IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.13536 of 2018

==

1. Shiv Shankar Prasad, S/o Late Chandreshwar Prasad, Ward No. 05, P.O. and P.S.- Sursand, District- Sitamarhi (Bihar).
2. Md. Idrish Rayn, S/o Shri Saliman Rayn, Ward No. 06, Village- Hanuman Nagar, Baidnathpur Tola, P.O. and P.S.- Sursand, District- Sitamarhi Bihar.
3. Manoj Shah, S/o Shri Vishwanath Sah, Village and Post- Sursand, District- Sitamarhi (Bihar).

... ... Petitioner/s

Versus

1. The Union of India through the Commissioner of Customs (Prev), Patna, 5th Floor, Kendriya Rajaswa Bhawan, Bir Chand Patel Path, Patna-800001.
2. The Assistant Commissioner, Customs Prev Division, Muzaffarpur, 2nd Floor, Customs Building, Imlichatti, Muzaffarpur-842001.
3. The Superintendent, Land Customs Station, Bhittamore, District- Sitamarhi (Bihar).
4. The Inspector, Land Customs Station, Bhittamore, District- Sitamarhi (Bihar).

... ... Respondent/s

==

Appearance :
For the Petitioner/s : Mr.Amit Pandey, Adv.
For the Respondent/s : Mr.Anshuman Singh, Adv.

==

CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY
and
HONOURABLE MR. JUSTICE PARTHA SARTHY
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE SHIVAJI PANDEY)

Date : 25-11-2019

Heard learned counsel for the parties.

This Court at the initial stage has asked the petitioners that there is provision for appeal, they should avail the provision of appeal and, in spite of that, they have filed the present writ application but, learned counsel for the petitioners insisted for disposal of the case on merit.

In that view of the matter, this Court does not have alternative remedy but, to decide the case on merit in the following manner.

In the present case, the petitioners are challenging the order dated 14.5.2018 whereby and whereunder the Assistant Commissioner,, Customs Division, Muzaffarpur Camp at Bodh Gaya has passed the following order:-

> *"In view of the facts as discussed above and in exercise of power conferred upon me under Section 22 of the Customs Act 1962, I pass the following orders:-*
>
> *(i) I order for absolute confiscation of the seized Zink Ingot weighing 1021.480 Kgs. valued at Rs. 1,94,081/- (Rupees One lakh ninety four thousand eighty one only) under Section 111(b) of the Customs Act, 1962.*
>
> *(ii) I order for confiscation of the seized vehicle valued at Rs. 2,50,000/- (Rupees Two lakh fifty thousand only) under Section 115(2) of the Customs Act 1962. However, I give option to redeem the vehicle on payment of fine of Rs. 50,000/- (Rupees Fifty thousand only) under Section 125 of the Customs Act, 1962 to the noticee No.1. Since, I find that the noticee No.1 has deposited amount of Rs. 50,000/- (Rupees Fifty thousand only) vide T.R. 6 No. 00002 dated 30/12/2016 at the time of provisional release of vehicle, I hold that the deposited amount of Rs. 50,000/-*

may be appropriated against redemption fine as above.

(iii) I impose penalty of Rs. 10,000/- (Rupees Ten thousand only) upon the noticee No.1 under Section 112 of the Customs Act 1962.

(iv) I impose penalty of Rs. 10,000/- (Rupees Ten thousand only) upon the noticee No.2 under Section 112 of the Customs Act 1962.

(v) I impose penalty of Rs. 5,000/- (Rupees Five thousand only) upon the noticee No.3 under Section 112 of the Customs Act 1962."

On 4.12.2016, a casual information was received at about 15.00 hrs., the officers of LCS Bhithamore intercepted Truck bearing registration No. AS09C/7546 at Nawahi Chowk, Bhitamore and examined the contents loaded on the truck in the presence of noticee No.1 Md. Idrish Rayn (petitioner no.2) and two independent panches. The noticee No.1 was asked to produce the bill/documents in respect of loaded goods but, he failed to produce the same. The said vehicle loaded with zinc ingots and driver was brought to the office at LCS Bhithamore for thorough search and completion of the seizure formalities. In the truck, 49 pieces Zinc ingots weighting 1021.480 kgs. were found. The said truck along with the goods were seized in exercise of power under Section 110 of the Customs Act, 1962 on reasonable belief that the goods brought into India from Nepal without any documents is liable to confiscation under Section 111(b) and the said vehicle used for transportation of the contraband goods is liable to confiscation under Section 115(2) of the Customs Act, 1962 and person involved in this case is liable for penalty under Section 112 of the Customs Act, 1962 for contravention of Section 7, 11, 46 and 47 of the Customs Act, 1962 read with Section 3(2) of the Foreign Trade (Development & Regulation) Act, 1962.

