

IN THE HIGH COURT AT CALCUTTA
Criminal Revisional Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 458 of 2019

Union of India

Vs.

Sushanta Karmakar @ Susanta Karmakar

For the Petitioner : Mr. K.K. Maiti,
Mr. Tapan Bhanja.

For the Opposite Party : Mr. Souvik Mitter,
Mr. Saptarshi Basu,
Mr. Sanjib Seth.

Heard on : 25.04.2023

Judgment on : 19.05.2023

Shampa Dutt (Paul), J.:

1. The present revision has been preferred praying for quashing of the order dated 05.04.2018 read with order dated 05.12.2018 passed in Complaint Case No. 1108 of 2016 arising out of Seizure Case No. 1/Seizure/CL/IMP/CUS/GD/2016 dated 22.09.2016 under Section 110 of Customs Act, 1962 for the offence punishable under Section

135 1(b)(ii) of the Customs Act, 1962 pending before the learned Chief Judicial Magistrate, Krishnanagar, Nadia.

2. The petitioner's case is that the petitioner is a public servant and is duly authorized to file this petition before this Hon'ble Court as per provisions of law and has preferred this application against the order dated 05.04.2018 read with order dated 05.12.2018 passed in Complaint Case No. 1108 of 2016 by the learned Chief Judicial Magistrate, Krishnanagar, Nadia wherein the learned Court was pleased to pass the order stating inter alia,

".....that the seized articles in connection with the case be returned to the accused on furnishing a bond of Rs.1 Crore and on further conditions that the accused will be liable to produce such articles before the Court as and when called for by the Court. It is also clarified that the accused will not dispose the article till the final disposal of the case".

3. **Mr. K.K. Maiti, learned counsel for the petitioner** has submitted that the above case has arisen out of the following facts :-

- (a) That acting on the basis of a specific information recorded vide DRI No.01/16 dated 22.09.2016 the Customs Officers of Gede Land Customs Unit, Gede Nadia on 22.09.2016 at 12.00 Hours at the time of baggage clearance searched the opposite party who was returning from Bangladesh through Gede Land Customs Station in presence of two independent witnesses and recovered two yellow coloured metallic bars believed to be gold of Foreign origin weighing 2.648 kgs., valued at Rs.81,84,000/- only from his possession. The

goods were concealed in between the feet and sole of his shoes (one piece under each foot).

(b) That a Panchanama of the incident was drawn in presence of two independent witnesses and a copy of the same was handed over to the opposite party. On demand by the Customs Officer the opposite party failed to produce any document whatsoever in support of legal importation, possession, acquisition or transportation of the said goods. Hence, inventory of the said goods was done in presence of two independent witnesses and were seized under section 110 of the Customs Act, 1962 vide seizure case no. 01/Seizure/CL/IMP/CUS/GD/2016 dated 22.09.2016 on the reasonable belief that the said goods so recovered had been illegally imported into India from Bangladesh through an unauthorized route in contravention of section 7(c) of the said Act read with section 77 of the said Act, Rule 3 of Baggage Rules, 2016 and Regulation 3 of the Customs Baggage Declaration Regulations, 2013, thus, rendering the goods liable for confiscation under Section 111(b) and 111(d) of the Customs Act, 1962.

(c) That subsequently a local gold smith namely M/s. Bhagabati Jewellers, Majdia, Nadia was contacted for examination of the seized goods and the said Gold Smith after examining the same has issued a certificate regarding the purity, weight and value of gold. The said Gold Smith certified that it was

24 carat gold, weighing 2.648 kgs., and valued approximately at Rs.81,84,000/-.

- (d) That the opposite party's voluntary statement under section 108 of the Customs Act, 1962 was obtained and recorded on 22.09.2016. The opposite party admitted his guilt confirming that he illegally imported the said two yellow metallic bars into India by concealing the same in between the feet and sole of his shoes. During the course of investigation the opposite party confirmed the names of other persons involved in the same.
- (e) That thereafter the opposite party was arrested on 22.09.2016 at 4.30 hours at Gede LCS under section 104 of the Customs Act for the offence punishable under section 135 of the Customs Act.
- (f) The opposite party was then produced before the Learned Chief Judicial Magistrate, Krishnanagar, Nadia on 23.09.2016 and the Learned Court was pleased to remand the said opposite party to Judicial Custody up to 24.10.2016.
- (g) That thereafter the department has filed a petition before the Learned Court on 05.10.2016 praying for permission to interrogate the opposite party and to record his statement at Krishnanagar District Correctional Home and the Learned Court was pleased to grant permission to that effect.

