BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
Reserved on : 01.04.2021
Pronounced on : 26.04.2021
CORAM
THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN
WP(MD)Nos.3917 & 3918 of 2020
and
WMP(MD)No.5459 of 2021
in
WP(MD)No.3917 of 2020

Mohammed Haroon ... Petitioner in WP(MD)No.3917 of 2020

Shaik Mohammed ... Petitioner in WP(MD)No.3918 of 2020

Vs.

1.The Additional Director General,
Directorate of Revenue Intelligence,
No.27, G.N.Chetty Road,
T.Nagar, Chennai - 600017.

2.The Senior Intelligence Officer,
Trichy Regional Unit,
Directorate of Revenue Intelligence,
No.1, Williams Road, Cantonment, Trichy.

3.The Regional Passport Officer,
Royala Towers No.2 and 3, IV Floor,
Old No.785, New No.158, Anna Salai,
Chennai.

4.The Airport Authority of India,
Tiruchirappalli Airport, Trichy.

5.The Joint/Additional Commissioner of Customs,
Office of the Commissioner of Customs,
No.1, Williams Road, Cantonment,
Trichy.

(R3 in both the writ petitions are impleaded vide court order dated 10.02.2021 in WMP(MD)No.14388 & 14065 of 2020)
(R4 in both the writ petitions are impleaded vide court order dated 24.02.2021 in WMP(MD)No.2888 & 2897 of 2021)

(R5 in both the writ petitions are su motu impleaded vide court order dated 10.03.2021)

Common Prayer: Writ Petitions are filed under Article 226 of the Constitution of India, to issue a Writ of Mandamus, to direct the respondents herein to allow re-export of the goods viz., gold ornaments weighing 200 grams and electronic goods as requested by the petitioners vide letter dated 03.02.2020 to the first respondent and to hand over the passport, impounded/detained by the second respondent to the petitioners.

(prayer was amended vide court order dated 17.12.2020 in WMP(MD)Nos.14392 & 14070 of 2020)

in both cases :

For Petitioners : Mr.Zahir Hussain

For Respondents : Mr.R.Aravindan, CGSC for R1 & R2
Ms.Victoria Gowri,
Assistant Solicitor General for R3
Mr.S.Bageerathan for R4

COMMON ORDER

While reading the great Indian epics, namely, the Ramayana and the Mahabharatha, we feel that some of the principal characters have been less than fair while dealing with their antagonists. Was Lord Rama justified in shooting the fatal arrow at Vali by hiding behind a tree ?. Karna is another unforgettable character. The wheel of his chariot was stuck in the mud and when he was attempting to retrieve it, Arjuna's arrows struck him. What about Abhimanyu?. Though the Sastras spoke of rules of war (Yudha Dharma), the approach was often that all is fair in love and war. Attainment of victory was more important than observing the niceties of the game.

2.But, a constitutionally governed democratic State which is committed to upholding the rule of law shall not adopt unfair methods when prosecuting citizens and non-citizens alike. And if the executive wing does, judiciary shall not wink. I must, with a sense of moral unease, acknowledge that there exists an exception to this lofty principle. An illegally procured evidence may still be admissible provided it is relevant. Just as an accused in a criminal case is entitled to fair trial, a noticee is entitled to fair adjudication and enquiry. This is implicit in Article 14 as well as Article 21 of the Constitution of India. It can be taken as axiomatic and an uncontestable proposition. What are the contours of this right ?. While it is not necessary to exhaustively delineate its scope, there can be no doubt that the noticee is entitled to copies of documents in official custody if they have a bearing on the defence. Denial of access to such documents may result in prejudice to the noticee in properly defending his or her case.

3.The question that arises for consideration in these writ petitions is whether this right to fair adjudication has been infringed. To answer the said question, it is necessary to take note of the competing versions presented by the petitioners as well as the department.

