**(1998) 09 MAD CK 0130**

**In the Madras High Court**

**Case No :** Writ Petition No''s. 14431 to 14434, 17547, 17549, 17562, 17787 and 17946 of 1996 and W.M.P. No''s. 19759 to 19762, 24315, 24337, 24699 and 24964 of 1996

Abdul Rahim Nazeer — APPELLANT

Vs

Union of India (UOI) — RESPONDENT

**Date of Decision :** 11-09-1998

**Acts Referred:**
Customs Act, 1962 — Section 111

**Citation :** (1998) 104 ELT 311

**Hon'ble Judges :** S. Jagadeesan, J

**Bench :** Single Bench

**Advocate :** K. Alagirisami for A.K. Ramachandran, for the Appellant; N.R. Chandran, Addl. Solicitor General of India for V.P. Sengottuvel, Addl. Central Govt. Standing Council, for the Respondent

**Final Decision :** Dismissed

## Judgement

S. Jagadeesan, J.—Though the petitioners are different in each petitions, the respondents are the same and the relief sought for is also identical. Hence, all the writ petitions are taken up for joint disposal with the consent of Counsel for either side. Since the averments made in all the affidavits are identical, there is no need to traverse the same individually in detail.

2. The petitioners have filed these writ petitions seeking for the issuance of a Writ of Mandamus directing the respondents to release the silver, the quantity of which is mentioned in each writ petitions.

3. The case of the petitioners, in short, is that they stayed abroad for more than six months and on their short visit to India, they imported silver pursuant to the Notification No. 172/94, dated 30-9-1994 issued by the Govern- ment of India, the Ministry of Finance (Department of Revenue). As per the terms of the said Notification, an eligible passenger is entitled to import 100 kgs of silver, if he is a passenger of Indian origin or a passenger holding a valid permit issued under the

 

provisions of the Passports Act, 1967 (Act 15 of 1967) and coming to India after a period of not less than six months. The said eligible passenger can bring silver with him or he can import the same as unaccompanied baggage within fifteen days of his arrival in India. Apart from this, the eligible passenger has to pay the duty by way of foreign currency.

4. In these cases, the petitioners stayed abroad for more than six months and during their short visits to India, each of the petitioners imported a quantity of 99 and odd kgs of silver. They paid necessary duties by way of foreign currency and also got clearance from the Customs Authorities. The Customs Authorities also made an endorsement "out of Customs charge". Subsequent to this, the respondents have not released silver to the petitioners. Hence the present writ petitions.

5. The respondents have filed a counter affidavit in W.P. Nos. 14431 to 14434 of 1996 and another common counter affidavit in W.P. Nos. 17547, 17787, 17549 and 17946 of 1996 and a separate counter affidavit in W.P. No. 17562 of 1996. In the counter affidavits, the respondents have stated that the Notification No. 172/94, dated 30-9-1994 has been issued to give benefit to those who stayed abroad for more than six months. But it has been noticed that by virtue of the scheme an organised smuggling of silver in the names of passengers and the payment of duty in foreign currency procured locally in India, it has become a regular business of a few. Silver is a restricted item for the import and cannot be imported by persons other than those covered by the Customs Notifications viz. No. 172/94. If the imports do not cover under the said Notification, then the same is liable for confiscation u/s 111(d) of the Customs Act, 1962. The investigation conducted revealed that the passengers have neither procured silver from their earnings abroad nor they brought foreign currencies for the payment of duty, but only lent their names for monetary consideration.

6. It has further come to light that out of as many as 32 cases, some of the passengers have obtained passports by furnishing fictitious address and some of the passengers are having more than one passport. Some of the passengers had lent their passports for monetary gains by signing power of attorney and some had lent their passports without even signing power of attorney deed. In the cases where the power of attorney deed has not been signed by the passenger, the clearance had been sought for by forging the signature of the said passengers. In view of these illegal activities, it has been decided to send for the petitioners to find out the truth and adjudicate the matter. Show cause notices were sent to the petitioners in W.P. Nos. 14431 to 14434 of 1996 as well as the petitioner in W.P. No. 17789 of 1996. The show cause notice sent to them on more than two occasions returned unserved for one reason or the other and from their conduct, it is dear that they are avoiding the show cause notices.