The driver, Noticee No.1 has made his voluntary statement recorded on 4.12.2016 under Section 107 of the Customs Act, 1962 stating that he is the driver of the said vehicle and Sri Manoj Sah (Noticee No.3) who is petitioner no.3 in the present case, approached him asking to carry some kabars from his kabar shop to Sitamarhi with Rs. 1500/- as freight charge. The said Noticee No.1 agreed and gave him key of said vehicle for loading kabar. The Noticee No.1 returned back after taking lunch and moved with loaded vehicle. The officer of the LCS Bhithamore intercepted the said vehicle along with the said goods.

In the interrogation, he has accepted that the vehicle was given to Sri Manoj Sah on his request for loading the said goods from kabar shop belonging to him situated at Bhithamore. He was paid Rs. 1500/- as freight of the said goods for carrying up to Sitamarhi. At the loading point, he has stated that the said old Jasta

(Zinc) has been loaded on his vehicle in the kabar shop of Shri Manoj situated at Bhithamore. He has further stated that the Jasta appears to be of Nepal but he did not know the actual mode of illegal import from Nepal into India. The zinc Ingot was of different shape and size but he did not disclose the destination where to deliver the material and further he has filed application on 7.12.2016 claiming the ownership of the seized vehicle which was later on released on provisional basis. The said vehicle was released on the security money of Rs. 50,000/-. The said goods were sent to Joint Director, Chemical Laboratory, Customs House 15/1 Strand Road, Kolkata and the Chemical Examiner, Kolkata gave the following report:-

> *"The sample is in the form of out/broken shining grayish metallic lumps of irregular shape and size. It is mainly composed of zinc together with iron and small amount of other inorganic matter. Zinc=96.4% by wt.".*

The show-cause notice was issued under Section 124 of the Customs Act, 1962 to all the petitioners giving full details of fact wherein mentions about the casual information on 4.12.2016 at 15.00 hrs. whereafter the truck was intercepted and analysis has been reproduced and also mentions the statement of petitioner no.2

but, neither of them filed their show-cause nor appeared before the Custom Authority nor made statement under Section 8 of the Customs Act.

The Noticee No.2 (petitioner no.1) has made following statement:-

> *"(i) He is the businessman of Kabar (scrap). He engaged to purchase of Kabar (scrap) from the cyclewala or thelawala. He has no permanent kabar shop. While the kabar (scrap) accumulated in huge quantity the same is to be sold to the outsider customer.*
>
> *(ii) He earns his income from business of kabar scrap and agriculture.*
>
> *(iii) While the said goods was intercepted by Customs Authority, he was present at Sitamarhi and he got information from the said Noticee No.1 (Driver).*
>
> *(iv) Seized goods are of Indian origin and same has been purchased from local unknown persons for which he has no any relied documents/bill with him in respect of the said goods.*
>
> *(v) He knows the Noticee No.1 and 3 but he did not know details about Noticee No.3 Noticee No.3 was engaged in loading and unloading of the subject goods.*
>
> *(vi) The seized goods was delivered to someone at Muzaffarpur and freight was negotiated with Noticee No.1 (Driver) Rs. 1500/-.*
>
> *(vii) Seized goods is to be further used to manufacturing of Gas Regulator and belt buckles.*

(viii) He has purchased the seized goods from different local cyclewala and thelawala after paying Rs. 70 to 80 per kg, but he did not know the details of above sellers.

(ix) Such type of manufacture activities is to be carried out at Sursand, Sitamarhi and Muzaffarpur but he did not know name and details of manufacturing/conversion unit of Zinc ingot.

(x) He admitted no fabrication unit of Zinc Ingot from Kabar of Battery surrounding of Bhithamore and Nawahi."

