

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 04.03.2021

CORAM:

THE HON'BLE Dr.JUSTICE ANITA SUMANTH

W.P. No.19977 of 2020
and WMP.No.24657 of 2020

Kannan Ramdurai Iyer

... Petitioner

Vs.

- 1 The Commissioner of Customs,
Chennai II Commissionerate, Rajaji Salai,
Chennai.
- 2 The Director of Revenue Intelligence,
Chennai Zonal, Unit 27, GN Chetty Road,
T. Nagar, Chennai. ... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a writ of Certiorarified Mandamus calling for the records of the impugned order i.e. intimation U/s. 110(2) of the Customs Act 1962 in F. No. CAU/DRI/ CZU/ 31/ 2020- CAU-II DIN. 20200973MX00009K8F08 dated 30.09.2020 passed by the 1st respondent and to quash the same and consequently to direct the 1st respondent to release the Dry dates covered under SEIZURE MEMORANDUM with ANNEXURE-A in C. NO.DRI/ CZU/ VIII/ 48/ ENQ-01/ INT-05/ 2020 dated 06.03.2020.

For Petitioner : Mr.A.Navaneetha Krishnan,
Senior Counsel for
Mr.R.Naveen

For Respondent : Mr.V.Sundareswaran,
Senior Panel Counsel

ORDER

Heard Mr.A.Navaneetha Krishnan, learned Senior counsel for Mr.R.Naveen, learned counsel for the petitioner and Mr.V.Sundareswaran, learned Senior Panel Counsel.

2. The petitioner seeks a certiorarified mandamus calling for and quashing intimation under Section 110(2) of the Customs Act, 1962 (in short Act) passed by R1, and as a consequence thereof, direct R1 to release the consignment covered under Seizure Memorandum dated 06.03.2020, comprising dry dates.

3. The petitioner carries on the business of export and import and had, in the course of business, imported dry dates from, according to him, Jebel Ali UAE/Dubai, declaring the country of origin as Oman. There was a search on 21.09.2019 by the Customs Officials and several summons issued under Section 108 of the Act. The petitioner appeared in response to a few summons but not all. Twenty two (22) containers of dry dates, for which the shelf life is stated to be two years, were seized on the ground that the place of origin was Pakistan and not Oman as contended by the petitioner. This is the crux of the dispute between the petitioner and the Authorities. The rate of duty for import of dry dates from Pakistan is 200% whereas the rate for import from Oman is only 20%. According to the petitioner, there is no mis-declaration or violation of any of the provisions of the Act and no material on the basis of which the imports have been labelled as 'smuggled', as the respondents contend in counter.

4. The seizure was effected on 06.03.2020 and the provisions of Section 110(1) provide that where any goods are seized under sub-section (1) and no show cause 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. The period of six months expired on 05.09.2020, upon expiry of which, the petitioner is entitled to the return of the consignment.

5. The proviso to Section 110(2) states that the Principal Commissioner of Customs or Commissioner of Customs may, for reasons to be recorded by him in writing, extend the period of six months to a further period not exceeding six months, and inform the person from whom such goods were seized of such extension, before the expiry of the period so specified. The impugned notice in this case was issued on 30.09.2020 extending the period for issuance of show cause notice for further period of six months invoking the proviso to Section 110 (2) of the Act, received by the petitioner on 07.10.2020.

6. The main grounds upon which the challenge is laid are:

(i) That several facts as set out in the impugned intimation are incorrect. I desist from referring to disputed

facts in a proceeding under Article 226 of the Constitution. In any event, these questions of facts are not relevant to decide the legal question raised in this writ petition.

(ii) There is no proper satisfaction that has been arrived at by R1 for the extension granted as required in terms of Section 110(1).

(iii) The impugned notice has been passed on 30.09.2020, and served on 07.10.2010, both beyond the periods stipulated under statute, and reliance upon the Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 (in short 'Ordinance 2020') does not advance the case of the respondent.

(iv) No opportunity was granted to the petitioner prior to passing of the impugned order.

(v) The impugned order militates against the principles of free trade purported by the World Trade Organization.

