

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 11747 OF 2017

M/s. Unik Traders

..Petitioner

versus

Union of India and ors.

..Respondents

Mr. Vikram Nankani, Sr. Advocate a/w. Mr. Jitendra Motwani and
Dr.S.Krishnanandh i/b Economic Laws Practices for the Petitioner.
Mr. P.S. Jetly for the Respondents.

CORAM: S. C. DHARMADHIKARI &
SMT. BHARATI HARISH DANGRE, JJ.

DATE : 11TH JANUARY, 2018.

P. C. :

1] By this petition under Article 226 of the Constitution of India, the petitioner has challenged a memo styled as Seizure Memorandum dated 31st October 2017 and the provisional release order dated 3rd November 2017.

2] The prayer clauses (a1) and (a2) read as under:

“(a1) That this Hon'ble Court be pleased issue writ of certiorari or writ in the nature of certiorari calling for the records and proceedings of the Seizure Memorandum dated 31.10.2017 and the Provisional Release Order dated 03.11.2017 and quash and set aside the same;

(a2) That this Hon'ble Court be pleased to issue a writ or an order in the nature of a writ, more particularly, a writ of mandamus directing the Respondents herein to withdraw the Seizure Memorandum dated 31.10.2017 and release the consignments under Bills of Entry No.3210940 and No.3211093 both dated 12.9.2017 and Bills of Entry No.3327768 and No. 3327769 both dated 21.9.2017 herein listed at Exhibit B, finally for home consumption;"

3] At the outset, Mr. Nankani learned Senior Advocate appearing for the petitioner would submit that this Court need not bother itself with the conditions imposed for provisional release of the goods or the legality and validity of the provisional release order otherwise, for what the petitioner is questioning is the action from inception and namely the seizure memo itself.

4] Mr. Nankani has taken us through the memo of the petition and all the annexures thereto to submit that the essential ingredients of the power of seizure are not satisfied in this case at all. There is no reason to believe that the goods ought to be seized, for there is no material in that regard. Mr. Nankani would highlight a solemn treaty between India and Sri Lanka to submit that as far as this treaty is concerned, it enables free trade. In the sense that India Sri Lank Free Trade Agreement (ISFTA for short) enables clearance of the goods of Sri Lankan origin by the importer, like the petitioner, duty free. There is an exemption and which is enjoyed by the said importer, the benefit of which cannot be taken away in the garb of exercise of power of seizure. That power cannot be exercised to nullify a solemn Free Trade Agreement between two countries. Our attention has been invited to several annexures to this

petition to submit that the competent authorities in Sri Lanka have certified that the goods ought to have been of Sri Lankan origin and even the port from which they were shipped, styled as port of origin, is in Sri Lanka. If these competent statutory authorities issued certificates to the effect that the goods are of Sri Lankan origin and they satisfy the terms and conditions of the treaty, there is no power in the Customs Authorities acting under the Customs Act 1962 to go behind the certificates which are issued by the statutory authority and question their contents. Precisely that is done in this case and that is why he would submit that there is no reason to believe that the goods are not of Sri Lankan origin. Secondly, once there are certificates on record then those certificates cannot be doubted nor their genuineness and authenticity questioned in the manner done by the authorities namely, by seizing the goods. They are extremely casual in their approach and have detained the goods and have now imposed unreasonable and unfair conditions for their release. All this denotes, according to Mr. Nankani that the action of seizure is entirely unfair, unjust and violates the mandate of Article 14 of the Constitution of India.

5] Mr. Nankani places reliance upon several annexures to the petition as also a judgment of a learned single Judge of this Court delivered way-back in 1981-82 in the case of ***Bombay Chemicals Pvt. Ltd. vs. Union of India and ors.*** reported in ***1982 (10) E.L.T. 171 (Bom)***.

6] On the other hand, Mr. Jetly appearing on behalf of the respondents would submit that there are two facets of the matter. One is that the petitioner is not questioning the power of seizure conferred by the law. It is not the case of the petitioner that such a power cannot be exercised merely because there is a treaty with the neighbouring country.

