(1971) 07 CAL CK 0005

In the Calcutta High Court

Case No : Civil Rule No. 286 (W) of 1968

Chunilal Damani APPELLANT

Vs

Collector of Central Excise and Customs RESPONDENT

Date of Decision : 30-07-1971

Acts Referred:

Customs Act, 1962 — Section 110(2), 111, 112, 123, 123(2)
Foreign Exchange Regulation Act, 1947 — Section 8(1)

Citation : (1973) 1 ILR (Cal) 707

Hon'ble Judges : P.K. Banerjee, J

Bench : Single Bench

Advocate : G.N. Roy, for the Appellant;Balai Chandra Roy, for the Respondent

Judgement

P.K. Banerjee, J.—The Petitioner M/s Chunilal Damani is a registered partnership firm and is a registered dealer in gold. It is alleged that on or about November 22, 1966, M/s Chandulal Khusalchand of Bombay, a registered gold dealer, entered into two separate transactions with the Petitioner firm and sold to the Petitioner firm for valuable consideration 1,013-200 gms. and 1,008-700 gms. of gold ornaments under Bills Nos. 4191 and 4193 both dated November 22, 1966. The said ornaments were despatched through postal department by parcel from Bombay to Calcutta declaring the contents correctly. On receipt of an intimation from the Burrabazar Post Office the Petitioner No. 2 went to the Post Office to take delivery of the parcels in. question, but the Petitioner was prevented from taking delivery of the said parcels and was directed by some Customs officers to make arrangements for examination of the contents of the parcel. The Petitioner, it is alleged, declared the contents and produced the original of the said bills of the supplier. The Petitioner took delivery of the parcel from the Post Office and made over the same to the Customs officers for verification of the contents. It is alleged that on verification of the parcels the description given in the original bills was found to be correct. The Customs officers, however, on November 29, 1966, seized the gold on the allegation that they apprehended that the said ornaments were of gold illicitly imported from the foreign country. It is stated that the seizure was made on November 29,1966, but the Respondents did not serve any notice on the Petitioner u/s 124(a) of the Customs Act, 1962, within six months from the date of the illegal seizure. It is further stated that the Respondent is not entitled to retain the gold beyond six months without an order of extension u/s 110(2) of the Customs Act, 1962. It is alleged that by two letters both dated May 24, 1967, it is found that the Customs authorities have extended the period of seizure by two months from May 28, 1967, in exercise of powers u/s 110(2) of the Customs Act, 1962. It is submitted by the Petitioner that the said extension was made without giving an opportunity of being heard to the Petitioner and, as such, the order of extension was illegal. Be that as it may by letter dated July 25, 1967, the Petitioner was served with a notice u/s 124 of the Customs Act which is in the following terms:

Collector of Central Excise & Customs, West Bengal, Calcutta

Show Cause Notice

Registered with A/D.

Dated 25th July, 1967

C. No. VIII(10)17-CUS/WB/67/16504C

To Messrs Chunilal Damani, 12 Monohar Das Street, Calcutta.

Whereas on the evidence indicated in the enclosed sheet there is reason to believe that the gold of foreign origin in the form of crude and unfinished ornaments weighing 2021-900 grammes as mentioned in the enclosed schedule have been imported into India without a valid Import Permit from the Reserve Bank of India, as required under Government of India, Ministry of''Finance Notification No. 12(11) F. 1/48 dated 25.8.48 (as amended) issued u/s 8(1) of the Foreign Exchange Regulation Act, 1947.

(2) Accordingly, the said foreign gold in the form of crude and unfinished ornaments are liable to be confiscated u/s 111(d) of the Customs Act, 1962.

(3) And whereas you were concerned with and/or abetted possession/removal/purchase/disposal of the goods or otherwise dealt with the goods knowing or having reasons to believe that the same were liable to confiscation and you are liable to a penalty u/s 112 of the Customs Act, 1962.

(4) You are, therefore, called upon to show cause before the undersigned within ten days from the date of receipt of this Notice why penalty should not be imposed upon you and the said gold in the form of crude and unfinished ornaments should not be confiscated under the aforesaid provisions of the Customs. Act, 1962.