7. Reliance is placed on the following cases, Assistant Collector of Customs Vs. Charan Das Malhotra [(1971) SCC 1 697]; I.J.Rao, Assistant Collector of Customs Vs. Bibhuti Bhushan Bagh & Another [(1989) SCC 3 2020]; M/s.Gaunir Impex Pvt. Ltd. Vs. The Commissioner of Customs (W.P.(Md).No.10933 of 2012 dated 12.09.2012); Sardar Kulwant Singh Vs. Collector of Central Excise [(1981) 8 ELT 3 Del) and Gastrade International Vs. Kandla (Customs Appeal No.10497 of 2019 dated 03.06.2019), in support of the submission of the petitioner relating to the recording of satisfaction and affording of opportunity prior to passing of the impugned notice.

8. The Assistant Director, Directorate of Revenue Intelligence has filed a counter wherein he states that an order of extension of time for issuance of show cause notice does not require prior opportunity to be afforded to the assessee concerned. The counter narrates various facts in relation to the transactions of import. It also states, inter alia, that investigation at the 'overseas level' and 'correspondence with the overseas supplier' proves mis-declaration of country of origin on the part of the petitioner. These communications relied on by the revenue in counter (at para 7) are, ostensibly, dated 16.03.2020 and 19.03.2020. These details do not, however, form part of the impugned order and are mentioned for the first time in the counter filed by the respondent.

9. Before me, however, Mr.Sundareshwaran sings a different tune conceding to the position that the principles of natural justice have to be adhered to while extending time for issuance of notice. I have specifically sought a

clarification from the learned counsel in regard to this position pointing out that what he argues is at variance with what is stated in the counter but he would confirm that his stand is that the principles of natural justice must be adhered to even in passing an order under Section 110(2) proviso. This position is recorded. According to him, the impugned intimation is only an intimation proposing to extend time and calling for objections. However, even assuming so, such intimation is beyond the time stipulated in statute, as I have concluded at paragraph 21 of this order.

10. Since the controversy on merits appeared to revolve around the short issue of determination of country of origin, I had at the time of admission of the matter on 25.01.2021 passed the following order:

Mr.V.Sundareshwaran, learned Senior Panel Counsel requests some time to file a counter and also object to the request of interim release under Section 110A on the ground that the goods appear to have been entered from Pakistan and not from Abu Dhabi as projected. Thus, the goods are 'smuggled consignments' in terms of Section 2(33) read with Section 2(39), liable to be confiscated.

2. Mr.A.Navaneetha Krishnan, learned Senior Counsel appearing for learned counsel for the petitioner on record would draw my attention to the guidelines regarding implementation of Section 28DA of the Customs Act, 1962 and CAROTAR, 2020 in respect of Rules of Origin under Trade Agreements (FTA/PTA/CECA/CEPA) and the verification of certificates of original-reg., which at para 7 states that the designated director of the ICD/CBIC has been designated as a Nodal Officer for taking up issues relating to issuance of place of origin.

3. Let a clarification be obtained from the designated authority and incorporated in the counter as to the proper place of origin of the consignments in question.

4. List on 17.02.2021.

11. The direction at para 10, extracted above, was solely to settle the position in regard to the place of origin since the dispute substantially emanated from this one aspect of the matter. Counter dated 16.02.2021, however, has not complied with the direction. This blatant non-compliance with the direction of this Court is not appreciated, particularly,

seeing as order dated 25.01.2021 was passed in the presence of both learned counsel.

12. Be that as it may, the legal question that arises here is an interpretation of Section 110 (2) read with the proviso thereto, in regard to extension of time granted for issuance of show cause notice under Section 28 of the Act. In interpreting the same, one has to bear in mind the position that consignments of an assessee are seized by the Department on the basis of apprehensions. The scope and veracity of such apprehensions would have to be crystallized by way of a show cause notice, putting the assessee to notice of all materials available with the department in support of its apprehensions and allegations, for which purpose the Legislature has granted a period of six months. An extension of the period as aforesaid is provided for, conditional upon reasons being recorded and such reasons and being intimated to the assessee, prior to the expiry of the original period of six months. To argue that the factum of extension of time may be intimated post-extension, is, in my view, contrary to the express language of the provision as well as its scheme.

