

(2011) 03 GUJ CK 0100
In the Gujarat High Court

Case No : Special Civil Application No. 3031 of 2011

Baboo Ram Harichand

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 29-03-2011

Acts Referred:

Customs Act, 1962 — Section 110, 111, 54, 77

Citation : (2011) 270 ELT 356

Hon'ble Judges : Harsha Devani, J;Bela Trivedi, J

Bench : Division Bench

Advocate : Mihir Joshi and Amar D. Mithani, for the Appellant; P.S. Champaneri and R.J. Oza, SSC, for the Respondent

Judgement

Harsha Devani, J.—Mr. R. J. Oza, learned Senior Standing Counsel tendered copies of various communications as well as copy of an order

of final assessment of one of the Bills of Entry filed by the petitioner in compliance with the order dated 28-3-2011 passed by this Court. The same are taken on record.

2. Heard Mr. Mihir Joshi, learned Senior Advocate with Mr. Amar Mithani, learned advocate for the petitioner and Mr. R.J. Oza, learned Senior

Standing Counsel appearing on behalf of the respondents No. 2 to 5.

3. Assailing the seizure made vide seizure memo and panchnama both dated 7-2-1010, Mr. Joshi, learned counsel for the petitioner submitted that

the seizure is not warranted under the facts and circumstances of the case. Referring to the provisions of Section 110 of the Customs Act, 1962

(the Act) it was submitted that under the said provision the proper officer is empowered to seize any goods liable to confiscation. Insofar as

imported goods are concerned, the same can be confiscated if the same fall

under any of the categories enumerated u/s 111 of the Act and that the present case does not fall within any of the categories enumerated of thereunder. Inviting attention to the Bill of Entry for Home Consumption, at Annexure R-III to the affidavit in reply filed on behalf of the respondents No. 2 and 3, it was submitted that the description and the value of the goods have been correctly stated by the petitioner and that, there is no misrepresentation made in the Bill of Entry. It was urged that all that the petitioner has done is that it has claimed the benefit of exemption under the DFIA licences on the ground that Areca Nut which are the goods imported by the petitioner, are covered by item No. 12(c)(i) of G-7 of the Standard Input and Output Norms (SION) prescribed by the Director General of Foreign Trade. It was submitted that merely making a claim cannot be said to be a misdeclaration so as to fall within the ambit of clause (m) of Section 111 of the Act. As regards the applicability of clause (o) of Section 111 of the Act, it was submitted that the said provision would be applicable in a case where goods are exempted, subject to certain conditions and there is non-observance of any condition, whereas in the present case, so far the goods in question have not been exempted from duty so as to fall within the purview of the said clause. According to the learned counsel, there is no material for the respondent No. 3 to have formed a reason to believe that the subject goods were liable to confiscation for the purpose of resorting to seizing the same under the provisions of Section 110 of the Act.

4. On the other hand, Mr. R. J. Oza, learned Senior Standing Counsel appearing on behalf of the respondents No. 2 to 5 vehemently opposed the petition. Inviting attention to the Bill of Entry annexed with the affidavit-in-reply, it was submitted that the petitioner has claimed the benefit of exemption under the Duty Free Import Authorisation (DFIA) Scheme and has, accordingly, stated in the Bill of Entry that it is totally exempted from the liability to pay any duty. It was submitted that the said assertion in the Bill of Entry would amount to mis-declaration inasmuch as, the goods imported by the petitioner, viz. Beetle Nut/Areca Nut, do not fall under G-7 of SION norms.. It was accordingly submitted that any material misdeclaration on the part of the importer would render the goods liable to confiscation and can be seized u/s 110 of the Act and that the

present case would be squarely covered by clauses (m) and (o) of Section 111 of the Act. It was submitted that once the proper officer has been

satisfied that the conditions precedent for invoking Section 110 of the Act are satisfied, this Court in exercise of writ jurisdiction would not interfere

with the same. Reliance was placed upon a decision of the Supreme Court in the case of *State of Gujarat Vs. Mohanlal Jitmalji Porwal and*

Another, for the proposition that if prima facie there are grounds to justify the belief of the proper officer that the seized goods were liable to

confiscation, the courts have to accept the officers belief whether the court of its own might or might not have entertain the same belief. Courts

should not sit in appeal in regard to this question.

5. Inviting attention Note: 3 below SION norms, it was submitted that Supplementary Vegetable Tanning Agents, are allowed to be imported on

actual user condition and that the petitioner not being an actual user, is even otherwise not entitled to import the said goods under the DFIA

Schenne. The learned counsel further submitted that in the light of the relief claimed by the petitioner, whereby the petitioner seeks a direction to

the respondents to pass assessment orders in respect of the Bills of Entry filed by it, the respondents have finalized the assessment and have

quantified the duty and as such, the petitioner is now liable to pay the duty under the said orders of final assessment, and if at all the petitioner is

aggrieved by the final assessments, it is open to the petitioner to avail of statutory remedy available under the Act. It was also submitted that once

the goods have been seized in exercise of powers u/s 110 of the Act, the remedy available to the petitioner is to make an application for

provisional release of goods seized pending adjudication to the Commissioner of Customs u/s 110A of the Act. It was submitted that in the

circumstances, at this stage, the petitioner is not entitled to grant of any interim relief.

