

order in WP-1898-20.doc.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1898 OF 2020

Exim Incorporation
(Through its Proprietor-Gaurav Gupta)

..Petitioner

Versus

Union of India & Ors.

..Respondents

Ms. Anjali Manish a/w Mr. Priyadarshi Manish and Ms. Deepa Premachandran, for the Petitioner.

Mr. Pradeep S. Jetly, Senior Advocate a/w Mr. J. B. Mishra, for the Respondents.

CORAM : UJJAL BHUYAN &
ABHAY AHUJA, JJ.

RESERVED ON : 24th NOVEMBER, 2020
PRONOUNCED ON : 9th DECEMBER 2020

P.C. (Per Ujjal Bhuyan, J.)

1. Heard Ms. Anjali Manish, learned counsel for the petitioner and Mr. Pradeep S. Jetly, learned senior counsel for the respondents.

2. This petition has been filed under Article 226 of the Constitution of India by the petitioner seeking a direction to respondent Nos.2 to 6 to unconditionally clear the goods imported against bill of entry Nos.3280852 dated 17.05.2019 and 3375143 dated 24.05.2019.

3. Petitioner in this case is Exim Incorporation which is a proprietorship firm of Shri. Gaurav Gupta. Petitioner is engaged in the

business of importing miscellaneous goods having the required importer exporter code.

4. In the course of business, petitioner had purchased 20575 kg. of pistachio (pistachio nut in-shell) from foreign supplier in California, United States vide bill of lading dated 05.04.2019. Upon arrival of the goods at Nhava Sheva Port, petitioner filed bill of entry No.3280852 dated 17.05.2019 declaring the goods as per import documents at Rs.1,17,78,882.10 on which duty payable was Rs.28,64,624.00. The goods were sent for testing whereafter no objection was granted following which import release order was passed on 03.06.2019. Prior to this, on 30.05.2019 petitioner had paid the entire customs duty. It may be mentioned that no assessment was prescribed. However, despite all clearances and payment of customs duty, respondents did not release the goods for home consumption.

5. Petitioner had also purchased from foreign supplier in Shanghai, China, 135 MTS of the good "Phthalic Anhydride Naphthalene Based". On arrival of the imported goods at Nhava Sheva Port, petitioner filed bill of entry bearing No.3375143 dated 24.05.2019 declaring the goods as per the import documents. Value of the goods was declared at Rs.86,73,540.75 and the duty payable was Rs.24,05,607.00. Like the previous bill of entry here also upon examination, no assessment was prescribed.

6. It is stated that customs authorities decided that the goods

imported by the two bills of entry dated 17.05.2019 and 24.05.2019 were required to be examined 100%. However, acting on instructions of the Directorate of Revenue Intelligence (DRI), Zonal Unit, Kolkata, petitioner was informed that such examination would be carried out only in the presence of proprietor of the petitioner. In this backdrop, when the legal representative of the petitioner had appeared before the customs authorities on 11.06.2019 for examination of the consignments, the Joint Commissioner did not allow him to participate in the examination proceedings. Request of the petitioner for warehousing of the goods under section 49 of the Customs Act, 1962 (briefly “the Customs Act”) was also not responded to.

7. In such circumstances, petitioner had filed a writ petition before this Hon’ble Court which was registered as Writ Petition No.7687 of 2019. During the proceedings of the said writ petition, respondents had contended that several summons were issued to the petitioner by DRI, Zonal Unit, Kolkata under section 108 of the Customs Act, but petitioner failed to comply with the summons and did not respond. It was stated that presence of Shri. Gaurav Gupta was warranted. However, petitioner clarified that no summons were issued to it by the customs authorities at Nhava Sheva. Further, it was not possible on the part of the proprietor to appear before the DRI authorities at Kolkata for each and every summons as he was a resident of Delhi.

8. Subsequently, petitioner withdrew Writ Petition No.7687 of 2019 on 26.07.2019 in order to avail such other remedy provided under the

Customs Act.

9. Petitioner came to learn that DRI, Zonal Unit, Kolkata had filed a criminal complaint against it for issuance of warrant of arrest under section 87 of the Criminal Procedure Code, 1973. It was alleged therein that despite summons dated 29.05.2019, 26.06.2019 and 04.07.2019 petitioner failed to appear before the DRI authorities. The complaint was registered as Complaint Case No.C-1745 of 2019 in the court of Chief Judicial Magistrate, North 24 Parganas in the State of West Bengal.

