

A.F.R.

Reserved

Court No. - 32

Case :- WRIT TAX No. - 573 of 2020

Petitioner :- Jaymatajee Enterprise (Seller) And Another

Respondent :- The Commissioner Of Customs (Preventive) And 2 Others

Counsel for Petitioner :- Shubham Agrawal

Counsel for Respondent :- Ramesh Chandra Shukla

Hon'ble Shashi Kant Gupta,J.

Hon'ble Pankaj Bhatia,J.

(Per: Hon'ble Pankaj Bhatia, J.)

The amendment application filed by the petitioners is allowed.

The above referred writ petition has been filed challenging the seizure of goods of petitioner no. 1 and vehicle of petitioner no. 2 vide Panchnama dated 17.8.2020 and the order of provisional release dated 1.9.2020, whereby an order has been passed releasing the goods provisionally in respect of petitioner no. 1 on the following terms and conditions:-

“i. Execution of Bond for the value/estimated value of the seized goods i.e. Rs. 53,76,000.00;

ii. Furnishing Bank Guarantee or Security Deposit of Rs. 13440000.00;

iii. Statement of goods owner under Section 108 of the Customs Act, 1962 before provisional release of the seized betel nuts & Compliance of other applicable laws (any other conditions, as prescribed by adjudicating authority).”

And in respect of petitioner no. 2 as follows:-

“i. Execution of Bond for the value/estimated value of the seized truck i.e. 700000.00;

ii. Furnishing Bank Guarantee or Security Deposit of Rs. 70000.00;

iii. Statement of the truck owner under Section 108 of the Customs Act, 1962 before provisional release of the seized truck & Compliance of other applicable laws (any other conditions, as prescribed by adjudicating authority). ”

The contention of the counsel for the petitioners, in brief, is that the petitioners received an order from one M/s Jagdamba Enterprises for supplying 17920 K.G. of betel nuts and the petitioner purchased 24,000 K.G. of betel nuts from one Neelkamal Saha, West Bengal by means of two tax invoices dated 14.8.2020 each for 12,000 K.G. It is also stated that said Neelkamal Saha had purchased 19,884 K.G. of betel nuts in an E-auction held by the Customs Department. It is further stated that the petitioners and the purchaser Jagdamba Enterprises both are registered under the G.S.T. Act. After purchasing the said betel nuts from the said Neelkamal Saha, the petitioners transported the said goods to the consignee M/s Jagdamba Enterprises through Truck No. DL01 GC-1731 owned by the petitioner no. 2 and the goods were sent alongwith requisite E-Way Bill Invoices etc. It is further stated that the goods were valued for the total consignment value of Rs. 29,56,800/-. As soon as the Truck carrying the betel nuts entered the State of Uttar Pradesh, the respondent no. 3 intercepted the said Truck and vide Panchnama dated 17.8.2020, seized the goods as well as the vehicle i.e. Truck No. DL01 GC-1731. A copy of the Panchnama is on record as Annexure-3 to the writ petition.

In the Panchnama on record, the Panches made a statement that on the request of the Excise Authorities, they agreed to act as Panch and after the interception of the Truck, the driver disclosed his name as Satendra Kumar, the Officers informed the Truck driver that they have received specific information that ‘Areca Nuts’ of foreign origin was being transported. On opening of the material being transported it transpired that some bags had inscriptions in foreign language which led to a belief that the arcenuts were of foreign origin, it is also recorded that the officers informed the panches that on the basis of information prima facie the goods appeared to be of foreign origin and also that as per the opinion of

the local dealers the supari appeared to be illegally imported from bangladesh in violation of Section 11 read with the provisions of Foreign Trade Regulation Act on the said basis he proceeded to seize the goods by means of the Panchnama dated 17.8.2020.