6. This Court has considered the rival submissions advanced by the learned counsel for the respective parties on the question of grant of interim

relief. In the present case the subject goods; viz. consignments of Areca nut have been seized by the respondent No. 3 in exercise of powers u/s

110 of the Act, as according to him the goods are liable to confiscation u/s III(m) and (o) of the Act. Section 111 of the Act lays down the

categories of goods which are liable to confiscation. Clause (m) thereof is attracted if any goods which do not correspond in respect of value or in

any other particular with the entry made under the Act or in the case of baggage with the declaration made u/s 77 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.

7. In the present case, a perusal of the Bill of Entry annexed along with the affidavit-in-reply indicates that the petitioner has described the subject

goods as Beetle Nut Industrial Grade and has also indicated the Tariff Heading under which the same are classifiable. In any case, it is not the case

of the respondents that the value or any other particular in relation to the goods imported by the petitioner do not correspond to the entry made

under the Act. The case of the respondents is that by claiming the benefit of DFIA licences in respect of Areca Nut, which according to the

respondents is not covered by the DFIA licence, the petitioner has made a misdeclaration in the Bills of Entry submitted by it.

8. Thus, according to the respondents the claim of the petitioner that it is entitled to exemption from payment of customs duty under the DFIA

licence in respect of the subject goods imported by it amounts to misdeclaration so as to fall within the ambit of clause (m) of Section 111 of the

Act. In this regard, it may be pertinent to refer to the decision of the Supreme Court in the case of M/s. Northern Plastic Limited Vs. Collector of

Customs and Central Excise, wherein, the Supreme Court has held that whether the assessee is entitled to the benefit of exemption under a

particular notification or not, was a matter of belief of the assessee and not a matter of "any other particular" with respect to the goods. The Court

held that while dealing with such a claim in respect of payment of customs duty, when a declaration is in the nature of a claim made on the basis of

the belief entertained by the assessee it cannot be said to be a misdeclaration as contemplated by Section III(m) of the Act.

9. In the facts of the present case, in the opinion of the Court, prima facie, all that the petitioner has done is that it has made a claim that it is entitled

to exemption of duty in respect of the goods imported by it under the DFIA Scheme on the ground that Areca Nut would stand covered under

Item No. 12(c)(i) of the group G-7 of the Standard Inputs and Output Norms (SION). Insofar as other particulars are concerned, there does not

appear to be any dispute as regards their correctness. In the circumstances, prima facie, in the light of the aforesaid decision of the Supreme Court

in the case of Northern Plastic Ltd. v. Collector of Customs and Central Excise, (supra), it appears that the provisions of clause (m) of Section

111 of the Act would not be attracted in the present case.

10. Insofar as invocation of clause (o) of Section 111 of the Act is concerned, the same provides that any goods exempted, subject to any

condition, from duty or any prohibition in respect of the import thereof under the Act or any other law for the time being in force, in respect of

which the condition is not observed, would be liable to confiscation. In the facts of the present case, according to the respondents the subject

goods are not exempt from customs duty, which is also borne out from the fact that the subject goods have been finally assessed by levying

appropriate rate of duty applicable to such goods if they are not entitled to exemption under the DFIA licence. Thus, if the goods are not exempted

goods, there would be no question of the goods being subject to any condition. The said provision would apply in a case where the goods are

exempted subject to certain conditions and thereafter, there is non-observance of the said conditions. In the facts of the present case, that not

being the position, the said clause would not be applicable to the goods in question. In the circumstances, prima facie, the provisions of Section

111 of the Act would not be attracted in the facts and circumstances of the present case. Consequently, it cannot be said that there is any material

on the basis of which the proper officer could form the requisite belief that the subject goods are liable to seizure u/s 110 of the Act. The decision

of the Supreme Court in the case of State of Gujarat v. Shri Mohanlal Jitmalji Porwal and another, (supra) does not carry the case of the

respondents any further inasmuch as the said decision would be applicable in case where prima facie there are grounds to justify the belief of the

proper officer that the seized goods were liable to confiscation, in which case the court has to accept the officers belief and not in a case like the

present one where there are no grounds to justify the belief of the proper officer that the seized goods are liable to confiscation.

11. In the light of the aforesaid observations, the Court is of the view that the petitioner is entitled to the grant of interim relief in the following terms:

The seizure memo as well as the panchnama both dated 7-2-2011 (Annexure ""A"" collectively, to the petition) are hereby suspended and the

petitioner is permitted to clear the subject goods subject to the following conditions:

(i) The petitioner shall pay fifty per cent of the customs duty assessable under the orders of final assessment on the basis of non-applicability of

DFIA Scheme and to the extent of remaining fifty per cent, the petitioner shall furnish a bank guarantee to be issued in favour of the President of

India through the Commissioner of Customs, Kandla. The petitioner shall furnish Bonds to the extent of the value of the goods seized, which shall

enure till final adjudication, if any, made by the authorities, failing which, the same shall stand discharged.

(ii) The aforesaid payment, furnishing of bank guarantee and bonds shall be without prejudice to the rights and contentions of the petitioner and the

same shall abide by further orders that may be passed in the present proceedings.

(iii) Upon compliance of the aforesaid condition, the concerned respondent shall forthwith return the DFIA licences and Transfer Release Advices

lying with the said respondent to the petitioner.

12. Mr. Joshi, learned counsel for the petitioner submits that upon receipt of the assessment orders, the petitioner would take steps for making

necessary amendments in the petition.

13. On request made by Mr. R.J. Oza, learned Senior Standing Counsel, the matter is adjourned to 11-4-2011 to enable him to file affidavit-in-

reply on behalf of the customs authorities.

14. It is clarified that the aforesaid order has been passed without prejudice to the rights and contentions of the respective parties.

15. Direct Service is permitted.