10. Proprietor of the petitioner moved the Calcutta High Court for quashing of the criminal complaint which was registered as CRR No.113 of 2020. Calcutta High Court by order dated 14.01.2020 issued notice and stayed all further proceedings pending before the Chief Judicial Magistrate, North 24 Parganas in connection with Complaint Case No.C-1745 of 2019.

11. Immediately thereafter, letter dated 29.01.2020 was issued to the petitioner by the office of Commissioner of Customs (General), Mumbai Zone-II, Central Intelligence Unit, Nhava Sheva calling upon the proprietor to be present in person before the Central Intelligence Unit on 19.02.2020 to undergo authentication or furnish proof of possession of aadhar number and such other documents or information to establish identity as well as residential and business addresses.

12. Aggrieved by the illegal detention of the imported goods and non-examination of the same on the ground of non-appearance of the

proprietor, the present writ petition has been filed seeking the relief as indicated above.

13. Primary contention of the petitioner is that the imported goods were detained for more than six months but without issuing show-cause notice under section 124 of the Customs Act though there is no seizure of the goods under section 110 of the Customs Act. There is no provision in the Customs Act for detaining imported goods. Therefore such detention is illegal and liable to be appropriately interfered with.

14. When the writ petition was moved on 13.03.2020, learned counsel for the respondents sought for time to obtain instructions. On his request, case was deferred to 24.03.2020. Thereafter due to the outbreak of Covid-19 pandemic and the resultant lock-down, the case could not be taken up for consideration. Finally, when the case was taken up on 22.10.2020, Mr. Pradeep Jetly, learned senior counsel along with Mr. J. B. Mishra, learned counsel submitted that they had received instructions to appear on behalf of the respondents. On the next date of hearing i.e. on 29.10.2020 contention was advanced by learned counsel for the petitioner that the period of detention of the imported goods had exceeded one year which is the outer time limit in the event of seizure where show-cause notice under section 124 has not been issued; in the present case there is no seizure and the goods have been simply held up. Therefore petitioner is entitled to release of the detained goods forthwith. Mr. Pradeep Jetly was granted time to obtain instructions on this contention. Subsequently, an affidavit was filed on behalf of respondent No.3.

15. In the said affidavit of respondent No.3 filed by Mr. Sushil Lepcha, Assistant Director, DRI Zonal Unit, Kolkata, it is stated that intelligence input was received by DRI Kolkata Zonal Unit to the effect that certain unscrupulous importers were importing goods declared as rough precious stones and semi precious stones which could be over invoiced though they are of inferior quality having no value in the market. Investigation revealed that such imports had been staged by a syndicate of importers only to send illegal money out of the country in the guise of imports. Explaining further it is stated that the syndicate had chosen rough stones for imports primarily for two reasons: firstly, they could inflate the value as much as they could in the name of precious stones; and secondly, there is no customs duty on such items. Only IGST is payable, that too, at the nominal rate of 0.25%. Therefore, the *modus operandi* was to send money illegally out of India in the guise of imports.

15.1. During investigation, it was revealed that M/s. Global Suppliers had also made similar imports. Directors of M/s. Global Suppliers were namesake directors and the works related to the imports made by M/s. Global Suppliers were handled by one Shri. Ravindra Baweja at the behest of Shri. Gaurav Gupta, proprietor of the petitioner. This was admitted by Shri. Ravindra Baweja in his statement recorded under section 108 of the Customs Act.

15.2. It is stated that Shri. Gaurav Gupta has emerged as the key person who had masterminded the said fraudulent import of inferior quality stones and the link between the petitioner and M/s. Global

Suppliers was established during the course of financial investigation. Shri. Gaurav Gupta, proprietor of the petitioner is being investigated by DRI, Kolkata Zonal Unit in connection with the import of inferior quality stones by M/s. Global Suppliers. It is the contention of respondent No.3 that M/s. Global Suppliers is the front company of Shri. Gaurav Gupta.

15.3. As per the affidavit, summons issued by DRI authorities at Kolkata to the petitioner for appearance were not complied with as the proprietor is avoiding the legal process.

15.4. During investigation, it came to the notice of DRI, Kolkata Zonal Unit that petitioner has imported two consignments which are presently at Nhava Sheva Port. Considering the role of Shri. Gaurav Gupta in the import of inferior quality stones, the present consignments of the petitioner is under scanner and as such the same is required to be examined 100%. Accordingly, letter was written by the authorities of DRI, Kolkata Zonal Unit on 30.05.2019 to the Commissioner of Customs (Import), Nhava Sheva-I to get the consignments examined 100% in the presence of the proprietor. The need for presence of the proprietor is warranted as he has been defying summons issued under section 108 of the Customs Act.