(5) You are informed that u/s 123 of the Customs Act, 1962, the burden of proving that the seized gold in the form of crude and unfinished ornaments are not smuggled is on you.

(6) All evidence, documentary or otherwise, in your possession should be produced in support of your explanation within the period specified above failing which the case will be decided ex parte on the basis of available records without any further reference to you.

(7) You should state at the same time whether you desire to be heard in person or through your authorised representative in your defence by the said authority. On receipt of your reply, if necessary, a time and date will be fixed and communicated to you.

Sd/- -D.R. Kohli Collector of Central Excise fc Customs, West Bengal, Calcutta

End. 3

Along with the notice there was a brief outline of the evidence which has been collected by the Customs authorities against the Petitioner. The Petitioner showed cause. The Petitioner further requested the Respondent No. 2 to make arrangements for ensuring the personal attendance of the witnesses who had made statements behind the back of the Petitioner, be produced at the adjudicating proceeding by letter dated December 28, 1967. In reply to the said letter the Assistant Collector of Customs (Technical), West Bengal, Calcutta, by letter dated January 4, 1968, intimated that the Collector had rejected the prayer, for examination of the witnesses. Being aggrieved by the order dated May 24, 1967, extending the period of seizure by two months and show cause notice dated July 25, 1967, and the proceeding with the adjudication on the basis thereof, the Petitioner moved this Court and obtained the present Rule.

2. In the affidavit-in-.opposition filed by the Respondent it is, inter alia, stated that the ornaments seized were crude and unfinished and the weighment receipt did not mention the description of the said ornaments. It is alleged that the Petitioner stated the name of the sender of the parcels, but the Petitioner could not explain the source of supply of the said gold ornaments from whom the said sender got them. It is stated further that the crude and unfinished ornaments were found inside the parcels. It is stated that as the crude and unfinished ornaments were found inside the parcels they, were liable to confiscation and the Respondent seized them legally. The Respondent reiterated that the gold was legally seized. It. is stated that the samples of the seized crude and unfinished ornaments were sent to the Calcutta Mint for assay. These steps took considerable time and, as such, notice u/s 124 of the Customs Act could not be given to the Petitioner within six months from the date of seizure. As there was sufficient cause for extension of time, a representation for extension of time was made to the Respondent No. 2, that is, Collector of Customs, by the Customs Department, who on being satisfied that there was sufficient reason for such extension, extended the time by two months from May 28, 1967, in exercise of his power under the proviso to Section 110(2) of the said Act. It is alleged that the Petitioner is not entitled to get the copy of the request for extension of the period or any notice thereof or to any hearing of the matter. It is alleged that it

was purely an administrative matter as enjoined by the Customs Act and the Respondent No. 1 and/or 2 extended the period on his personal satisfaction that there was sufficient cause for doing so.

3. It is stated-that the show cause notice is valid one and there is no infirmity in the show cause notice. It is further stated that the Respondent No. 1 and/or 2 had not made up his mind nor had he come to any definite conclusion and prejudged the issue before the completion as alleged. On the basis of this pleading the parties went to trial.

4. Mr. Ganendra Narayan Roy on behalf of the Petitioner, firstly, contended that the order dated May 24, 1967, which was communicated by letter dated May 27, 1967, by which the Respondent No. ''l had extended the time under sv 110(2) by two months is illegal as the said matter was disposed of without hearing the Petitioner at all. Mr. Balai Chandra Roy contended that it was not necessary to hear the Petitioner in extending the time of retention of the gold beyond the period of six months as assaying by the Calcutta Mint of the gold seized took time, and, therefore, there was sufficient reason for such extension. It appears that in order to pass ah order u/s 110(2) of the Customs Act it is incumbent on the part of the authorities concerned to hear the parties. As the right of restoration of the gold seized after a period of six months is over, the Petitioner gets a vested fight to get back-the gold, which is defeated if an extension is granted; and such vested civil right cannot be defeated-by an ex parte order of extension by the Collector behind the back of the Petitioner without giving the Petitioner an opportunity, of being heard. This point is. now concluded by. the judgment of the Supreme Court reported in Assistant Collector of Customs Vs. Charan Das Malhotra, . While considering a similar question the Supreme Court'' held that in order to pass an order u/s 110(2) of the Customs Act it is incumbent on the part of the Collector of Customs or the authorities concerned to hear the parties. It has been held by the Supreme Court as follows:

that the power under the proviso Section 110(2) was quasi-judicial or at any rate one requiring a judicial approach and consequently an opportunity of being heard ought to be given to the Petitioner before order of extension was made.

