(1991) 12 MAD CK 0065

In the Madras High Court

Case No : Writ Petition No''s. 15974 and 15975 of 1991 and W.M.P. No''s. 24957, 24958, 25000 and 25001 of 1991 in Writ Petition 13702/91

Bheena Pharma Japadar APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 12-12-1991

Acts Referred:
Customs Act, 1962 — Section 107, 108, 124

Citation : (1992) 40 ECC 79 : (1992) 58 ELT 480

Hon'ble Judges : K.S. Bhakthavatsalam, J

Bench : Single Bench

Advocate : Shri R. Thiyagarajan, for Mr. M. Muthappan, for the Appellant; Shri Habibulla Basha, P. Narasimhan, SCGSC and T. Srinivasamoorthy, ACGSC, for the Respondent

Judgement

1. Both the writ petitions filed by two different firms through the power of Attorney Agent are directed against the summons issued by the fourth respondent on 11-10-1991 u/s 108 of the Customs Act.

2. These writ petitions are off-shoot of earlier writ petition Nos. 13702 and 13703 of 1991. Writ Petition No. 13702 of 1991 was filed for the issue of a writ of mandamus to direct the respondents therein to assess five Bills of Entry relating to Invoice Nos. 932 to 936 dated 7-9-1991 and Bill of Lading No. 232-86442764 dated 8-9-1991 and relating to the goods therein. The said writ petition was filed by M/s. R. V. Chem, through its Power of Attorney Agent D. R. Vora. Writ Petition No. 13703 of 1991 was filed by Bheena Pharma through its Power of Attorney Agent D. R. Vora praying for the vary same relief to direct the respondents to assess the two Bills of Entry relating to Invoice Nos. 930 and 931 dated 7-9-1991 and Bill of Lading No. 232-86442764 dated 8-9-1991. When the abovementioned writ petitions were coming for admission, notice of motion was ordered on 30-9-1991. After hearing the arguments of the learned counsel on both sides, the following order is passed by me on 8-10-1991.

"........ the facts and circumstances of the case and also the fact that the demurrage will be heavy if the goods are detained, I think suffice to direct the fourth respondent to complete the investigation within six weeks from today and thereafter the adjudicating authority can take up the matter for adjudication and pass orders within two weeks from the date of receipt of the report from the investigating authority. Recording the undertaking of Mr. Thiyagarajan, learned senior counsel for the petitioner that the petitioner is prepared to waive the show cause notice, it is open to the respondent to make an adjudication even without issuance of show cause notice. It is made clear that the petitioner will not be allowed to question the adjudication proceedings on any ground, especially violation of principles of natural justice. Ordered accordingly. No costs...."

The nature of goods imported in W.P. No. 15974 of 1991 is Phenylephrine HCL B.P. a bulk drug used in Pharmaceuticals and in W.P. No. 15975 of 1991 the goods involved are Carbamezipine a bulk drug used in Pharmaceuticals. As stated above, a common order in W.P. Nos. 13702 and 13703 of 1991 has been passed on 9-10-1991. After the disposal of the abovementioned writ petitions, summons u/s 108 of the Customs Act have been issued to both the writ petitioners herein, and they arrested the following effect :

"Summons sent to the petitioner u/s 108 of the Customs Act, by post and telegram :

Summons dated 9-10-1991 Bina Pharma R. V. Chem Phenylephrine Carbamezipine 14-10-1991 14-10-91 Telegram and post Telegraphic summon 1-11-1991 1-11-1991 dated 29-10-1991 Summons dated 14-10-1991 22-10-1991 22-10-1991 to representative of the petitioners for appearance on Telegraphic summon to 11-11-1991 11-11-1991 the representative on 6-11-1991 ...."

A reply was received by the respondents from the petitioners expressing their inability to attend the meeting on 25-10-1991. At this stage, the petitioners have challenged the issue of summons u/s 108 of the Customs Act in these two writ petitions.

3. Notice of motion has been ordered by me in both the writ petitions on 15-11-1991. The fourth respondent has filed a counter-affidavit and Mr. Habibullah Basha, the learned senior counsel appears for the fourth respondent along with Mr. T. Srinivasamoorthy, Additional Central Government Standing Counsel. Mr. P. Narasimhan, the learned senior Central Government Standing Counsel appears for other respondents.