15.5. It is also stated that permission for warehousing of the goods has been granted subject to the condition that the same shall be executed in the personal presence of the proprietor of the petitioner.

15.6. Seeking dismissal of the writ petition, a submission is made that direction may be issued to the proprietor of the petitioner to co-

operate with DRI, Kolkata Zonal Unit in the investigation.

16. In its rejoinder affidavit petitioner has contended that respondent No.3 has failed to respond to the core issue raised by the petitioner i.e. as to whether the Customs Commissionerate at Nhava Sheva can retain/detain the goods beyond the statutory period provided under section 110(2) of the Customs Act. It is contended that respondent No.3 has failed to show any provision empowering the customs authorities to detain the goods beyond the period of six months or the extended period of further six months when no show-cause notice is issued under section 124 of the Customs Act.

16.1. It is stated that petitioner has never imported any rough precious stones or semi precious stones; it has neither made any import nor any export at Kolkata. It is also not related to M/s. Global Suppliers in any manner.

16.2. Petitioner has categorically denied that Shri. Gaurav Gupta is in any manner responsible for the imports made by M/s. Global Suppliers. It is further denied that Shri. Gaurav Gupta had masterminded the alleged fraudulent import of inferior quality stones. Petitioner is a renowned importer and is counted amongst the priority list of customers of the ports of Mumbai including at Nhava Sheva. There is no case registered against the petitioner.

16.3. In so far the summons issued to the petitioner by DRI authorities at Kolkata is concerned, the same is the subject matter of CRR

No.113 of 2020 pending before the Calcutta High Court. There is no mention about the said proceeding in the affidavit of respondent No.3.

17. Ms. Anjali Manish, learned counsel for the petitioner submits that the bills of entry in respect of the two consignments of the petitioner were filed on 17.05.2019 and 24.05.2019. Despite payment of the entire excise duty and all clearances given by the authorities, the consignments have not been released till date. Respondents have not seized the goods under section 110 of the Customs Act. If it had been a case of seizure under section 110 of the Customs Act, then sub section (2) thereof would have come into play because no notice has been issued to the petitioner under section 124(a) of the Customs Act. If no such notice is issued within six months of the seizure of the goods, then the goods are required to be returned to the person from whose possession the goods were seized. This period of six months though can be extended for a further period not exceeding six months by the Principal Commissioner of Customs or by the Commissioner of Customs for reasons to be recorded in writing to be informed to the person from whom the goods were seized before expiry of the period of six months. Since no notice under section 124(a) of the Customs Act has been issued till date and not only the initial period of six months but even the extended period of further six months has expired, there is no way that the respondents can withhold release of the two consignments of the petitioner. There is no provision for detention of goods in the Customs Act and such detention for more than a year now is therefore without any authority of law and is liable to be appropriately interfered with. She submits that for investigation in respect of other

consignments, the consignments in question cannot be withheld. According to her, even after release of the withheld consignments, respondents can continue with the investigation. Assailing the action of the respondents, she submits that it is extremely high handed and is nothing but trying to arm-twist the petitioner. In support of her submissions, she has placed reliance on a number of decisions.

18. *Per contra*, Mr. Pradeep Jetly, learned senior counsel has referred to the averments made in the affidavit of respondent No.3. He submits that it is quite evident that conduct of the proprietor of the petitioner is highly questionable and therefore the Writ Court in exercise of its discretionary jurisdiction under Article 226 of the Constitution of India may not grant any relief to such a litigant. All that the respondents want is that the proprietor should present himself in person before the investigating authority and co-operate with the investigation. Since he is evading summons, his personal presence has become necessary for the purpose of warehousing or examination of the consignments.

19. In reply, Ms. Anjali Manish, learned counsel for the petitioner submits that the stay order passed by the Calcutta High Court is still continuing and all the contentions advanced by respondent No.3 are required to be made before the Calcutta High Court in the petition filed by the petitioner and not in the present proceeding. She submits that it is quite interesting that the customs authorities at Nhava Sheva i.e. respondent Nos.2, 4, 5 and 6 have not filed any affidavit and have remained silent. It is only respondent No.3 who has adopted an inimical

stand against the petitioner and because of the pressure of DRI, Kolkata Zonal Unit, respondent Nos.2, 4, 5 and 6 have not released the two consignments despite the fact that such withholding of imported goods is clearly unlawful.

20. Submissions made by learned counsel for the parties have received the due consideration of the Court. Also examined the materials on record.

21. We have carefully perused the provisions of the Customs Act but we could not come across any such provision authorizing detention of goods. However, we may mention that section 110 of the Customs Act deals with seizure of goods, documents and things.