Counsel for the petitioners argues that as no bonafide ***‘reasons to believe’*** existed, the seizure of the goods was wholly arbitrary and illegal. He further argues that the goods were purchased in an E-auction held by the Customs Department itself and as such there was no question of the goods being imported. It is further stated that on 18.8.2020 and 20th August, 2020, the petitioner wrote a letter to the respondents for release of the goods and the vehicle and requested as the goods were of perishable nature, the same may be released. Counsel for the petitioners Shri Shubham Agarwal further argues that even the manner of taking sample was contrary to the provisions of Section 144. He thus argues that as the goods i.e. 'Areca Nuts' were not 'notified goods' under Section 123 of the Act and do not fall in the category of prohibited/notified goods, the seizure order is liable to be quashed and goods were liable to be released.

Counsel for the petitioners argues that Section 110 of the Customs Act confers powers on the proper Officer for seizure of goods, documents and things if the proper Officers has ***‘reasons to believe’*** that the goods are liable to confiscation under this Act. Section 110 (1) is being quoted hereinunder:-

“SECTION 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 goods except with the previous permission of such officer.”

He further argues that only the goods which are liable to confiscation can be seized and Section 111 of the Customs Act provides

for the goods which can be confiscated under Section 111 of the Customs Act. Section 111 of the Customs Act is quoted hereinunder:-

“111. Confiscation of improperly imported goods, etc.—The following goods brought from a place outside India shall be liable to confiscation:—

(a) any goods imported by sea or air which are unloaded or attempted to be unloaded at any place other than a customs port or customs airport appointed under clause (a) of section 7 for the unloading of such goods;

(b) any goods imported by land or inland water through any route other than a route specified in a notification issued under clause (c) of section 7 for the import of such goods;

(c) any dutiable or prohibited goods brought into any bay, gulf, creek or tidal river for the purpose of being landed at a place other than a customs port;

(d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;

(e) any dutiable or prohibited goods found concealed in any manner in any conveyance;

(f) any dutiable or prohibited goods required to be mentioned under the regulations in an import manifest or import report which are not so mentioned;

(g) any dutiable or prohibited goods which are unloaded from a conveyance in contravention of the provisions of section 32, other than goods inadvertently unloaded but included in the record kept under sub-section (2) of section 45;

(h) any dutiable or prohibited goods unloaded or attempted to be unloaded in contravention of the provisions of section 33 or section 34;

(i) any dutiable or prohibited goods found concealed in any manner in any package either before or after the unloading thereof;

(j) any dutiable or prohibited goods removed or attempted to be removed from a customs area or a

warehouse without the permission of the proper officer or contrary to the terms of such permission;

(k) any dutiable or prohibited goods imported by land in respect of which the order permitting clearance of the goods required to be produced under section 109 is not produced or which do not correspond in any material particular with the specification contained therein;

(l) any dutiable or prohibited goods which are not included or are in excess of those included in the entry made under this Act, or in the case of baggage in the declaration made under section 77;

(m) [any goods which do not correspond in respect of value or in any other particular] with the entry made under this Act or in the case of baggage with the declaration made under section 77 3[in respect thereof or in the case of goods under transshipment, with the declaration for transshipment referred to in the proviso to sub-section (1) of section 54];

(n) any dutiable or prohibited goods transited with or without transshipment or attempted to be so transited in contravention of the provisions of Chapter VIII;

(o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer;

[(p) any notified goods in relation to which any provisions of Chapter IVA or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened.]”

He thus argues that for confiscation of goods it is essential to establish that:-

(i) the goods were imported into India, and;

(ii) the goods should be dutiable and that the imported duty has not been paid.

He further argues that even assuming without accepting the contentions of the respondents, none of the conditions specified in Clause (a) to Clause (p) of Section 111 are made out in respect of goods brought

by the petitioners within the territorial limits of India and being transported within the territorial limits of India and he further argues that there is no whisper or reason recorded by the respondents to come to a conclusion that the goods were being imported without payment of any duty. He thus argues that the goods could not be seized at the first instance itself in exercise of powers under Section 110 of the Customs Act.

The next argument of counsel for the petitioners is that Section 110-A provides for provisional release of goods, documents and things seized pending adjudication. Section 110-A is quoted hereinbelow:-

“[SECTION 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 20[adjudicating authority], be released to the owner on taking a bond from him in the proper form with such security and conditions as the 19[adjudicating authority] may require.]”