4. Mr. R. Thiyagarajan, the learned senior counsel appearing for the petitioner in both cases fairly started his arguments stating that he is not questioning the jurisdiction of the respondents in issuing summons u/s 108 of the Customs Act, but questions only the mode of issue of summons. Learned counsel contends that when affidavits and documents filed in the earlier writ petitions mentioned hereinabove are with the respondents. It is not necessary for them to issue

summons u/s 108 of the Customs Act. According to the learned senior counsel, the issue of summons is not a bona fide and it is a clear abuse of power. The learned senior counsel further argues that the summons show that they have been issued to different bills of entry and as such the summons issued show total non-application of mind on the part of the fourth respondent. The learned counsel further argues that the only question to be decided is with regard to the valuation which has to be made according to Rules 5 to 8 of the Customs Valuation Rules and as such it is not necessary for the respondents to summon the petitioner for any enquiry. According to the learned senior counsel, when the petitioners in both cases have waived the show cause notice and asked for only enquiry, it is not necessary for respondents to issue summons for an enquiry u/s 108 of the Customs Act. The learned senior counsel further refers to certain decisions for the purpose of showing the evidentiary value of an affidavit. For that purpose, the learned senior counsel also refers to a passage in "Sarkar in Evidence" 11th Edition page 1391, and the decisions reported in [1988 (38) E.L.T. 535 at 548], [1988 (36) E.L.T. 369], in [1979 (4) E.L.T. 212] and in Mehta Parikh and Co. Vs. Commissioner of Income Tax, Bombay, . According to the learned senior counsel the dispute is only with regard to the value. According to the learned senior counsel for the petitioner, the issue of summons by the fourth respondent is nothing but to harass the petitioners. The sum and substance of the argument of the learned senior counsel for the petitioner is that when all the materials are available with the respondents, there is no necessity for respondents to issue the summons, which are impugned herein, as if new point is going to be brought out in the enquiry, in pursuance of the summons issued u/s 108 of the Customs Act.

5. Mr. Habibullah Basha, the learned senior counsel appearing for the fourth respondent contends that insofar as the power to issue summons is not challenged in these writ petitions, mala fides cannot be inferred. The learned senior counsel further points out that Sections 174 and 175 IPC provide for a punishment for disobeying summons. The learned senior counsel produced before me the Bill of Entry in original and points out that a portion of the same had been cut off and passed, and as such it is for the petitioners to come before the Authorities concerned and satisfy them with regard to questions that would arise during enquiry. According to the learned senior counsel, the summons have been issued properly and Section 108 of the Customs Act provides for the same. He refers to an unreported decision of a Division Bench of this Court, consisting of V. Ramaswamy, J. (as he then was) and T. Sathiadev, J. (as he then was) with regard to the power of an officer under Sections 107 and 108 of the Customs Act. He further refers to a judgment of a Full Bench of this Court in The Collector of Customs, Madras v. Kotumal Bhirumal Pahlajani (1967-The Indian Law Reports P. 665)..... (C.R.C. No. 1374 of 1965 dated 29-6-1965) for the proposition that statements recorded by enquiring officers of Customs are not inadmissible in later criminal trials by reason of bar u/s 25 of Indian Evidence Act (I of 1872), Section 162 of Criminal Procedure Code. The decision in Balakrishna Chaganlal

Soni v. State of West Bengal (1973) II S.C.W.R. 764 is also referred to by the learned senior counsel with regard to the object and purpose of Section 107 of the Customs Act. Another unreported judgment of a Division Bench of this Court, consisting of the Chief Justice and Srinivasan, J. in Vittainathan and Others v. The Collector of Customs, Coimbatore (W.A. Nos. 1015, 1017 and 1021 of 1987 dated 30-11-1987) reported in 1989 (42) ELT 523 is also referred to.

6. After considering the arguments of Mr. R. Thiyagarajan, the learned senior counsel appearing for the petitioners and of Mr. Habibullah Basha, the learned senior counsel appearing for the fourth respondent and of Mr. P. Narasimhan, the learned Senior Central Government Standing Counsel, appearing for other respondents, I am of the view that there are no merits in the writ petitions. Section 107 of the Customs Act reads as follows :

".. Power to examine persons :-

Any officer of customs empowered in this behalf by general or special order of the Collector of Customs may during the course of any enquiry in connexion with the smuggling of any goods, -

(a) require any person to produce or deliver any document or thing relevant to the enquiry;

(b) examine any person acquainted with the facts and circumstances of the case...."