22. Seizure of goods etc. is provided in section 110 of the Customs Act. Sub section (1) makes it clear that if the proper officer has reason to believe that any goods are liable to confiscation under the Customs Act, he may seize such goods. As per sub section (2), which is relevant, where any goods are seized under sub section (1) and no notice in respect thereof is given under section 124(a) within six months of the seizure, the goods shall be returned to the person from whose possession those goods were seized. As per the first proviso, the aforesaid period of six months can be extended for a further period not exceeding six months by the Principal Commissioner of Customs or Commissioner of Customs for reasons to be recorded in writing, which however has to be informed to the person from whom such goods were seized before expiry of the period so specified.

Second proviso says that the specified period of six months shall not apply in a case where order for provisional release of the seized goods has been passed under section 110A.

23. Section 124 provides for issue of show-cause notice before confiscation of goods etc. It says that no order confiscating any goods or imposing any penalty on a person shall be made under the Customs Act unless the owner of the goods or such person is given a notice in writing informing him of the grounds on which confiscation is proposed or penalty is sought to be imposed (clause a); providing an opportunity to make a representation responding to the grounds of confiscation or imposition of penalty (clause b); and providing a reasonable opportunity of being heard (clause c). The first proviso says that at the request of the person concerned the provision for notice and representation under clauses (a) and (b) may be oral. Second proviso mentions that the proper officer may issue a supplementary notice after the show-cause notice.

24. A conjoint reading of sections 110(2) and 124 of the Customs Act would make it clear that a show-cause notice has to be issued to the person from whom the goods were seized within six months of seizure failing which the goods shall be returned to the person from whose possession the goods were seized. However, it is provided under the first proviso that the said period of six months can be extended for a further period not exceeding six months by the higher authority for reasons to be recorded in writing with intimation to the person concerned within the extended period.

25. Before proceeding further, we may advert to section 47 of the Customs Act. Section 47 deals with clearance of goods for home consumption. As per sub section (1), where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charge payable under the Customs Act, the proper officer may make an order permitting clearance of the goods for home consumption. This process for clearance of goods may take some time but certainly the goods cannot be detained for an indefinite period in the name of verification. This aspect was dealt with by the Punjab and Haryana High Court which will be adverted to a little later.

26. We have come across a decision by the Customs Excise and Gold (Control) Appellate Tribunal, East Regional Bench, Calcutta (briefly “the Tribunal” hereinafter) in the case of ***Ramnarain Bishwanath Vs. Collector of Customs, Calcutta*** reported in ***(1988) 34 ELT 202***. That was also a case where the goods were detained without making seizure under section 110 of the Customs Act. Tribunal examined the Central Apprising Manual of the department which dealt with detention, seizure and storage of seized goods. The manual interpreted the words “detention” and “seizure” of goods in the context of the Customs Act. It was mentioned that in ordinary parlance, there is a distinction between ‘detain’ and ‘seize’: ‘detain’ means ‘to keep back, withhold; especially to keep back what is due and claimed’. ‘Seize’ means ‘to be in possession or take possession of goods in pursuance of an order; to take possession by force (The Oxford English Dictionary)’. ‘Seizure’ is not equivalent to ‘detention’ as the latter word

involves the idea of keeping what has been seized. In the context of the above, Tribunal observed that as per the Central Apprising Manual customs authorities distinguishes between 'detention' and 'seizure' made under the Customs Act.

26.1. If this view is accepted, then detention would be at a stage post seizure. First there has to be seizure of the goods only whereafter the goods can be detained. In the instant case, admittedly there is no seizure. Therefore, there can be no detention.

27. In *Om Udyog Vs. Union of India* reported in *2010(254) ELT 547*, a division bench of the Punjab and Haryana High Court considered the question as to whether detention of goods for a period of more than two months could be held to be justified. In the facts and circumstances of the case, it was held that non-clearance of goods may be justified for a minimum period required for assessment. In no case, non-clearance of goods for months can be justified. It was held in no uncertain terms that non-clearance seriously affects rights of a lawful importer and fair procedure being constitutional mandate, no authority can plead unlimited power of non-clearance for its own incompetence as a justification beyond reasonable period. Sounding a note of caution, division bench of the Punjab and Haryana High Court took the view that while customs officials may have justification to verify whether goods were prohibited or otherwise liable to confiscation or to assess and recover duty, they are not immune from accountability against abuse of power by detaining goods for indefinite period on the ground that they were in the process of checking

the value or nature of goods. They are under legal obligation to do so promptly and if by reason of their incompetence they are unable to do so, detention of goods beyond reasonable time cannot be allowed.

