned counsel for the respondents that only when the Officer concerned had reason to believe that the subject goods were liable for confiscation, that he proceeded to seize the same, and therefore, followed it up, by issuing the show cause notice within the prescribed time limit. In support of his submission, counsel for the respondents, like the counsel for the petitioner, relied upon the CBEC's circular dated 04.01.2011. Specific emphasis was laid by the counsel for the respondents on Clause 4 of the said Circular.

8. Having heard the learned counsel for the parties and perused the record, according to me, the first question, which arises for consideration, is : as to whether detention of goods is similar to seizure.

8.1. Pertinently, the Act does not define either terms, i.e., detention, or, seizure. Therefore, one may have to look to the dictionary meaning to ascertain the meaning in the context of the statute, with which, one is concerned with, for the moment. The Dictionary meaning of the word "detention" would be : "the action or state of detaining or being detained" (See Concise Oxford English Dictionary, Tenth Edition, Revised, page No.390). Whereas, "seizure" means : "the act or an instance of taking possession of a person or property by legal right or process".

8.2. Ordinarily, the word "detention" applies to person and not goods. However, in the context of the statute, with which, we are dealing with, detention is the terminology, which is also used in the context of goods.

8.3. Therefore, while seizure is an act of taking possession of a property, i.e., goods in pursuance of an legal authority or process, detention of goods is carried out by the respondents, as it were, by way of an administrative practice.

8.4. Since, the practice of detention has received approval by its usage, over a period of time, one would like to believe that detention of goods was also backed by legal authority and/or legal process.

8.5. As a matter of fact, I cannot conceive of the situation, where, Mr.Sheriff, would argue to the contrary. It is, perhaps, because of the reason, which is, that there is no clear legislative backing for detaining the goods, as against seizing them that nothing was shown in this behalf by Mr.Sheriff.

8.6. As a matter of fact, the CBEC, by way of administrative direction, vide its circular dated 04.01.2011, exhorts the officers to allow the provisional exportation of goods, even, when there is a mis-declaration, with regard to quantity, value and description.

8.7. The facts in the present case clearly reveal, as noticed above, that the respondents, on their own showing, had rejected the petitioner's request for provisional release of the subject goods, vide their letter dated 19.05.2016. This assertion is made by the respondents, quite clearly, in paragraph 8 of their counter-affidavit, though, the letter dated 19.05.2016, has not been filed by the respondents. It is further averred that the request for provisional release of the subject goods made by the petitioner, is declined, as the mis-declaration constituted a fraud, within the meaning of paragraph 2.2(c)(iii) of Chapter XV of the Customs Manual. For the sake of convenience, paragraph 8 of the counter affidaivt is extracted hereinbelow :

> "..... 8. It is most respectfully submitted, vide letter dated nil which was received by this office on 24.02.2016, the petitioner requested for re-export of the goods. The said request could not be processed as the request for re-export of the goods appeared to be meaningless as the goods were never imported in the first place. Thereafter, vide his second letter dated nil, received in the customs sevottam counter on 29.03.2016, the petitioner requested for provisional release of the goods. In response to the aforesaid letters, vide this office letter dated 19.05.2016, the petitioner was informed that his request for provisional release of the goods had been processed, and the same was denied by the Competent Authority as the case fell under Para 2.2(c)(iii) of Chapter XV of Customs Manual, as the case involves fraud."

8.8. In my view, the said provision, that is, para 2.2.(c)(iii) of Chapter XV of the Customs Manual, has to be read along with the circular.

9. Quite clearly, fraud, if at all, as allegedly committed by the petitioner, pivots around the allegation of the respondents that the petitioner had declared the subject goods as "hand knotted woolen carpets", whereas, enquiries had revealed that they were "hand woven carpets".

9.1. This apart, the respondents have also charged the petitioner with mis-declaring the value; though, this charge, to my mind, would be related to the first charge, which involve mis-declaration as to the nature of the goods.

9.2. CBEC's circular dated 04.01.2011 takes into account these very circumstances, and advises the customs authorities to ensure that inordinate detention of seized goods, leads to delays in fulfillment of export orders and at times their cancellation, as also, congestion in ports and accumulation of demurrage charges, and therefore, mis-declared goods, which are seized and are liable for confiscation, should be released provisionally, on the terms, indicated in the circular.

9.3. Strangely, as indicated above, the respondents, in derogation of its own circular dated 04.01.2011, rejected the request of the petitioner for a provisional release of the subject goods meant for export. For the sake of convenience, the relevant parts of the said circular are extracted hereafter :

> "...... 2. Instances have come to the notice of the Board that export consignments continue to be detained and not allowed clearance on provisional basis on account of pending test reports/investigations for alleged mis-declaration in terms of quantity, value and description of the goods. In one case it was reported that the detained goods were not allowed to be exported provisionally on the ground that Board's Circular referred above provides for provisional release of only the seized goods.
>
> 3. In this regard it is observed that inordinate detention of the seized goods entered for exportation results in delays in fulfillment of export order and at times cancellation of such orders. Detention of goods also adds to congestion in ports besides resulting in payment of demurrage charges to the Custodians. Accordingly, the matter has been re-examined by the Board with the view to ameliorate the aforementioned difficulties faced by exporters and to streamline the procedure of provisional release / exportation of seized goods / goods under investigation on account of mis-declaration in terms of quantity and value etc.
>
> 4. Seizure should be resorted to only when the Customs officers have a reason to believe that the goods in question are liable to confiscation under the Customs Act, 1962 and thereafter the provisions of Section 110A of the Customs Act, 1962 would come into play. However, there may be situations when the goods are to be detained for purpose of tests etc. to confirm the declaration. In such cases the endeavour should be to quickly undertake the necessary action (test / enquiry etc.) and take appropriate legal action thereafter so that the period of detention is kept to the minimum. Thus, the following

course of action is prescribed in respect of goods entered for exportation.