Section 108 of the Customs Act reads as follows :

".. Power to summon persons to give evidence and produce documents :-

(1) Any gazetted officer of customs shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making in connexion with the smuggling of any goods.

(2) A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned.

(3) All persons so summoned shall be bound to attend either in person or by an authorised agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such documents and other things as may be required :

Provided that the exemption u/s 132 of the Code of Civil Procedure, 1908 (5 of 1908) shall be applicable to any requisition for attendance under this section.

I am not able to agree with the argument of Mr. R. Thiyagarajan, the learned senior counsel appearing for the petitioner that just because some affidavits and documents are available with the respondents, they are prevented from issuing summons u/s 108 of the Customs Act, 1962. I am also not able to accept the contention of the learned senior counsel that summons have been issued with ulterior motives. Equally, I am also not able to accept that it is an abuse of power. When the Authorities have got to adjudicate on the issue and if they feel that an enquiry is needed on the facts and circumstances of the case, I do not think that they are barred from issuing summons u/s 108 of the Customs Act. I do not think the dispensation of show cause notice has anything to do with the issue of summons issued u/s 108 of the Customs Act. The petitioner herein may be anxious for finishing of the matter at the earliest, but at the same time, if the respondent feel that some more information is necessary, I do not think the petitioners can question the issue of summons. So far as this Court is concerned, the scope of the provisions of Sections 107 and 108 of the Customs Act have been considered by a Full Bench of this Court in The Collector of Customs, Madras v. Kotumal Bhirumal Pahlajani (1967) The Indian Law Reports 665) 1967 I M.L.J. 408. In that case, the Full Bench has considered the decision of this Court in Rainbow Trading Co. Vs. Assistant Collector of Customs, Appraising Dept., with reference to Section 171A of the Old Sea Customs Act. In my view, it appears that Section 108 of the Customs Act is enacted to facilitate an enquiry to find out whether an offence had been or is being committed. The Customs Officer is entitled to serve a summons to produce a document or other thing or to give evidence in order to collect evidence. I am also of the view that the power to arrest, the power to detain, the power to search or obtain a search warrant and the power to collect evidence are vested in the Customs Officer for enforcing compliance with the provisions of the Sea Customs Act. The power u/s 108 of the Customs Act itself contemplates an enquiry and as pointed out by the Supreme Court in Percy Rustomji Basta Vs. State of Maharashtra, the Customs Officer making an enquiry u/s 107 or 108 of the Customs Act is not a police officer and the person against whom enquiry is made is not an accused person. A person who is summoned u/s 108 of the Customs Act may have nothing to do with the actual smuggling of goods although he may know other relevant facts regarding such goods. That is why even a person who has nothing to do with actual smuggling of goods can also be summoned in an enquiry u/s 108 of the Customs Act. In an unreported decision of the Division Bench of this Court in Vittainathan and Others v. The Collector of Customs, Coimbatore and Others (W.A. Nos. 1015, 1017 and 1021 of 1987 dated 30-11-1987) reported in 1989 (42) ELT 523 it has been observed as follows :

"... In Balkrishna Chhaganlal Soni Vs. State of West Bengal, it is undoubtedly observed by the Supreme Court that while the normal process of enquiry is facilitated by Section 108, investigatory emergencies are taken care of by Section 107. In the same decision, it was pointed out that the provision of Section 107 was wide in its terms and was designed to facilitate the investigatory process by examination without restriction on person, place or time. This was in the context of the contention that interrogation u/s 107 could be only of the potential delinquent or whether it must be confined only to witnesses who threw light on the delinquent''s contravention of the law. The words ''any person'' in Section 107 were construed as covering every person including a suspect and potential accused. It is not possible for us to construe these observations as laying down that Section 108 can be invoked by the Customs authorities only in a case in which a notice u/s 124 of the Act is issued....."

In that case, the Division Bench further observed as follows :

".. The question as to whether this will be followed up by any proceeding relating to confiscation of goods or imposition of penalty does not arise at the present stage..."