He thus argues that in terms of the powers conferred on the Adjudicating Authority, the goods are liable to be released provisionally to the owner on taking bond from him in the proper form with such security and conditions as may be required.

The next argument of Shri Agarwal is that the valuation of the goods imported is to be determined in terms of the specific Rules known as the Customs Valuation (Determination of the Value of Imported Goods) Rules 2007. He particularly relies on Rule 3, which states that subject to Rule 12, the transaction value of the imported goods should be accepted as the value. He further states that Rule 3 (4) provides that in the event the goods cannot be valued in terms of the provisions of Rule 3 (1), the value shall be determined through Rule 4 to 9 of the Valuation Rules, 2007.

On the basis of Rule 3, counsel for the petitioners argues that exercise for determining the Rules either in terms of Rule 3 or in terms of Rules 4 to 9 was carried out by the respondents while passing the

impugned order and the goods were arbitrarily valued by the respondents as is clear from the order dated 1.9.2020. However as the counsel for respondent has placed reliance on the Notification No 36/2001-Customs (NT) dated 3.8.2001 as amended vide Notification No 84/2019-Customs (NT) dated 15.11.2019 issued under Section 14(2) of The Customs Act wherein the valuation of Arecanuts is notified, the contention of the counsel for the petitioner on the manner of valuation does not merit acceptance.

Attacking the provisional release order dated 1.9.2020, counsel for the petitioners argues that although a discretion is vested in the Adjudicating Authority in terms of the powers conferred under Section 110-A, the discretion has to be exercised in accordance with law and in good faith and cannot be the pretence for confiscating the goods. He has further argued that the condition of furnishing bank guarantee or security deposit of Rs. 7,00,000/- for the release of the Truck seized is also bad in law.

Shri Agarwal then proceeded to argue on the provisions of law to stress that the Ministry of Finance has issued specific **Instruction No. 01/2017-Cus. (F. No. 591/04/2016-Cus. (AS)) dated 8.2.2017** stating that the Delhi High Court in a reasoned order has held that the Panch and statement by Panches (witness) cannot be taken to be an order passed by the proper Officer under Section 110 of the Customs Act and in terms of the said position in all the future cases following may be adhered to. The relevant part of the said Instruction No. 01/2017-Cus. (F. No. 591/04/2016-Cus. (AS)) dated 8.2.2017 is quoted hereinbelow:-

- *“Whenever goods are being seized, in addition to panchnama, the proper officer must also pass an appropriate order (seizure memo/order/etc.) clearly mentioning the reasons to believe that the goods are liable for confiscation.*
- *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. In such cases, investigations should be fast-tracked to expeditiously decide whether to place the goods under seizure or to release the same to their owner.”

In view of the said circular, Shri Agrawal submits that the same is binding on the Department, however, has not been followed for the reasons best known by the respondents and the Panchnama is the only document of seizure on record.

He further placed on record the circular dated 16th August, 2017 (based upon which the order dated 1.9.2020 is passed), which provide for guidelines for provisional release of the seized imported goods, pending adjudication wherein instructions have been issued that for the provisional release besides executing a bond for the full value/estimated value of the seized goods, competent authority **shall** take a bank guarantee or security deposit to cover the entire amount of duty/differential duty, the amount of fine that may be levied in lieu of confiscation under Section 125 of the Customs Act and the amount of penalties that may be levied under the Customs Act. Attacking the said circular, Shri Agarwal argues that the said circular in fact guides the Adjudicating Authority for passing a particular order in a particular manner. He submits that Section 151-A of the Customs Act confers the power on the Board to issue instructions to the Officers of the Customs for uniformity in the classification or with respect to the levy of duty thereon, however, even the Board is prohibited from issuing any directions so as to require any Officer of the Customs to make a particular assessment or to dispose of a particular case in a particular manner or to interfere with the discretion of the Commissioners of Customs (Appeals) in the exercise of its appellate function. Section 151-A is being quoted hereinbelow:-