In the said case it has been held, after the expiry of six months the Petitioner has vested civil right to get back his gold. The Supreme Court upheld the order of the Calcutta High Court directing the restoration of the gold seized.

5. The next question which is argued by Mr. G. N. Roy is that, even before the show cause notice was issued, the authorities concerned had already made up their mind about the guilt of the Petitioner inasmuch as in the brief outline of the allegation, it appears from the last portion thereof (para. 11), it is stated that they have already made up their mind that the gold was illicitly imported and that being the gold which was seized and having a fineness of 999.3 and 999.9 which- are never manufactured in our country, it is foreign gold imported illicitly, and u/s 123(2) if the Seizing officer has reason to believe that this is smuggled

gold the onus is on the Respondent to prove that this is not so. It is argued by Mr. Roy that it is exactly what has been done in para. 11 of the show cause notice. If the Respondent at the adjudicating proceeding could satisfy the Adjudicating officer that the gold was not illicitly imported, then he would be entitled to get back the gold and there would be no confiscation at all.

6. Reading the relevant para. 11, on which the argument is based, it appears to me that the authorities concerned are satisfied that the gold was smuggled gold and it further appears that before the show cause notice the mind has already been made up by the authorities concerned. A similar question arose before the Division Bench presided over by D. N. Sinha C.J. in Charandas Malhotra Vs. Assistant Collector of Customs and Superintendent Preventive Service and Others, . In the said case some watches were seized and a show cause notice was issued. In the show cause notice in para. 9 the Adjudicating officer stated that the Petitioner had failed to prove the legal importation of the remaining 110 pieces of watches. The Division Bench of the Court was of the opinion that such statement only, proved that the Respondents had already made up their mind. D.N. Sinha C.J. held in para. 9 as follows:

Not only are the charges made vague and unspecific, the Additional Collector of Customs in para. 4 of the notice says that the. Appellant had ''failed to prove the legal importation of the remaining 110 pieces of watches''. In other words, the Adjudicating officer has already, made up his mind although Section 124 says that he should not do so without giving an opportunity to the person affected of making representation against the proposed grounds of confiscation or penalty. The object of a notice u/s 124 is to give to the person affected an opportunity td prove legal importation and not to disprove a conclusion already arrived at by the authorities.

7. In my opinion, the said observation applies in all forces in this case also. The Adjudicating officer, Collector of Central Excise, who issued the notice, along with the brief outline of the evidence stated in para. 11 that

the gold of which the crude and unfinished ornaments were made of were illicitly imported into India from a foreign country in violation of the Government of India Notification No. 12(11) F.1/48 dated 25.8.48 (as amended) issued u/s 8(1) of the Foreign Exchange Regulation Act, 1947.

Therefore, it appears to me that the Adjudicating officer has already made up his mind that the gold which has been seized was illegally imported and there was nothing to disprove the conclusion already arrived at. The opportunity of showing cause which is given u/s 124 of the Customs Act must be a real one. If the authority has already made up his mind about the guilt of the offence of illicit importation of the gold, it cannot be said that the Petitioner had an opportunity to show cause against the ground of confiscation u/s 124 of the Customs Act. It is given to the authorities concerned to set out the ground why the proposed action is contemplated in the said show cause notice. The authority, the

Adjudicating officer, must have an open mind so that the Petitioner may produce such evidence to disprove the charges or the grounds and to prove that the grounds are non-existent, but if the Adjudicating officer has already made up his mind, then the opportunity of being heard or making representation becomes idle formality.

8. In that view of the matter, in my opinion, the show cause notice cannot stand and must be quashed. The Rule is, therefore, made absolute. The order of extension dated May 24, 1967, passed by the Collector of Customs u/s 110(2) proviso is quashed. The show cause notice dated July 25, 1967, is also quashed. The Respondent is directed to restore the gold seized to the Petitioner forthwith.

9. The operation of the order is stayed for six weeks from to-day.