It has been held by this Court in Anil G. Merchant Vs. Director of Revenue Intelligence, Madras and Others,) that there is no right in the person examined u/s 108 of the Customs Act to have a lawyer present at the time of interrogation. In that connection, it was further pointed therein that the person interrogated u/s 108 of the Customs Act may be a person who only knows some facts or about somebody also committing it who is in the nature of a witness unconnected with the offence. In an unreported decision in Anil G. Merchant v. Director of Revenue, Madras (W.A. No. 114 of 1985 etc. dated 21-3-1985) a Division Bench of this Court had an occasion to go into the scope of enquiry made by the Customs Officers u/s 107 of the Customs Act and also with Clause (3) of Section 108 and held as follows :

".. Section 107 of the Customs Act enables an officer of Customs empowered in this behalf during the course of an enquiry in connection with the smuggling of any goods to require any person to produce or deliver any document or thing relevant to the enquiry and to examine any person acquainted with the facts and circumstances of the case. Section 108 gives power to any Gazetted Officer of Customs to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making in connection with the smuggling of any goods. Clause (3) of Section 108 further provides that all persons so summoned shall be bound to attend either in person or by an authorised agent, as such officer may direct and that all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such documents and other things as may be required. These provisions, therefore, enable a Customs Officer to summon any person to give evidence or for the purpose of interrogation in connection with any enquiry which such officer is making in connection with any enquiry which such officer is making in connection with the smuggling of any goods. Neither these provisions in Section 107 nor Section 108 nor any other provision in the Act or the rules framed thereunder restrict the right of the Customs Officer to require the person to appear only at stated hours. In the nature of things, therefore, it will have to depend on the facts and circumstances of the case and therefore the only thing which we can expect is that the time and place shall be reasonable and fair having regard to the facts in that particular case. Normally it is expected that such interrogation or examination will be done during the normal office hours or during day time. However, we could not say that in every case it could be done during day time or during office hours. If the circumstances demand an examination or interrogation immediately or during the night subject to all other reasonable facilities provided to the person interrogated or examined it could be done at any time. The other thing which is expected is that the examination should be conducted in such a way consistent with human dignity and comfort and not inhuman, unreasonable or unfair. The provisions in the Customs Act do not also enable the Customs Officers to extract, coerce or use any third degree methods as mentioned by the counsel for the petitioners in the matter of examination or interrogation in exercise of powers u/s 107 or Section 108. The section does not enable the Customs Officers to take any person to custody. When a person is obliged to attend in pursuance of the summons issued u/s 108 and state the truth he could not be considered while he was examined or interrogated as in the custody of the Customs officials. In such a situation as he is expected to appear before the officers in obedience to the summons and in compliance with law, he cannot be considered to be a person taken into custody. Taking them as captive prisoners, coercing them to give false statements or depriving them of elementary facilities are not authorised by the Act. It is needless to expressly prohibit such actions. If and when the officers violate any of these principles or coerce them to give false confessions, it would always be open to the person concerned to complain of the same wherever those statements are sought to be used and if the allegations are established, certainly nobody could rely or take note of those statements. In this connection we may note that a Full Bench of this Court in the decision reported in Roshan Beevi v. Joint Secretary to the Government, Tamil Nadu Public Department etc. 1983 Law Weekly (Crl.) p. 289 in paragraph 48 observed : "If, in a given case, the Customs official detains any person required or summoned under the provisions of the Customs Act for a prolonged period, even exceeding twenty-four hours, or keeps him in closed doors as a captive prisoner surrounded by officials or locks him in a room or confines him to an office premises, he does so at his peril because Ss. 107 and 108 of the Customs Act do not authorise the officer belonging to the Customs Department to detain a person for a prolonged custody and deprive him of the elementary facilities and privileges to which he is entitled. In such a situation, the officer must be held to have over-stepped his limits, and any confessional statement obtained from such a person by keeping him in a prolonged custody has to be recorded with grave suspicion, because there is always room for criticism that such a confession might have been obtained from extorted mal-treatment or induced by improper means. As pointed out by the Supreme Court in Nathu Vs. State of Uttar Pradesh, , the prolonged custody may stamp the confessional statement so obtained as involuntary one, and the intrinsic value of such a statement may be vitiated. The question whether a person has been kept in prolong custody is a question of fact, which has to be carefully considered against the background of the circumstances disclosed in each case. So, it is neither advisable nor possible to lay down any inflexible standards for the guidance of Courts, though in the ultimate analysis, it is the Court which is called upon to decide the circumstances of a particular case..."