“SECTION [151A. Instructions to officers of customs.—The Board may, if it considers it necessary or expedient so to do for the purpose of

uniformity in the classification of goods or with respect to the levy of duty thereon, 3[or for the implementation of any other provision of this Act or of any other law for the time being in force, in so far as they relate to any prohibition, restriction or procedure for import or export of goods] issue such orders, instructions and directions to officers of customs as it may deem fit and such officers of customs and all the other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board:

***Provided** that no such orders, instructions or directions shall be issued—*

(a) so as to require any such officer of customs to make a particular assessment or to dispose of a particular case in a particular manner; or

(b) so as to interfere with the discretion of the 4[Commissioner of customs ((Appeals)] in the exercise of his appellate functions.]”

Counsel for the petitioners further argues that along with request for provisional release, the petitioners had placed on record the letter dated 4th January, 2018 issued by the Department of Agriculture, Co-operation and Farmers Welfare, Government of India to the effect that the betel nuts cannot be conclusively determined upon examination of the naked eye with regard to its origin further It cannot be determined even through laboratory test whether the betel nuts are indiginous or are of a foreign origin and also to the effect that there is no mechanism available to test the country of origin of ‘Areca Nuts’. He has also placed reliance on the letter issued by ICAR-National Bureau of Plant Genetic Resources (Independent Council of Agricultural Research) to the effect that it is not possible to determine the country of origin of betel nuts.

Shri Shubham Agarwal has also placed reliance on the judgment passed by this Court in the case of ***Commissioner of Customs Vs. M/s Maa Gauri Traders, Customs Appeal No. 3 of 2019***, the judgment of the Patna High Court in the case of ***Union of India Vs. Salsar Transport Company***, the judgment of the Patna High Court in the case of ***M/s***

Ayesha Exports Vs. The Union of India (CWJC No. 7589 of 2018), where in it was recorded that there was no standardise laboratory test for determining the country of origin and that ARDF is not a credited laboratory. He has also placed reliance on the judgment of the Patna High Court in the case of *M/s Ramesh Kumar Baid Vs. Union of India*, wherein it was recorded that when the goods were seized within territory of India and not of any land custom station or any port, a mere seizure on the basis of specific information received cannot be said to be justified.

Thus in sum and substance on the basis of the arguments made above, the counsel for the petitioners argues that the seizure of goods vide panchnama dated 17.8.20 and the order dated 1.9.2020 are liable to be set aside. He has also placed reliance on a judgment of this Court, whereby this Court had directed in *Writ Tax No. 589 of 2017* that the goods be released on furnishing security other than cash and bank guarantee in respect of the total amount of value of the goods.

A counter affidavit has been filed on behalf of the respondents by one Shri Rakesh Srivastava posted as Deputy Commissioner of Customs, Lucknow. In the counter affidavit, it has been stressed that the writ petition is not maintainable in view of the judgment of this Court in the case of *Creative Media Vs. State of U.P. and 2 others (Writ Tax No. 469 of 2019)*. Counsel for the respondents has further argued that an alternative remedy of appeal lies before the Commissioner (Appeals) against the order of provisional release and as such the writ petition is liable to be dismissed on the ground of alternative remedy. For the said proposition, the counsel for the respondents has relied upon the judgments in the case of *Authorized Officer, State Bank of Travancore Vs. Mathew K.C. (Civil Appeal No. 1282 of 2018)* and the judgment of the Supreme Court of India in the case of *State of Uttar Pradesh & Others Vs. M/s Kay Pan Fragrance Pvt. Ltd in (Civil Appeal No. 8941 of 2019), 2019 (31) G.S.T.L. 385 (SC)*.

Thus, in sum and substance, the counsel for the respondents has argued that in view of the availability of alternative remedy of appeal against the order of provisional release, the writ petition is liable to be dismissed.