4.According to the petitioners who are Indian citizens, they returned to India after a brief overseas trip. They landed at Trichy International Airport at around 12.10 a.m on 06.11.2019. Each of them was carrying 200 gms of gold valued at Rs.7,64,200/- and electronic goods worth more than Rs.20.00 lacs. They intended to declare what was in their baggage before the customs authority and clear them after paying the applicable duty. But, before they could do so, they were intercepted and the goods in question were seized. They were subjected to indignities. They were made to squat and fingers were inserted into their anus. They were arrested and granted conditional bail on 07.11.2019. After coming out, the petitioners retracted the statements obtained from them. The petitioners replied to the show cause notices dated 29.06.2020. They sought permission to re-export the seized goods. Since no response was forthcoming, the present writ petitions were filed.

5.The allegations made by the writ petitioners have been strongly controverted by the Directorate of Revenue Intelligence. They received specific intelligence that passengers arriving at Trichy from Kuala Lumpur, Dubai, Sharjah and Singapore through four particular flights at around the midnight on 05.11.2019 would be bringing huge quantities of 24ct gold in the form of crude chain and paste and attempt to smuggle the same without payment of applicable customs duty. The information turned out to be well founded. Among the 640 passengers, 128 were detained and huge quantity of gold, silver and electronic goods were seized. Gold was smuggled either by concealing in the form of paste in the rectum or in the form of crude chains. From the petitioners, two crude gold chains weighing 200 gms each and electronic goods worth more than Rs.40.00 lacs were seized. The petitioners admitted in their voluntary statements that they were not the owners of the goods and that they were to be handed over to third parties who were waiting outside the airport premises. The petitioners had offered their services for monetary consideration. The specific stand of the DRI is that the petitioners were intercepted when they were about to exit the green channel. The allegations regarding ill-treatment and coercion have been denied. It is further stated that the complaint lodged by the petitioners before the National Human Rights Commission was closed. Likewise, the criminal complaint lodged before the local police against the DRI officials was also closed. The department had already initiated adjudication proceedings. The petitioners will be given full opportunity to take part and contest the allegations made against them. When the proceedings are pending, the petitioners have prematurely moved this Court for relief. The writ petitions are clearly not maintainable.

6.Since the standing counsel raised a technical objection that when the adjudication proceedings are still pending, it may not be open to the writ court to grant the relief sought for, I directed the competent authority to take up the enquiry on 17.03.2021 and pass final orders on or before 24.03.2021. The counsel for the petitioner offered to extend his fullest cooperation. He was ready to conduct the cross-examination of the witnesses through video conferencing. He even served the questionnaire in advance. This specific direction given to the adjudicating authority has not been complied with. Instead, a petition was filed for extension of time. The standing counsel submitted that the enquiry officer has been deputed for election duty and therefore, he wanted this Court to adjourn the proceedings. I declined the said request as I had spent considerable time on this case. I had heard the counsel on either side on 22.01.2021, 15.02.2021, 05.03.2021, 10.03.2021 and 19.03.2021. Therefore, on 01.04.2021, I reserved orders.

7.Initially, a submission was made that since the petitioners had brought prohibited goods into India, they cannot be permitted to be re-exported. They can only be confiscated. As already pointed out, the petitioners were carrying gold as well as electronic goods. Electronic goods are obviously not prohibited items. They can be cleared after making declaration and paying the applicable customs duty. Gold is also not a prohibited item for import. It would only come under the regulated/restricted category. Of course, the Division Bench of the Madras High Court in the decision reported in ***2016 (341) E.L.T 65 (Mad) (Malabar Diamond Gallery P.Ltd vs. Addl.Dir.General, Directorate of Revenue Intelligence, Chennai)***, went on to hold that though gold is not notified as one of the prohibited goods, when there is failure to comply with the conditions subject to which goods are to be imported, they are liable for confiscation. “Prohibited goods” has been defined in Section 2 (33) of the Customs Act, 1962. The Division Bench held that the provision cannot be narrowly interpreted so as to hold that gold is not an enumerated prohibited goods to be imported into the country. Section 11-A (a) defined “illegal import” as meaning the import of any goods in contravention of the provision of the Customs Act or any other law for the time being in force. The Division Bench held that Section 11-A cannot be thrown to winds while interpreting Section 2(33) of the Act. If the restrictive conditions set out in the notifications are found to have been breached, the authorities are bound to proceed on the premise that prohibited goods have been imported.