(a) In case the export goods are found to be mis-declared in terms of quantity, value and description and are seized for being liable to confiscation under the Customs Act, 1962, the same may be ordered to be released provisionally on execution of a Bond of an amount equivalent to the value of goods along with furnishing an appropriate security in order to cover the redemption fine and penalty.

(b) In case the export goods are either suspected to be prohibited or found to be prohibited in terms of the Customs Act, 1962 or ITC (HS), the same should be seized and appropriate action for confiscation and penalty initiated.

(c) In case the export goods are suspected of mis-declaration or where declaration is to be confirmed and further enquiry / confirmatory test or expert opinion is required (as in case of chemicals or textiles materials), the goods should be allowed exportation provisionally. The exporters in these cases are required to execute a Bond of an amount equal to the value of goods and furnish appropriate security in order to cover the redemption fine and penalty in case goods are found to be liable to confiscation. In case exports are made under any Export Promotion / Reward Schemes, the finalization of export incentives should be done only after receipt of the test report / finalisation of enquiry and final decision in the matter. The Bond executed for provisional release shall contain a clause to this effect,

(d) Export goods detained for purpose of tests etc. must be dealt with on priority and the export allowed expeditiously unless the prohibited nature of goods is confirmed. Continued detention of any export goods in excess of 3 days must be brought to the notice of the Commissioner of Customs, who will safeguard the interest of the genuine exporters as well as the revenue. ...."

10. Therefore, having regard to the facts and circumstances of the case, the provisions of the CBEC circular dated 04.01.2011 and the foregoing discussion, I am of the view that

the fine distinction between "detention" and "seizure" of the goods, if any, was lost, as the respondents chose not to release the goods on terms or otherwise, despite, the petitioner's letter dated 08.06.2016, 17.06.2016, 24.02.2016 and 29.03.2016; though, I must note that in the letter dated 24.02.2016, as per the assertions made in the counter-affidavit by the respondents, the terminology used by the petitioner was, he be given permission to re-export the goods, as against seeking permission to export the goods.

10.1. Quite clearly, therefore, the continued detention of the subject goods is illegal. Therefore, the petitioner, in my opinion, should be handed over the custody of the subject goods.

11. The other question, which arises for consideration, is as to the terms, on which, the petitioner be allowed release of goods.

11.1. Even, Mr.Sheriff, during the course of the arguments, admitted that there was no duty liability involved, since, the petitioner only sought to export the subject goods. The adjudication, if at all, would lead to imposition of fine and penalty. This position was accepted, even by the counsel for the petitioner. However, counsel for the petitioner submitted that, if, the stand of the respondents were to be accepted, even then, he would be entitled to some amount of duty draw back, i.e., in the sum of Rs.2,41,850/-.

11.2. On the other hand, Mr.Sheriff, relied upon, as noted above, the provisions of Section 76(1)(b) of the Act, to say that no duty draw back would be payable to the petitioner, in view of the fact that the re-determined price of the subject goods was less than the duty draw back, which the petitioner had claimed.

11.3. As indicated above, the re-determined value of the subject goods, according to the respondents, was a sum of Rs.24,93,291/-, whereas, the duty draw back, which, the petitioner had claimed was a sum of Rs.27,12,946/-. The said amount had been claimed by the petitioner by way of duty draw back, based on the value of the subject goods being pegged, by him, at Rs.3,10,30,857/-. Therefore, in my view, as to whether or not Section 76(1)(b) of the Act would be applicable, would be an issue that would arise during adjudication proceedings, which, the respondents are required to carry out, pursuant to the issuance of show cause notice dated 05.08.2016.

11.4. Apart from anything else, it would depend upon the concerned adjudicating forum accepting the respondents stand with regard to the value of the subject goods.

12. Therefore, only other aspect, which would arise at the moment, is as to whether the petitioner should be asked to

furnish a security for fine and penalty.

12.1. Given the circumstance that the respondents have already rejected the petitioner's request for provisional release, as also, the fact that there is no duty element involved, in my opinion, the goods can be released to the petitioner, upon a personal bond being furnished by him, whereby, he will undertake to pay fine and penalty, if found payable, upon adjudication by the appropriate forum.

12.2. In order to secure the interest of the respondents, the petitioner will also disclose the details of its movable and immovable assets to the respondents.

13. Consequently, the writ petition is disposed of in the aforesaid terms. There shall, however, be no order as to costs.

sd/
Assistant Registrar(CCC)

/true copy/

Sub Assistant Registrar

gg

To

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

2. The Deputy Commissioner of Customs (SIIB),
   Custom House, No.60, Rajaji Salai,
   Chennai - 600 001.

3. The Inspector (Prev-SIIB),
   Custom House, No.60, Rajaji Salai,
   Chennai - 600 001.

+1cc to Mr.Hari Radhakrishnan, Advocate SR.No.3887.
+1cc to Mr.G.H.Syed Nurullah Sheritt, Advocate SR.No.3873.

Pre-Delivery order in
W.P.No.36866 of 2016

CP(CO)
GN(06/02/2017)