Secondly, this is not a case where there is absolutely no material and the seizure is *ex-facie* illegal or arbitrary, unjust and unfair, muchless unreasonable. There is a definite material in possession of the investigating machinery. The investigating machinery has, *prima facie*, from these investigations concluded that the goods are not of Sri Lankan origin. They have been shipped in Indonesia. The port of origin is shown as Indonesia. The goods which are of Indonesian origin and routed through Sri Lanka, are passed off as goods of Sri Lankan origin to earn and gain the exemption. It is thus a dubious mode by which dutiable goods are sought to be imported duty free. We should not, in the exercise of writ jurisdiction, scuttle these investigations midway. Even the conditions imposed for release of the goods are not unfair, unjust and illegal. Therefore, Mr. Jetly seeks to distinguish the judgment relied upon by Mr. Nankani. He also invites our attention to the two affidavits-in-reply filed to the petition and particularly the statement which is to be found at page 116 of the paper book, paragraph 3 of the additional affidavit-in-reply.

7] With the assistance of Mr. Nankani and Mr. Jetly, we have perused the petition and all the annexures thereto. Upon perusal of these materials, we are of the opinion that when the investigations are underway, we should not interfere. Secondly, these investigations are in relation to certain consignments and which have been dubbed to be not of Sri Lankan origin. The power of investigation and the power to seize the goods upon such investigation and further power to issue a seizure memo is not at all questioned. The limited argument is that presently there are documents certifying the goods or the consignments to be of Sri Lankan origin and there is no reason to question the genuineness and authenticity thereof on some preliminary investigation. The goods

obviously are lying in the port and incurring and inviting several charges, including detention charges as complained. The investigations are going to take some more time as is revealed in the affidavit because the investigating machinery under the Customs Act would have to route its request to conduct and complete proper investigation through several Ministries of Government of India and which would then authorise the officials either to visit Sri Lanka or to summon more material or documents from Sri Lanka and Indonesia. For that, procedural formalities have to be completed. No useful purpose will be served by allowing the goods to be detained and when samples have already been drawn.

8] Therefore, we propose to balance the rights and equities and that is without expressing any opinion on the rival contentions or the legality and validity of the seizure. We enquired from Mr.Nankani appearing for the petitioner as to whether the petitioner is ready and willing to execute a bond as demanded by the authorities and in addition, furnish a bank guarantee so as to secure at least part of the duty demand, which eventually may be raised. Mr. Nankani, after taking instructions, states that today the demand is to secure the revenue by a bank guarantee in addition to furnishing the bond to the extent of 150% of the duty demanded. If the goods are worth Rs.3.50 crores and today when they are lying for three months in the custody of the Customs, it will be unfair to insist on compliance with these conditions. We must therefore, make an appropriate adjustment. On further instructions, Mr. Nankani states that the petitioner would execute a bond as demanded and also furnish a bank guarantee to the extent of Rs.1.20 crores and which bank guarantee shall be kept alive till further orders and directions of the competent authority or till such time as directed by this Court.

9] We have heard Mr.Jetly on this point and he would submit that such a resolution of the dispute would hamper the investigation or send a clear message to the wrongdoers and they would then continue to bring goods duty-free. They are avoiding their obligation to pay duty by involving the department and the Government of India in litigation.

10] We do not think that the extreme apprehension of Mr. Jetly is justified. In the facts and circumstances of the present case, we think it just, fair and proper and when the duty demand is substantially secured by a bank guarantee as also bond in favour of the Government of India that the following order will meet ends of justice :

a] On the petitioner executing a bond equal to 150% of the value of the goods and furnishing a bank guarantee in the sum of Rs.1.20 crores both within a period of two weeks as stated and undertaken, the competent authority shall pass an order on the pending application seeking a detention certificate and release the goods in favour of the petitioner. The bank guarantee shall be kept alive till final orders of the Competent Authority;

b] Needless to clarify that this would be without prejudice to the rights and contentions of both sides, particularly on the merits of the controversy;

c] While disposing this petition with these directions, we clarify that we have not expressed any opinion on the rival contentions on the issues noted by us and they are kept open.

11] The petition is disposed of accordingly.

(SMT. BHARATI H. DANGRE, J.) (S. C. DHARMADHIKARI, J.)