13. The provisions of Section 110(2) were substituted by the Finance Act, 2018 (Act No.13 of 2018), with effect from 29.03.2018 and prior to amendment, the provisions read as follows:

"PROVIDED that the aforesaid period of six months may, on sufficient cause being shown, be extended by the Principal Commissioner of Customs or Commissioner of Customs for a period not exceeding six months."

Post amendment, the provision along with the proviso reads as follows:

Section 110 Seizure of goods, documents and things

(1)

(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 Principal Commissioner of Customs or Commissioner of Customs may, for reasons to be recorded in writing, extend such period to a further period not exceeding six months and inform the person from whom such goods were seized before the expiry of the period so specified:

14. The difference is that, post amendment, a duty is cast upon the officer to record reasons on the basis of which the extension has been granted and though the provision does not say that such reasons be supplied to the assessee, the provision is clear to the effect that the intimation of extension be conveyed to the concerned assessee, during the original period of seizure. Such intimation must, in my view, be accompanied by the reasons on the basis of which the extension has been granted.

15. There is a line of decisions in the context of pre-amended Section 110(2) wherein an opportunity of personal hearing has been read into the provision. Post amendment, the Rajasthan High Court, in Commissioner of Customs (Preventive), Jodhpur Vs. Swees Gems and Jewellery [(2019) 368 ELT 455] and Kerala High Court in M.M.Hassan Vs. Superintendent of Customs, Thrissur [(2020) 374 ELT 28], have opined that no separate notice is required to be issued to an assessee prior to extension being granted.

16. In the case of Swees Gems and Jewellery (supra), a Division Bench of the Rajasthan High Court has expressed the view that proceedings for extension in terms of the proviso to Section 110(2) of the Act require the recording of reasons and the intimation of such extension to the person from whom the goods were seized before the expiry of the period of seizure and hence, no separate show cause notice was necessary to be issued to the assessee.

17. In doing to, the court has taken note of the change in law of by the Finance Act, 2018 to the effect that pre-amendment the expression used was 'on sufficient cause being shown' which necessitated the issuance of a show cause notice, whereas post-amendment, the expression used was 'for reasons to be recorded in writing' and thus post-amendment it was enough if the officer recorded reasons and conveyed them to the assessee, in time. Relevant observations are at paras 15 to 19 extracted below:

15. The change in the statute, in the opinion of this court, is a significant one. The previous provision required the Commissioner to show sufficient cause, which meant that such cause had to be based on objective considerations. However, the amended provision merely requires the Commissioner to record the reasons in writing and "inform the person from whom such good were seized before the expiry of the period so specified". In this court's considered view, the amended provision deliberately sought to overbear the previous view that a notice before extension was necessary. Now two conditions

are to be satisfied: one, the Commissioner has to record his reasons in writing, why the extension is necessary, and two, inform the person from whom such goods were seized before the expiry of the period so specified. The latter condition is equally important, in the opinion of this court, because it is a pre-requisite for the exercise of the power of extension. The pre-amended provision was silent on this aspect.

16. There are other reasons for this court to hold that the amendment brought about a radical change in the law. Parliament had knowledge - or is deemed to have knowledge of the existing state of law, which required notice, before extension. Therefore, the change of terminology is significant; the amendment has resulted in only two conditions, being insisted upon- primarily that the Commissioner should record his reasons, before the expiry of the period of limitation and should inform those reasons to the party concerned.

17. Besides, this court also notices that Parliament, aware of difficulties that might be faced by importers of goods, which might be seized, also provided, through an amendment in 2006, the facility of provisional release. Section 110A, enacted for this purpose, reads as follows:

"110A. 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 3 [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."

18. These developments, in the opinion of the court, resulted in a complete change of law, on the aspect. Section 110 (2) too has not remained unaffected; a second proviso has been added, which states that:-

"Provided further that where any order for provisional release of the seized goods has been passed under section 110A, the specified period of six months shall not apply".

19. The effect of these amendments, is that the rigor of unamended Section 110 (2) has been softened. Now, a person, whose goods are detained, can claim provisional release. At the time when IJ Rao was decided, that facility was not available. Seen in the context of these facts, it is apparent that a textual reading of Section 110 (2) would lead one to conclude that no separate notice is necessary, before extending the period of limitation by a further six months (for issuance of show cause notice); the authority has to record reasons in writing, which of course, should be based on materials and inform the concerned party about the extension before the expiry of the first period of six months. At this stage, it is necessary to also notice that even in IJ Rao (supra) the court recognized that not all reasons can be disclosed, because investigative processes and information gathering can be confidential.