7. So far as the petitioner in W.P. No. 17547 of 1996 is concerned, he gave a voluntary statement before the Superintendent, Central Excise and Customs, Preventive Unit, Pattukottai disowning the ownership of silver and further, he has

 

no objection regarding the confiscation of the same. Subsequent to the statement, for further enquiry, notices were sent to the petitioner and the petitioner is effectively avoiding the service. Subsequently, he also retracted the statement given by him before the Superintendent, Central Excise and Customs, Preventive Unit, Pattukottai.

8. Similarly, the petitioner in W.P. No. 17562 of 1996 has also given a voluntary statement that he did not purchase the silver and he did not bring foreign currency from abroad for payment of duty, and that he had given his passport for monetary consideration of Rs. 4,000/-. Subsequently, he also retracted his statement. The summon issued for further enquiry have also been returned with the endorsement "absent" or "no such addressee" or "refused" or "unclaimed".

9. The petitioner in W.P. No. 17946 of 1996 also gave the statement that he had no objection for confiscation of silver and he did not know anything about the import of silver in his name. The summons sent to him returned undelivered with the postal endorsement "no such addressee".

10. So far as the petitioner in W.P. No. 17787 of 1996 is concerned, the enquiry reveals that he is absconding and the first two summons sent to him were returned with an endorsement "no such addressee." In the affidavit filed by him before this Court, he has given the same address and hence, there is no doubt that the petitioner is evading the service of summons. As the conduct of the petitioners amounts to import of silver without valid permit i.e. without valid import licence and the benefit of Notification No. 172/94 is being misused, the respondents are entitled to probe into the nature of transactions and if ultimately it is found that the petitioners have genuinely imported silver in order to have the benefit of Notification No. 172/94, tike same will be returned to them. Otherwise appropriate action will be taken. For this, it is absolutely necessary for the petitioners to cooperate with the authorities in completing the adjudication proceedings which are already initiated and are pending. In view of these facts, the relief sought for by the petitioners cannot be granted.

11. Mr. Alagirisami, learned Senior Counsel on behalf of the petitioners contended that the Notification No. 172/94 permits to import a quantity of silver not exceeding 100 kgs for which the duty has to be paid in convertible foreign currency. The defence put forth by the respondents is that the petitioners have not purchased the silver from out of their earnings and hence, there is a doubt with regard to the transaction involved in these proceedings, which cannot be entertained because the said Notification do not contemplate that the eligible passenger should purchase the said quantity of silver out of his own earnings.

12. What are all the requirements of the said Notification is that he should be an eligible passenger which term is also explained in the said Notification stating that he should be a passenger of Indian origin or a passenger holding a valid passport issued under the provisions of the Passports Act who is coming to India after a period of not less than six months of stay abroad.

 

13. In all these cases, all the three conditions have been complied with. In fact the Government has issued notification for the import of gold with identical conditions in Notification No. 177/92-Customs, dated 1-3-1992. The said Notification has been clarified by stating that there is no condition that the source of earnings from which the gold has been purchased has to be verified and further no such condition has been prescribed in the I.R. order or R.B.I. notification. In view of the said clarification, the same condition will be applicable for the import of silver also, as there cannot be two yard sticks for two different notifications, when the purpose of the notification is one and the same.

14. When once the Customs Authorities are satisfied with the import of silver in accordance with the Notification 172/94 and having collected the duty and cleared the same, it is not open to them to detain the goods for further verification. Even if further verification is necessary, it is their duty to release the goods i.e. silver and thereafter can proceed with the further investigation and hence the detention of silver in all these cases is illegal and the relief sought for has to be granted to all the petitioners.

15. Mr. N.R. Chandran, learned Additional Solicitor General on behalf of the respondents contended that because of certain malpractices adopted by the traders in smuggling the silver taking advantage of Notification No. 172/94, the goods have been detained. As stated in the counter affidavit, it has been noticed in some of the cases that the eligible passenger is not the owner of the silver and he has not imported the silver. Further the import duty which has been paid by way of foreign currency has not been brought by the eligible passenger, while he was returning to India and some third person has arranged for the payment of import duty thereon by procuring foreign currency locally.