Counsel for the petitioners in rejoinder states that the order of provisional release is liable to be interfered for the reason that the goods in question are 'Areca Nuts' and they have a limited shelf life and the appeal would take a long time to be decided and the goods being a perishable nature, the entire purpose is liable to be defeated. He further argues that when the basic conditions of seizure are non-existent and no Appeal lies against a seizure order, this Court should not hesitate in exercising its jurisdiction under Article 226 of the Constitution of India and thus, the argument of the counsel for the respondents that the writ petition is not maintainable in view of the alternative remedy, is liable to be rejected. He further argues that the order impugned has been passed contrary to mandate of Section 110-A and solely on the on the dictation of the Board through its circular, which itself is bad in law and violative of the powers conferred upon the Board under Section 151-A of the Customs Act. He further states that the valuation of the goods in the provisional release order is contrary to the specific valuation rules and no reasons have been disclosed for valuing the goods in such a hefty manner and there being prima facie illegalities in the discretion exercised by the Adjudicating Authority, this Court should not hesitate in exercising its powers under Article 226 of the Constitution of India. He further argues that the mandate of the circular no. 1/2017 is binding on the respondents but has been conveniently not followed and thus not only the provisional release order is liable to be quashed even the seizure by means of a Panchnama is also liable to be set aside.

On the basis of the arguments advanced at the bar, the first question to be considered is whether the alternative remedy of appeal before the

Commissioner (Appeals) is an efficacious remedy and in view of the said remedy, the writ petition cannot be entertained.

We are in complete disagreement with the counsel for the respondents for the following reasons:-

(i) No appeal lies against a seizure order;

(ii) the goods detained are perishable in nature and considering the fact that relegating the petitioners to the appellate remedy would render the entire exercise futile as by then the goods itself will be of no value;

(iii) the seizure memo as well as the provisional release order are contrary to the Act and the departmental instructions;

(iv) order has been passed in violation of principles of natural justice inasmuch as neither in the provisional release order has the contention of the petitioners being addressed nor has any opportunity of hearing accorded before passing the provisional release order, and ;

(v) the order of provisional release has been passed even contrary to terms of the circular issued and there is no independent exercise of discretion by the Adjudicating Authority while passing the provisional release order.

Thus, on all the above grounds, which are all well carved out exceptions for exercise of jurisdiction under Article 226 of the Constitution, we reject the preliminary objection of the counsel for the respondents that in view of the remedy of appeal writ petition is not maintainable.

Reverting to the judgments relied upon by the counsel for the respondents on the grounds of alternative remedy. The Supreme Court while deciding the matter in *Authorized Officer, State Bank of Travancore (supra)* held that writ jurisdiction should normally not be

entertained without assigning any special reasons and that too without even granting opportunity to contest the maintainability of the writ petition and failure to notice the subsequent developments in the interregnum. The Court was dealing with the exercise of powers under Article 226 of the Constitution by the High Court against the proceedings initiated under Section 13 of the SARFAESI Act and relating to an interim order, the Court had also observed that there was no assertion that the grievance fell within the well defined exceptions to the exercise of jurisdiction under Section 226. The said judgment would not benefit the respondents solely for the reasons that in the present case, specific averments have been raised and argued which carved out the well known exceptions as recorded above for exercise of powers under Article 226 of the Constitution.

The next judgment of the Supreme Court in the case of *The State of Uttar Pradesh 7 Ors. v. M/s Kay Pan Fragrance Pvt. Ltd. (supra)*, the Supreme Court was seized of a matter whereby the High Court had entertained the writ petitions at the first instance itself without the petitioner taking any recourse whatsoever, as provided under the statute and in view of the said facts, the Supreme Court held that recourse firstly to be taken to the remedy provided under the Act and entertaining the writ petition directly is an improper exercise of powers. The said judgment may not benefit the argument of the respondents for the sole reason that in the present case, the petitioners have approached the statutory authority for release of goods and the statutory authority has, in fact, passed an order and the validity of the said order is under challenge and the petitioners have not approached this Court at the first instance. Furthermore, the petitioners have carved out a case for exercise of powers under Article 226 under the well known exceptions. Thus, the objections of the counsel for the respondents is liable to be rejected.