28. Delhi High Court in the case of ***Mohd. Salman Khan Vs. Union of India*** reported in ***2016(337) E.L.T. 513*** examined a challenge to seizure of Nepalese currency. In that case stand of the customs authorities was that the Nepalese currency were detained; a distinction was sought to be drawn between detention of the currency and seizure of the currency whereafter it was contended that the department did not convert the detention into seizure. When the case was heard, already eighteen months had passed since the date of detention and no show-cause notice was issued. Court noted that learned counsel for the respondents was unable to point out any provision in the Customs Act that permitted detention of goods in lieu of seizure. In that context it was held that there is no provision for detention of goods in lieu of seizure. Referring to section 110(2) of the Customs Act, Delhi High Court observed that there is a definite time limit within which the department has to determine if the seized goods are to be confiscated. It was held in the facts of that case that the customs authorities cannot take shelter under the device of detention of goods in order to avoid the consequences flowing from seizure of goods.

29. Again in ***Shiv Shakti Trading Company Vs. Commissioner of Customs (Preventive)*** reported in ***(2016) 336 ELT 415***, Delhi High Court held that the time limit under section 110(2) of the Customs Act is sacrosanct. It was held that if no show-cause notice is issued within the

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period of six months from the date of seizure the consequence would be immediate and unconditional release of the goods in favour of the person from whom the goods were seized which would however be without prejudice to initiation and completion of adjudication.

30. Delhi High Court in ***Sai Incorporation Vs. Principal Commissioner for Customs (Import)*** reported in ***2016 (338) E.L.T. 578*** held that failure of the customs authorities to release the goods notwithstanding expiry of the time limit under section 110(2) of the Customs Act is unlawful. Accordingly, direction was issued for immediate release of the seized goods unconditionally without precluding the customs department from proceeding to take any further action as permissible in law including proceeding under section 124 of the Customs Act.

31. Upshot of the above discussion is that firstly, there is no provision in the Customs Act authorizing detention of goods. Secondly, even if the understanding of the customs department as discussed in ***Ramnarain Bishwanath (supra)*** is accepted, then also detention would be at a stage after seizure. Detention and seizure therefore cannot be used interchangeably meaning one and the same thing. Detention cannot be taken resort to or the customs authorities cannot take the plea of detention to avoid consequences of seizure under sub section (2) of section 110 of the Customs Act. If no show-cause notice under section 124(a) is issued, customs authorities cannot retain the seized goods for more than six months though the aforesaid period of six months can at best be extended for a further period not exceeding six months. Therefore beyond the

period of one year at the maximum, there cannot be any detention of goods even in the case of seizure without issuing show-cause notice under section 124(a) of the Customs Act.

32. Having summed up the position as above, it is glaring to the naked eye that the respondents have committed two illegalities. First illegality is they have detained the goods without affecting seizure. Secondly, they have exceeded the time limit for detention of the goods even if it is construed to be a case of seizure. In such circumstances, the impugned action cannot at all be justified and is liable to be appropriately interfered with.

33. At this stage, we would like to remind the respondents what the Punjab and Haryana High Court had said in *Om Udyog (supra)*. It was made abundantly clear that in no case non-clearance of goods for months can be justified. Non-clearance seriously affects rights of lawful importer and fair procedure being a constitutional mandate, no authority can plead unlimited power of non-clearance. Punjab and Haryana High Court held that officers of the customs department are not immune from accountability against abuse of power by detaining goods for indefinite period.

34. In the present case, we are only considering the legal challenge made by the petitioner to non-clearance of the imported goods. If respondent No.3 has any grievance regarding non-response of the petitioner to its summons, it can certainly raise the issue before the Calcutta

High Court but that cannot be a justification for detaining the goods at Nhava Sheva for more than one year. This is a case where having regard to the unauthorized nature of prolonged detention we had considered imposing cost on the respondents but after thoughtful deliberation we have refrained from doing so for the moment. However, respondents are put on notice that henceforth Court may consider imposition of cost if any instance of misuse of power or such unauthorized and unlawful action is found on adjudication.

35. Consequently, respondents are directed to forthwith release the imported goods of the petitioner covered by the bill of entry Nos.3280852 dated 17.05.2019 and 3375143 dated 24.05.2019 on completion of the necessary legal formalities and in any case within a period of two weeks from the date of receipt of a copy of this judgment and order.

36. Writ petition is accordingly allowed to the above extent but as discussed above, we have refrained from imposing cost on the respondents.

37. This order will be digitally signed by the Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

ABHAY AHUJA, J

UJJAL BHUYAN, J