8.The petitioners have not stayed abroad for six months. Therefore, they cannot be called as eligible passengers within the meaning of the relevant customs notifications. Yet, in the counter affidavit, there is not much of emphasis that the petitioners have attempted to import prohibited goods. On the other hand, the stand is that the petitioners tried to exit the green channel without making a declaration. This is because, even in the Travellers Guide issued by Central Board of Indirect Taxes and Customs, the following is the answer given to the question "***Who can import gold as a baggage***?" :

> "Ans.Any passenger of Indian Origin or a passenger holding a valid passport, issued under the Passport Act, 1967, coming to India after a period of not less than six months of stay abroad. However, short visits during these six months shall be ignored if the total duration of such short visits does not exceed 30 days and the passenger has not availed of the exemption under this scheme, at the time of such short visits. Except for these passenger, no other passengers are allowed to import gold in Baggage.
>
> **Conditions:**
>
> (i) The duty shall be paid in convertible foreign currency
>
> (ii) Concessional rate of duty @ 12.5% + Social Welfare Surcharge @ 1.25% is applicable for gold to Indian Passport holders and persons of Indian origin if stays is for more than 6 months. Short visits up to a total of 30 days during the six months shall be ignored.
>
> (iii) In cases other than those mentioned in (ii) above, normal rate of Customs Duty @ 38.5% will be charged.
>
> (iv) The weight of gold (including ornaments) should not exceed 1 Kg. per person.
>
> (v) The passenger can either bring the gold himself at the time of arrival or import the same within fifteen days of his arrival in India.
>
> (vi) The passenger can also obtain the permitted quantity of gold from Customs bonded warehouse of State Bank of India and Metals and Mineral Trading Corporation subject to conditions (i) and (ii) above. He is required to file a declaration in the prescribed Form before the Customs Officer at the time of arrival in India stating his intention to obtain the gold from the Customs bonded warehouse and pay the duty before clearance.
>
> (vii) The rate of duty levied would be as follows:

S.No.	Description of Goods	Rate
1.	Gold bars, other than tola bars, bearing manufacturer's or refiner's engraved serial number and weight expressed in metric units and gold coins	@ 12.5% + Social Welfare Surcharge @ 1.25%

2.	Gold in any form other than at S.No.1 above including tola bars and ornaments, but excluding ornaments studded with stones or pearls	@ 12.5% + Social Welfare Surcharge @ 1.25%"

Of course, as held by another Division Bench of the Madras High Court in the decision reported in ***2009 (247) E.L.T. 21 (Mad) (Commissioner of Customs vs. Samynathan Murugesan)***, if the manner of import is patently fraudulent, then, the adjudicating authority may direct absolute confiscation of the goods instead of exercising his discretion under Section 125 of the Act. The ratio of this decision would definitely apply in cases of those passengers who had carried gold in paste form by concealing it on their person. The passengers who had hidden gold in their rectum cannot contend that they intended to declare before the customs authority and pay the applicable duty.

9.The issue to be resolved in this case can be formulated in clear cut terms. While the stand of DRI is that the petitioners attempted to smuggle gold and electronic goods, the petitioners claim that they never had any such intention and that they wanted to declare before the customs authority. Their specific contention is that before they could do so, they were intercepted and apprehended. The petitioners would claim that when they were apprehended, it was captured in the CCTV installed in the airport premises. The petitioners would pointedly allege that even before they could cross the Door Frame Metal Detector (DFMD), they were taken into custody by the DRI officials. On 07.11.2019 itself, the petitioners invoking the provisions of the RTI Act sought from the airport authorities copies of the CCTV footage. The petitioners' request was declined. Thereafter, the petitioners wrote to the Additional Director General of DRI that if the CCTV footage is seen and verified, the stand of the petitioners will be borne out.

10.The exact spot of interception is highly relevant and material. It was authoritatively laid down in ***K.R.Ahmed Shah vs. Additional Collector of Customs, Madras & Others (1981 E.L.T 153 (Mad.)***, that goods could not be deemed to be imported the moment an air craft lands in one of the airports in India. Importation can be said to have taken place only when the goods have crossed the customs barrier. The Hon'ble Judge followed the earlier Division Bench decision rendered in WA No.84 of 1968.