18. In M.M.Hassan (supra) a learned Single Judge of the Kerala High Court considered a similar challenge rejecting the case of the petitioner that opportunity is to be afforded prior to extension being granted.

19. Thus, the proper interpretation of Section 110(2) read with the proviso thereto, would be (i) The Principle Commissioner/Customs of Commissioner is to record reasons in writing as to why the proposed extension by six months is justified/warranted (ii) The reasons as well as intimation of extension should be communicated to the assessee before the expiry of the first six months of the original period as completed under Section 110(2) meaning that the factum of the extension should be known to the assessee before the expiry of the period of six months under Section 110(2). The intimation, as aforesaid, will suffice as proper opportunity to the assessee in regard to the extension.

20. The impugned intimation refers to Ordinance 2020 gazetted on 29.09.2020. Chapters 5 and Section 6 read as follows:

CHAPTER V

RELAXATION OF TIME LIMIT UNDER CERTAIN INDIRECT TAX LAWS

6. Notwithstanding anything contained in the Central Excise Act, 1944, the Customs Act, 1962 (except sections 30, 30A, 41 , 41A, 46 and 47), the

Customs Tariff Act, 1975 or Chapter V of the Finance Act, 1994, as it stood prior to its omission vide section 173 of the Central Goods and Service Tax Act, 2017 with effect from the 1st day of July, 2017, the time limit specified in, or prescribed or notified under, the said Acts which falls during the period from the 0¹st day of March, 2020 to the 29th day of June, 2020 or such other date after the 29th day of June, 2020 as the Central Government may, by notification, specify, for the completion or compliance of such action as- (a) completion of any proceeding or issuance of any order, notice, intimation, notification or sanction or approval, by whatever name called, by any authority, commission, tribunal, by whatever name called; or (b) filing of any appeal, reply or application or furnishing of any report, document, return or statement, by whatever name called, shall, notwithstanding that completion or compliance of such action has not been made within such time, stand extended to the 30th day of June, 2020 or such other date after the 30th day of June, 2020 as the Central Government may, by notification, specify in this behalf: Provided that the Central Government may specify different dates for completion or compliance of different actions under clause (a) or clause (b).

21. Thus, any act that would have had to be carried out between the period 20.03.2020 to 29.09.2020 could now be carried out on or before 30.09.2020. In the present case the impugned intimation is dated 30.09.2020, signed on 29.09.2020 by the officer. The date of seizure is 06.03.2020 and the periods of six months (original period of seizure) expires on 05.09.2020. The intimation of extension should have been brought to the knowledge of the petitioner on or before 05.09.2020, accompanied by the reasons recorded for the extension. However, by virtue of the relaxation ordinance, such time stands extended to 30.09.2020. However, and admittedly, the intimation has been received by the petitioner only on 07.10.2020, beyond the date stipulated in the proviso to Section 110(2) and the reasons for extension have also not been supplied. The counter filed by the revenue also refers to subsequent extensions granted in September which are not relevant as a counter cannot improve an order, that has to either stand or fall on its own merit. I find support in this regard from the case of Mohinder Singh Gill and Another Vs. Chief Election Commissioner, New Delhi and Others (1978 AIR 851).

22. For the reasons stated as above, this writ petition is allowed and the respondent directed to release the

consignment in question within a period of two weeks from today. MPs are closed with no order as to costs.

Sd/-

Assistant RegistrarCS (IV)

//True copy//

Sub Assistant Registrar

ska

To

- 1 The Commissioner of Customs,
Chennai II Commissionerate, Rajaji Salai,
Chennai.
- 2 The Director of Revenue Intelligence,
Chennai Zonal, Unit 27, GN Chetty Road,
T. Nagar, Chennai.

+7cc to Mr.R.Naveen, Advocate SR.No.13845

+1cc to Mr.V.Sundareswaran, Advocate SR.No.13661

W.P. No.19977 of 2020
and WMP.No.24657 of 2020

AAB (CO)

GMV (08/04/2021)

सत्यमेव जयते

WEB COPY