16. If it is made out by the department that the import duty has been paid out of foreign currency procured within India, then the persons who are involved in the transaction are liable to be prosecuted under the Foreign Exchange Regulations Act. The notification has been issued for the benefit of eligible passengers, who stayed abroad for more than six months and now that a racket is working to make profit out of the same it is for the department to stop such illegal activities. When there is a suspicion regarding the transaction involving import of silver, it is always open to the authorities to verify and satisfy the nature of transaction and they are not bound to release silver as a matter of course. Even though the petitioners need not have purchased silver from out of their earnings in abroad, but still they should be the owners of silver that is sought to be imported.

17. In none of the cases, it has been established that the petitioners are the owners of the quantity of silver, which they want to be released in these proceedings. When the Department has already initiated adjudication proceedings, it is open to the petitioners to appear before the appropriate authority and satisfy him with regard to the genuineness of the transaction and get release of silver. Most of the petitioners have evaded service of summons and filed these writ petitions.

 

18. When the silver, the subject matter in these writ petitions is liable for confiscation, if there is any violation of the Foreign Exchange Regulations Act or the Customs Act, at this stage, silver cannot be released to the petitioners especially when the adjudication proceedings are pending.

19. I have carefully considered the contentions of both the Counsel. In fact, Mr. Alagirisamy, learned Senior Counsel on behalf of the petitioners relied upon the judgment reported in Abdulla Kalingal Andu Vs. Union of India, and contended that before the Bombay High Court, the officials of the respondents conceded that the ownership of gold and silver is not a criterion for its eligibility to be imported by the passenger under the Gold Imports Scheme and thereby the incoming passengers can import gold so long as they satisfy the conditions of stay abroad and "those relating to payment of duty in foreign exchange. On the same principle, the petitioners herein are entitled for the benefit of the release of silver. It is not open to the officials of the same department to take different stand before different High Courts. The judgment of the Bombay High Court would clearly establish what is the intention of the Gold/Silver Imports Scheme and as such, if the three conditions contemplated under the scheme are satisfied, then the authorities are bound to release gold/silver as the case may be.

20. The learned Senior Counsel further relied upon some of the judgments in order to interpret the Notifications and I am of the view that those judgments are not necessary to be discussed in view of the facts of this case.

21. Mr. N.R. Chandran, learned Additional Solicitor General, however, contended that the judgment of the Bombay High Court cited by the learned Senior Counsel for the petitioners cannot be a precedent which this Court can follow. Admittedly, in that case, the Counsel for the respondents had conceded. Even though such a concession has been made on instructions of the departmental officials, still the same cannot be followed as a precedent. I am not proposed to discuss with regard to the nature of the judgment of the Bombay High Court in view of the decision that I am going to take in these matters.

22. Notification No. 172 of 1994, dated 30-9-1994 empowers an eligible passenger to import silver subject to the following conditions:

(a) The duty at the rate specified shall be paid in convertible foreign currency;

(b) the quantity of such silver shall not exceed 100 kgs per eligible passenger; and

(c) Silver is either carried by the eligible passenger at the time of his arrival in India or it is imported by him within fifteen days of his arrival in India.

Now the question for consideration is whether the authorities are bound to release silver, if all the three conditions are complied with. This question has to be considered with reference to the facts stated in the counter affidavit.

23. The respondents have stated that in investigation or on enquiry, it has been

 

brought to light that some of the well established traders catch hold of the ''eligible passengers'' and are using their passports for their personal benefit whereby the silver is being imported by the use of passports of those eligible passengers for which duty is being paid by procuring foreign currency locally.

24. If this aspect is to be taken into consideration, the eligible passenger need not establish the source of purchase for silver. Then the only requirement that has to be complied with is that the duty for such an import shall be paid in convertible foreign currency. When the eligible passenger has been permitted to import silver in terms of the Notification No. 172/94-Customs, dated 30-9-1994, he has to pay the duty in convertible foreign currency. In order to pay the duty, in convertible foreign currency, it is absolutely necessary that the eligible passenger has to bring the foreign currency along with him, when he returns to India. If the foreign currency is to be brought to India, then there must be an endorsement to that effect in the passport of the concerned passenger. If there is no endorsement and if that passenger pays duty in convertible foreign currency, naturally he is duty bound to explain the source for such convertible foreign currency.