In Balkrishna Chaganlal Soni v. State of West Bengal (1973) II S.C.W.R. 764 the Supreme Court considered the scope of Section 107 of the Customs Act and Krishna Iyer J. observed as follows : (at p. 775)

".. But proof of this depends in good measure on the statement given by the appellant to the Customs Officers the same day under S. 107 of the Customs Act. This provision is wide in its terms and is clearly designed to facilitate the investigatory process by examination without restriction on person, place or time. Lest it should be misuse the law is choosy and requires the empowerment of Customs Officers by general or special order of the Collector to exercise these larger powers. Does S. 107 enable the interrogation of even the potential delinquent or must it be confined only to witnesses who throw light on the delinquent''s contravention of the law ? "Any person" in the section certainly covers person including a suspect and potential accused. These words of the statute have to be interpreted in the light of the policy and purpose of the law. The objection of S. 107, located in the neighbourhood of S. 108, indicates that while the normal process of enquiry is facilitated by S. 108, investigatory emergencies are taken care of by S. 107. May be situations arise where the failure to question a witness quickly may mean irretrievable loss of a valuable material and S. 107 meets this need. The context in which the words "any person" occur, the object of the provision and the policy underlying Ch. XIII of the Customs Act assure relevance and become material in the construction of the text. Nor are we faced with any difficulty on account of Art. 20(3) of the Constitution since the examination is not of an accused person. Nor is there any warrant for saying that the section excludes, as a legal limitation, the Customs House as a venue for such examination. "Any place" in the section obviously means any place and a contrary view is so untenable that counsel did not seriously urge it. Indeed, often times it is more convenient for all concerned to move to the quiet and convenience of an office for recording statements. A businessman may be wantonly humiliated if he is arrested and kept in the bazaar and interrogated at length in the presence of a crowd which is sure to collect. The provision is plain that an authorised Customs official is entitled to examine any person at any time, at any place, in the course of an enquiry...."

So, considering the catena of decisions cited supra, with regard to scope of Sections 107 and 108 of the Customs Act, I think the contention raised by learned senior counsel appearing for the petitioners is devoid of merits. As I have already stated simply because some documents and affidavits are with the respondents, I am of the view in no way the Department is barred from issuing summons u/s 108 of the Customs Act. I am fully satisfied, on the facts and circumstances of the cases the issue of summons by respondents is perfectly right and I am not able to accept the argument of Mr. R. Thiyagarajan, the learned senior counsel appearing for the petitioners that the mode of issue of summons is wrong. What is the evidentiary value of affidavit and how far it can be relied upon cannot be questioned before me at this stage. Insofar as the respondents Department wants some more information, I do not think the petitioners can come to this Court and pray this Court to issue a writ of mandamus exercising its discretionary power under Article 226 of the Constitution of India to stall the proceedings. Virtually, what the petitioners pray from this Court is a direction so as to interdict with the enquiry to proceed further or to adjudicate the matter in full. I do not think the petitioners'' request can be acceded to, since I am of the view that this Court should not exercise its discretionary jurisdiction under Article 226 of the Constitution of India to interdict investigations in such matters. I am not able to accept the contention of the learned senior counsel for the petitioners that the respondents Department can enquire into the matter with the documents available with them. May be the Department is in need of some more information to enquire into the matter in detail. At any rate, anything cannot be decided at this stage and it is pre-mature in my view. Since I take the view that there is nothing wrong in issuing summons u/s 108 of the Customs Act, no necessity arises in my view, to refer to all the other decisions referred to by Mr. R. Thiyagarajan, the learned senior counsel for the petitioners, with regard to the evidentiary value of the affidavit. I am fully satisfied that the present attempt on the part of the petitioners is nothing but an abuse of processes, when cases sought to be made out by the respondents Department on the petitioners giving evidence on the goods imported. However, it is open to the petitioners to appear before the respondents Department and give evidence as required by the officer concerned. There are no merits in both writ petitions and accordingly, they are dismissed. However, there will be no order as to costs.

The respondents Department filed applications praying for extension of time for completion of investigation. The time for completion of investigation is extended upto 31-1-1992. If the petitioners want to co-operate with the Department it is well open to the Department to complete the enquiry even before that time set out by this Court.