Reverting to the validity of seizure order, it is clear from the statute that the power of seizure of goods under Section 110 of the Customs Act

can be resorted to only when the Officer exercising the said power has '*reasons to believe*' that the goods are liable to confiscation. In the present case, admittedly the goods were at Gorakhpur and not seized from any port or any custom area to form a belief that the goods were being imported into India. In the Panchnama, which the counsel for the respondents submits is a seizure memo, the only reasons recorded are that on a prima facie examination, the 'Areca Nuts' loaded in the Truck and as on some of the bags inscriptions in foreign language was written as well as that the 'Areca Nuts' on being taken out from the bags appeared to be of a foreign origin. The 'Areca Nuts' were shown to the local businessman and on the basis of their experience, they said that the 'Areca Nuts' appears to be of foreign origin. Thus, on these three grounds, the action for seizure was initiated.

It is on record in the form of certificates issued by the Ministry of Agriculture and Farmer Welfare as well as by ICAR to the effect that there is no mechanism available to trace the country of origin of 'Areca Nuts' and there is no laboratory test available for the same and further on the basis of examination by naked eye it cannot be conclusively determined with regard to origin of the 'Areca Nuts'. The ICAR has also opined that without there being samples available from the country of origin, it was not possible to determine the country of origin of the seized 'Areca Nuts'. That being the definite opinion of the Department of Agriculture and Farmers Welfare as well as the ICAR, it is difficult to comprehend as to how on the basis of examination by naked eye and the opinion of the traders can lead to forming an opinion that the goods in question namely 'Areca Nuts' are imported. Even otherwise there is nothing on record to form a belief that the goods in question were imported without payment of import duty (even if it is assumed for the sake of argument that the goods were of foreign origin).

On the contrary, in the present case as demonstrated by the petitioner prima facie that the goods in question were purchased in an E-

auction held by the Customs Authorities themselves within the territory of India, the fact that there was evidence in the form of transport documents to show that the goods were being transported within India, the prima facie 'reason to believe' recorded are unsustainable.

It is well settled that the '*reasons to believe*' must be based upon acceptable materials, which have to be more than a moon shine. The material on record overwhelming suggests that the '*reasons to believe*' were based upon the opinion of the local dealers, prima facie examination of the goods by naked eye and inscriptions in foreign language on some bags. We are not inclined to accept the reasons given for forming a belief for exercise of power of seizure are valid in law. The said reasons even fail the test of 'wednesbury principles' as no reasonable person can reach to conclusion of the country of origin of 'Areca Nuts' by mere perusal from naked eye as well as the opinion of the traders, as the Institutes as well as the Ministry have firmly opined that the country of origin cannot be traced by any laboratory method also.

It is also common ground that 'Areca Nuts' is neither prohibited nor notified goods.

The order of the seizure is further bad in law as it has failed to follow the specific instructions contained in Instruction No. 1/2017, which are binding on the respondent authorities.

Thus, the basis for forming '*reasons to believe*' as recorded in the Panchnama are wholly without any acceptable material and there being no prima facie material to suggest that the goods in questions were of foreign origin or were smuggled into India from any Customs Station or that the goods were imported without payment of import duty, we have no hesitation in holding that no valid '*reasons to believe*' existed for exercising the powers of seizure as was done by means of Panchnama dated 17.8.2020. Consequently, the seizure order dated 17.8.2020 is quashed.

Once we have quashed the seizure order dated 17.8.2020, we do not deem it fit to address on the question of validity and legality of the provisional release order inasmuch as once the seizure is held to be bad in law, no confiscation can take place, however, we leave the other arguments raised by the counsel for the petitioners while attacking the provisional release order open.

In view of the findings recorded above, we direct that the respondent authorities shall forthwith release the goods i.e. 'Areca Nuts' as well as the vehicle in question in favour of the petitioner nos. 1 and 2 respectively on the petitioners filing a copy of this order before the authority concerned.

The writ petition is **allowed** in terms of the said order passed.

Copy of the judgment downloaded from the official website of this Court shall be treated/accepted as certified copy of the judgment.

Order Date :- 22.10.2020

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