25. The possession of foreign currency by unauthorised persons in India is an offence punishable under the Foreign Exchange Regulations Act and also COFEPOSA. If any such illegality is involved in the transactions, naturally it is not open to the authorities to release the goods without completion of the proceedings and without ascertaining the nature of transactions.

26. As rightly pointed out by the respondents in their counter affidavits, if, after the adjudication proceedings, it is found that the petitioners have paid the duty by themselves from out of the foreign currency brought by them on their return to India or at least on their showing that they obtained foreign currency from the authorised persons, then ultimately, the goods will be released. On the other hand, if it is otherwise in view of the illegal nature of the transaction, the authorities are bound to proceed and take further appropriate action and pass final orders depending upon the nature of offence brought out in the enquiry.

27. None of the petitioners have stated that they paid the duty from out of the foreign currency they brought with them on their return to India. Hence, on this question, I am of the view that the adjudication proceedings initiated by the respondent officials are quite proper.

28. The learned Senior Counsel on behalf of the petitioners contended that when once the goods have been cleared by acceptance of duty, then it is not open to the authorities concerned to detain the same. I am unable to agree with the said contention. The Customs Act, FERA and COFEPOSA are all enacted to regulate the foreign trade and also to prevent the dealing in foreign currencies unauthorisedly. The main purpose of these enactments is to safeguard the economy of the country. While so, it is absolutely necessary that the authorities have to strictly enforce the provisions of these enactments.

 

29. By the Gold/Silver imports scheme, the Government wanted to extend the benefit to those who are returning to India after a long stay of more than six months and by virtue of such import, the metals mentioned therein can be made available more freely in India and thereby the cost also can be brought down. The eligible passenger may also have the benefit of a slight marginal profit. If this has been turned to be an wholesale trade by hiring the passport of the eligible passengers by a group of traders, it is but necessary for the authorities to have a control over the transactions. If the import is genuine by the eligible passenger, the authorities have no objection for the release of the same. But wherever the passport of the eligible passenger is being used by the traders in order to import silver or gold to have a large scale trade whereby the foreign exchange racket is established, naturally the authorities are expected to be vigilant to bring down such activities. Otherwise the said enactments are of no use and they remain in book.

30. From the counter affidavit, it is very clear that the respondents have taken action only after coming to know about the malpractices involved in the transactions. In such cases, it cannot be said that by the acceptance of duty, the authorities are bound to release the goods. Till the goods are released, it is open to the authorities to satisfy themselves with regard to the nature of transaction and if they satisfy themselves with regard to the genuineness of the transaction, they have to release the goods otherwise the release of the goods is not compulsory or a routine, when the authorities have decided to adjudicate the matter. The authorities have every right to retain the goods till the adjudication is over. Hence, it cannot be said that as soon as the duty is paid and the respondents having received the same, they are bound to release the goods as a matter of course and after giving the clearance they have no power or authority to retain the same.

31. As pointed out already, even if the petitioners need not establish the source for the purchase of silver, they are bound to establish the source for the payment of duty. The respondents have initiated proceedings mainly on the ground that the duty has been paid in foreign currency procured locally which attracts the provisions of the Foreign Exchange Regulations Act and it is open to the authorities to adjudicate the matter.

32. From the counter, it is very clear that the petitioners herein are evading the service of summons in the adjudication. The petitioners'' contention is that they are not aware about the adjudication proceedings. The respondents'' contention on the contrary, is that after initiation of the adjudication proceedings, these writ petitions have been filed and in some of the cases, after receipt of the show cause notice. To avoid any complicity, I am of the view that the petitioners should participate in the adjudication proceedings. Hence, the petitioners or their authorised agents are directed to meet the third respondent herein, the Additional Commissioner of Customs (Prev.), Customs House, Madras-1 within three weeks from today and receive the summons issued to them and thereafter

 

submit their explanations for the said show cause notices and assist the third respondent herein to complete the adjudication proceedings. The third respondent is directed to complete the adjudication proceedings and pass final orders within three months from the date of the service of the notices to the petitioners or their agents. The petitioners or their agents are directed to extend their full cooperation for such completion of the adjudication proceedings.

33. For the reasons stated above, I am of the view that the silver imported by the petitioners cannot be released at this stage and accordingly, all these writ petitions are dismissed with the above directions. No costs. Consequently, all the above W.M.Ps are also dismissed.