- (h) That pursuant to the permission granted by the Learned Court the Department has obtained the voluntary statements of the opposite party on 18.10.2016 in presence of the Controller of Krishnanagar District Correctional Home.
- (i) The opposite party has been enlarged on bail on 25.10.2016.
- (j) Thereafter the said seized yellow metallic bars were sent for testing to the Joint Director, Chemical Laboratory, Customs House vide letter dated 19.10.2016. Thereafter chemical test has been conducted by the Joint Director and as per the test report vide lab No.2080-2083/SZD(G)-382-385 dated 27.10.2016 the seized yellow metal is found to be gold and purity of the gold is 99.5%.
- (k) On 13.12.2016 a notice under section 150 of the Customs Act, 1962 was served upon the opposite party and in reply to the same dated 22.12.2016 the opposite party however claimed to be the owner of the seized gold and stated that he wants to receive it back by depositing nominal customs duty in terms of section 125 of the Customs Act.
- (l) Since the investigation of the case could not be completed within six months, under the provision of section 110(2) of the said Act the Commissioner of Customs (Preventive), West Bengal, Kolkata granted further extension period of six months for issuance of show cause notice vide Adjudication Order No. 43/CUS/CC(P)/WB/2016 dated 15.03.2017. Thereafter further investigation was conducted.

- (m) **A show cause notice dated 01.09.2017** was issued under section 124 of the Customs Act, 1962 to the opposite party proposing as to why the seized gold weighing 2.648 kgs. and having value of Rs.81,84,000/- **should not be confiscated** under section 111(b) and 111(d) of the said Act as well as why penalty under section 112 of the said Act should not be imposed.
- (n) **A written reply dated 10.10.2017 was submitted** on behalf of the opposite party by his learned Advocate against the show cause notice dated 01.09.2017.
- (o) That the Department issued notice for personal hearing for adjudication of the said show cause notice. Though three opportunities were granted for personal hearing but neither the opposite party nor his representative have appeared before the Adjudicating Authority.
- (p) The Adjudicating Authority after going through the records and reply of the opposite party has been pleased to pass **the order on 29.05.2018** holding that the opposite party is involved in smuggling of contraband gold from Bangladesh to India and the said opposite party is the key person involved in the smuggling of two pieces of gold bars of foreign origin weighing 2.648 kgs. valued at Rs.81,84,000/- into India in illicit manner in contravention of the provision of section 7(c) read with section 77 of the said Act along with Rule 3 of Baggage Rules, 2016 and Regulation 3 of the Customs

Baggage Declaration, 2013 which renders the aforesaid gold bars liable for confiscation under section 111(b) and 111(d) of the said Act and the said opposite party has rendered himself liable for penalty under section 112 of the said Act.

(q) The opposite party **on 19.01.2018** has made an application praying for return of the seized goods and to discharge him from the case before the Chief Judicial Magistrate, Krishnanagar, Nadia.

(r) The said application was heard by the Learned Court and the Learned Court was pleased to pass the **order on 05.04.2018** stating inter alia,

“.....that the seized articles in connection with the case be returned to be accused on furnishing a bond of Rs.1 crore and on further conditions that the accused will be liable to produce such articles before the Court as and when called for by the Court. It is also clarified that the accused will not dispose the article till the final disposal of the case”.

4. It is submitted that the Learned Court without observing and appreciating the provisions of the Customs Act has wrongly directed to return the goods furnishing a bond of Rs.1 crore.
5. That the said goods were seized under section 110 of the Customs Act, 1962. The direction for return of seized goods without considering the provision, as passed by the Learned Court is absolutely bad and perverse as well as contrary to the Customs Act.
6. Section 110(2) provides that where any goods are seized under sub Section 1 and no notice is given under clause (a) of Section 124

within six months of the seizure the goods, the goods shall be returned to the person from whose possession the goods have been seized. But in the present case the notice has been issued for extension of time to issue the show cause in terms of section 124 of the Customs Act and ultimately, the show cause notice under section 124 of the Customs Act, 1962 was issued to the opposite party on 01.09.2017 and the opposite party has filed his reply to the said show cause notice on 10.10.2017.

7. That the opposite party being aware of the legal provision has filed his reply but has purportedly avoided the personal hearing in spite of three opportunities of hearing being granted by the adjudicating authority. The opposite party without availing the said opportunity has purportedly filed the application on 19.01.2018 before the Learned Court praying for return of the goods.
8. That section 110A of the said Act clearly provides provisional release of goods, documents and things seized pending adjudication. The opposite party at no point of time made any application for provisional release of the goods before the Customs Authority.
9. That section 122 of the said Act provides adjudication of confiscation and penalties. The said section clearly provides that in every case under this chapter in which anything is liable to confiscation or any person is liable to a penalty, such confiscation or penalty may be adjudged (a) without limit by a (Commissioner of Customs or a Joint Commissioner of Customs).