In the statement, he has stated that he has purchased the Kabar from the cyclewala or thelawala, has no permanent kabar shop, when the kabar accumulated in huge quantity, he used to sold the same to outsider customer. He has mentioned that the goods are of Indian origin having purchased from unknown person but, failed to place document in support of the noticee. He has accepted that he knows the driver, the petitioner no.1 (Noticee No.2) and petitioner no.3 Manoj Sah (Noticee No.3). He has taken a stand that the material was to be delivered at Muzaffarpur and freight was netogiated with Noticee No.1 at Rs. 1500/-. The seized goods was to be used for manufacturing of Gas Regulator and belt buckles. He has admitted such activities are carried out at Sursand, Sitamarhi and Muzaffarpur but he did not give the name and details of the manufacturer or conversion units of zinc ingots. The Noticee No.3 (petitioner No.3) has appeared and said that he has no relation with the Noticee No.1 (petitioner no.2) but, he is a neighbor. The seized goods has been converted from old battery and he knows the petitioner no.1 (Noticee No.2) from childhood and accepted that two cases under the customs case have already been registered.

Again the statement of driver was recorded, he has re-stated the same that the goods belonged to Manoj Sah and who loaded the goods on his truck, the Noticee No.2 claiming to be his goods, Manoj Sah has said that it does not belong to him having no connection with any of the aforesaid two persons and, ultimately, after discussion, has arrived to a conclusion that under the goods were of Nepal origin, were imported illegally into India from Nepal without any valid document, contravene the provision of Section 7, 11, 46 and 47 of the Customs Act, 1962 read with Section 3(2) of the Foreign Trade (Development and Regulation) Act, 1992 and liable for confiscation. Ultimately, the final order for confiscation has been passed with respect to the vehicle which was released on provisional basis, has been given the benefit under Section 125 of the Customs Act that he may deposit a cost of the vehicle and get release of the same, as the petitioner no.2 has already deposited Rs. 50,000/-, the same has been directed to be appropriated against the redemption fine and also imposed penalty of Rs. 10,000/- to the petitioner no.1 and Rs. 5,000/- penalty has been imposed on petitioner no.3 under Section 112 of the Custom Act.

The point has been raised by the petitioner that before seizure, the authority was to form an opinion that he has a reasonable belief that the goods are liable for confiscation under the Act. The pre-condition before seizure, the authority was required to form this opinion as they have failed to form an opinion of reasonable belief of the goods of third country is required seizure, the seizure itself is bad and leads to wrong confiscation of the goods and the entire confiscation proceeding is vitiated and, as such, the order passed against the petitioners is liable to be quashed. It has further been submitted that in the order, there is no mention that it is the prohibited goods, could not have been brought from Nepal and, as such, the order itself is bad on this ground. It has again been stated that the material which was seized does not tally with the report furnished after the chemical analysis, inasmuch as, the seizure was made of the goods but, the seizure memo or any order of seizure was not served to the owner of the goods nor the copy of the Panch, recording the proceeding of search, was served and, as such, the search and seizure has been conducted without following the due procedure established by law.

Thus, the entire process is non-est in the eye of law. It has been said that in term of Section 123 of the Customs Act, 1962, the burden of proof lies to the Custom Department to show the material seized is of Nepal origin but, wrongly the burden has been shifted upon the petitioners to prove that the goods were not brought from Nepal but, the same are of Indian territory. At the last, learned counsel for the petitioners submits that they were/are obliged to release the goods in terms of Section 125 of the Customs Act. So, the impugned order is liable to be interfered with by this Court.

Per contra, learned counsel for the Custom Department submits that the goods were seized in presence of the driver as well as in presence of the two persons (witnesses), seizure memo was prepared properly, inasmuch as, there is a dispute of ownership of the property seized and the statement does not reflect that the seizure memo bearing signature of the panches was not handed over to the driver at the relevant time as the petitioner nos. 1 & 3 were not present. Further, forming an opinion that the material seized is of third country is based upon the information received, that led to interception of driver who made a statement that the seized Zinc has been smuggled from Nepal territory. It has further been submitted that looking to the facts and circumstances, the Custom Officer has rightly formed an opinion or reason to believe that the goods were of Nepal origin as per Section 123 of the Customs Act, the burden lies with the petitioners to show that it is a rightful material and not a material imported from the third country as the material seized from the driver who himself has made a statement that its origin is Nepal. In such circumstances, the claim of the petitioners that wrongly proceeding was initiated is completely misconceived and mis-construed, liable to be rejected.

Before discussing this issue, it is proper to quote Section 110 and 123 of the Customs Act,1962 which reads as follows:-

*"**110. Seizure of goods, documents and things**.—*

(1) If the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods:

Provided that where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer.