11.The Supreme Court in the decision reported in ***2017 (16) SCC 93 (Directorate of Revenue Intelligence vs. Pushpa Lekhumal Tolani)***, quoting International Convention on the Simplification and Harmonization of Customs Procedures, observed that a passenger going through the green channel is itself a declaration that he has no dutiable or prohibited articles. The respondents allege that the petitioners were intercepted when they were about to exit the green channel. The petitioners on the other hand claim that after the completion of immigration formalities and before crossing the DFMD, they were taken to custody. This controversy can be very easily resolved by production of the CCTV footage. The petitioners have not raised this contention as an afterthought. Right from the beginning this was their stand. Therefore, I impleaded the Airport Authority and directed them to make available the CCTV footage. The standing counsel for the Airport Authority after getting instructions submitted that since the occurrence had taken place in the 1st week of November, 2019, the footage got erased a few weeks thereafter and therefore, the direction issued by me in February, 2021 is impossible of being complied with.

12.The petitioners could have established their defence only by producing the CCTV footage. They have been denied access to this vital piece of evidence. The best evidence was very much available and it was allowed to vanish. The airport authority is a limb of the State. DRI cannot wash away its hands by taking the plea that they have not installed the CCTV and that it is not in their control. When a huge smuggling attempt was busted and when two of the arrested from whom recoveries were made wrote to the Additional Director General, DRI, Chennai that if he verifies the contents of the CCTV footage, their stand will be vindicated, then it was the bounden duty of DRI to have secured the CCTV footage. Since this was not done, I have to necessarily draw adverse inference against them. The Supreme Court in the decision reported in ***(2015) 7 SCC 178 (Tomaso Bruno and another vs. State of Uttar Pradesh***) observed that as per Section 114 Illustration (g) of the Evidence Act, if a party in possession of best evidence which will throw light in controversy withholds it, the court can draw an adverse inference against him notwithstanding that the onus of proving does not lie on him.

13.Where the fundamental right of the noticees to fair adjudication has been violated, adjudication proceedings cannot be allowed to continue for the purpose of determining their guilt. In view of my finding that the petitioners' defence has been prejudiced because of the non-production of CCTV footage, the adjudication proceedings initiated against them can be allowed to continue only for the limited purpose of determining whether the goods in question can be allowed to be re-exported or whether they can be cleared on payment of applicable duties. Such an order will be passed by the concerned authority within a period of four weeks from the date of receipt of copy of this order. The authority will hear the petitioners or their authorised representative through Video Conferencing or in person before passing final orders.

14.The petitioners claim that their passports have not been returned. The stand of DRI is that they never seized the petitioners' passports. There is no point in probing the issue. The petitioners were issued with passports and their period of validity has not expired. The only criminal case registered against the petitioners is at the FIR stage. It is well settled that pendency of a criminal case at FIR stage is not a ground for denying the issuance of passport or renewing it. I permit the petitioners to apply to the jurisdictional passport authority for issuance of duplicate passport and subject to fulfilment of the usual formalities, the jurisdictional passport authority is directed to issue duplicate passport to the petitioners without delay.

15.I do not for a moment suggest that the petitioners are innocent. I am not giving them a clean chit. There is much that arouses my suspicion. They hail from Chennai. There is no reason as to why they should land in Trichy. They do not appear to be financially sound. They are not even income tax assesses. There is every possibility that they are what is called in colloquial tamil as “Kuruvis”. Suspicion is one thing while proof is another. It is the prosecution that has to cover the distance. In ***Re:Arulanandu (AIR 1952 Mad 267)***, Panchapakesa Ayyar, J. remarked that the misfortune of the prosecution should never be allowed to become the misfortune of the accused. Just as the culprits in undetected crimes escape punishment, the unproved persons also must be unhesitatingly acquitted.

16.The writ petitions are disposed of accordingly. No costs. Connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (W)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

skm

Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

1.The Additional Director General,
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No.27, G.N.Chetty Road,
T.Nagar, Chennai – 600017.

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+1 CC to MR.S.ZAKIR HUSSAIN, Advocate (SR-17675[F] dated 27/04/2021)

+1 CC to MR.S.BAGEERATHAN, Advocate (SR-17664[F] dated 27/04/2021)

WP(MD)Nos.3917 & 3918 of 2020
and
WMP(MD)No.5459 of 2021
26.04.2021

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