10. Section 122A of the said Act provides for adjudication proceedings. The opposite party being aware of the same has not participated in the adjudication proceedings and has wrongly made an application before the Learned Court. The Learned Court also without appreciating the provision of Customs Act has wrongly passed the order on 05.04.2018, though, the show cause notice had been issued prior to that of the order passed by the Learned Court proposing confiscation of the goods as well as imposition of penalty, therefore, the Learned Court on 05.04.2018 ought not to have passed such order for return of the seized goods when the same has been taken care of by the adjudicating authority in terms of the Customs Act.
11. That the Learned Court from time to time directed the department to return the said goods and ultimately on 15.12.2018 directed the Assistant Commissioner to file a report before the Court as to the step taken in respect to the compliance of the order passed on 05.04.2018.
12. The petitioner states that the Learned Court being aware of the provisions of the Customs Act wrongly directed to return the goods to the opposite party.
13. That the Learned Court by exceeding the jurisdiction has passed the order which is contrary to the Customs Act, 1962 and is thus liable to be set aside.
14. **Mr. Souvik Mitter, learned counsel for the opposite party** has submitted that the order under revision is in accordance with law

and the petitioner is bound under the law to comply with same, and as such the revision is liable to be dismissed.

15. The relevant portion of the order under revision passed by the learned Chief Judicial Magistrate is as follows:-

Complaint Case No. 1108/2016

Order Dated 05.04.2018

“.....The second question of return of the seized articles due to non-compliance of Sec. 110(2) of the Customs Act on account of failure of proper confiscation is to be considered by the Court. It is to be mentioned that the process of confiscation or non-confiscation is the prerogative or duty of the customs authorities and this Court has got no function in either the confiscation or non-confiscation of the seized articles. The question of issuance of notice by the customs authorities and extension of period by Commissioner of Customs is not the jurisdiction of the Court, but when the process of inventory is already completed by the Magistrate and when the seized articles are not considered as prohibited articles as itemized in the Customs Act and when the goods or the seized articles are photographed and certified in presence of Magistrate then return of the seized articles in absence of confiscation can be given by the Court after furnishing a proper bond.

In the result, the petition partly succeeds.

Hence,

Ordered

that the seized articles in connection with the case be returned to the accused on furnishing a bond of Rs.1 crore and on further conditions that the accused will be liable to produce such articles before the Court as and when called for by the Court. It is also clarified that the accused will not dispose the articles till the final disposal of the case.”

Sd/-

Chief Judicial Magistrate, Nadia

16. The Supreme Court in ***Sunderbhai Ambalal Desai vs State of Gujarat, Special Leave Petition (crl.) 2745 of 2002, on 18 November, 2002*** laid down the guidelines for return of seized article/vehicles etc. as per section 451 of the Cr.P.C. But the Customs Act has its own provisions for search, seizure, confiscation etc. laying down the detailed procedure in respect of cases under the Act.

17. **From the materials on record the following facts are before this Court:-**

- i. The opposite party was served a notice under section 150 of the Customs Act, 1962 on 13.12.2016.
- ii. **On 01.09.2017 a show cause notice was issued to the opposite party under section 124 of the Act, thereby initiating the confiscation proceedings.**
- iii. Reply to the show cause was filed on 10.10.2017.
- iv. Final order of confiscation under section 111(b) and 111(d) of the Act was passed on 29.05.2018.
- v. **The opposite party after filing the reply to the show cause notice, approached the court of the Chief Judicial Magistrate, on 19.01.2018 praying for discharge and return of the seized article during the confiscation proceedings.**
- vi. **No notice was served upon the petitioner/customs authorities, for the hearing, when the confiscation proceedings had been initiated already.**

vii. The order of discharge was rejected but **the prayer for seized article was allowed without hearing the petitioner/authorities. Not even a notice was served and confiscation proceedings had already commenced.**

18. **Thus, it is clear** that the Magistrate did not act in the interest of justice and the said order dated 05.04.2018 read with order dated 05.12.2018 passed in Complaint Case No. 1108 of 2016 arising out of Seizure Case No. 1/Seizure/CL/IMP/CUS/GD/2016 dated 22.09.2016 under Section 110 of Customs Act, 1962 for the offence punishable under Section 135 1(b)(ii) of the Customs Act, 1962 pending before the learned Chief Judicial Magistrate, Krishnanagar, Nadia, being not in accordance with law is clearly an abuse of the process of law and if not set aside shall lead to miscarriage of justice.

19. **CRR 458 of 2019 is accordingly allowed.**

20. The Order dated 05.04.2018 read with order dated 05.12.2018 passed in Complaint Case No. 1108 of 2016 arising out of Seizure Case No. 1/Seizure/CL/IMP/CUS/GD/2016 dated 22.09.2016 under Section 110 of Customs Act, 1962 for the offence punishable under Section 135 1(b)(ii) of the Customs Act, 1962 pending before the learned Chief Judicial Magistrate, Krishnanagar, Nadia, is quashed and set aside.

21. No order as to costs.

22. All connected application, if any, stands disposed of.

23. Interim order, if any, stands vacated.

24. Copy of this judgment be sent to the learned Trial Court forthwith for necessary compliance.

25. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)