[(1A) The Central Government may, having regard to the perishable or hazardous nature of any goods, depreciation in the value of the goods with the passage of time, constraints of storage space for the goods or any other relevant considerations, by notification in the Official Gazette, specify the goods or class of goods which shall, as soon as may be after its seizure under sub-section (1), be disposed of by the proper officer in such manner as the Central Government may, from

time to time, determine after following the procedure hereinafter specified.

(1-B) Where any goods, being goods specified under sub-section (1A), have been seized by a proper officer under sub-section (1), he shall prepare an inventory of such goods containing such details relating to their description, quality, quantity, mark, numbers, country of origin and other particulars as the proper officer may consider relevant to the identity of the goods in any proceeding under this Act and shall make an application to a Magistrate for the purpose of—

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of the Magistrate, photographs of such goods, and certifying such photographs as true; or

(c) allowing to draw representative samples of such goods, in the presence of the Magistrate, and certifying the correctness of any list of samples so drawn.

(1-C) Where an application is made under sub-section (1B), the Magistrate shall, as soon as may be, allow the application.]

(2) Where any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized:

Provided that the aforesaid period of six months may, on sufficient cause being shown, be extended by the 2[Commissioner of Customs] for a period not exceeding six months.

(3) The proper officer may seize any documents or things which, in his opinion, will be useful for, or relevant to, any proceeding under this Act.

(4) The person from whose custody any documents are seized under sub-section (3) shall be entitled to make copies thereof or take extract therefrom in the presence of a officer of customs."

"[110-A. Provisional release of goods, documents and things seized pending adjudication. - Any goods, documents or things seized under section 110, may, pending, the order of the [adjudicating authority], be released to the owner on taking a bond from him in the proper form with such security and conditions as the [adjudicating authority] may require.]"

*"**123. Burden of proof in certain cases**.-*

[(1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be—

(a) in a case where such seizure is made from the possession of any person,—

(i) on the person from whose possession the goods were seized; and

(ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other person;

(b) in any other case, on the person, if any, who claims to be the owner of the goods so seized.]

(2) This section shall apply to gold [and manufactures thereof] watches, and any other class of goods which the Central Government may by notification in the Official Gazette, specify."

Section 110 speaks that if the officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods and Section 123 provides that (1) where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be (a) in a case where such seizure is made from the possession of any person (i) on the person from whose possession the goods were seized; and (ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other person; (b) in any other case, on the person, if any, who claims to be the owner of the goods so seized. (2) this section shall apply to gold and manufactures thereof, watches, and any other class of goods which the Central Government may by notification in the Official Gazette specify.

Thus, Section 123 of the Customs Act does not apply to the matter as the material seized is not any of the item mentioned under Section 123 of the Customs Act but, it is the common law that if the goods has been seized on reasonable belief that it is a smuggled goods from third country then, in that circumstances, the person from whose possession the seizure has been made, he has to show that the goods, which has been seized, does not fall in the mischief of the Customs Act or is not of a third country material.

In the present case, the driver in a specific term has stated that the goods were loaded by Manoj Sah and he has stated that it is likely the goods has come from Nepal. In such circumstances, the submission of the petitioner that it is not from Nepal territory, unless it is shown by valid document or material from the person they have purchased, in such circumstances, in view of the statement of the driver, rightly the confiscation has been made and the order has been passed holding that the material is from Nepal origin and, in the present case, the driver has stated that the materials are of Manoj Sah, the petitioner no.3 whereas the petitioner no.1 Shiv Shankar Prasad (Noticee No.2) is claiming to be the owner of the goods. So, it is an unverified material as to who is the owner of the property. The vehicle has already been released and Rs. 50,000/- has been forfeited, treated to be the value of the vehicle.

Learned counsel for the petitioners submits that they ought to have given the benefit of Section 125 of the Customs Act. When the ownership of the property is in dispute, the proper course for the petitioner no.1, who is claiming to be the owner of the property, is to file proper application under Section 125 of the Customs Act before the authority of proper jurisdiction who will take a decision in accordance with law.

In that view of the matter, this Court does not find that the petitioners have made out a case for interference with the impugned order passed by the Assistant Commissioner, Customs Division, Muzaffarpur Camp at Bodh Gaya.

Before parting with the judgment, this Court is of the view that if any of the petitioners file an application under Section 125 of the Customs Act, 1962, the Authority concerned will consider the case on merit and will take a decision in accordance with law.

With the aforementioned observation, this writ application is dismissed.

(Shivaji Pandey, J)

(Partha Sarthy, J)

rishi/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	28.11.2019
Transmission Date	