

**(2009) 10 BOM CK 0111**

**In the Bombay High Court**

**Case No :** Customs Application No. 41 of 2003

Commissioner of Customs (Import)

APPELLANT

Vs

Gem Nuts and Produce Exports Co. Pvt. Ltd.

RESPONDENT

---

**Date of Decision :** 14-10-2009

**Acts Referred:**

Customs (Attachment of Property of Defaulters for Recovery of Government Dues)  
Rules, 1995 — Rule 3, 4  
Customs Act, 1962 — Section 128, 129A, 129DD, 142, 142(1)

**Citation :** (2010) 2 BomCR 360 : (2010) 251 ELT 353

**Hon'ble Judges :** Rebello F.L., J;Karnik D.G., J

**Bench :** Division Bench

**Advocate :** P.S. Jelti, for the Appellant; V. Shridharan and Jai Sanghvi,  
instructed by DSK Legal, for the Respondent

---

**Judgement**

Rebello F.L., J.—This is an application by the Revenue praying that on the following question the learned Tribunal be directed to make a reference to this Court. We may gainfully reproduce the said question.

Whether the CEGAT is correct in holding that the earnest money received before 15th June, 1998 (date of passing of the adjudication order by AC/Drawback) by M/s. Gems Nuts and Produce Exports Co. Pvt. Ltd. from M/s. Utopian Financial Solution Pvt. Ltd. would not fall within the scope of Rule 4 (Customs Attachment of Property of Defaulters for Recovery of Government Dues) Rules, 1995 on the ground that "the liability of Bangard and his companies to repay the money of drawback that he has received arose only after the order of 15th June, 1998 of the Assistant Commissioner", the fact that such money was fraudulently obtained not having been disputed by the CEGAT.?

2. In order to answer the issue, a few facts will have to be noted. The respondent is an owner of a building. One Shri Nawal Kishore Bangard through his three firms fraudulently obtained drawback amounts. Shri Bangard from the money so received parted with the substantial part of the money in favour of a relative

Smt. Vinita Lakhotia. Thereafter Smt. Vinita Lakhotia from the sum of Rs. 3 crores received by her had paid an amount of Rs. 90.93 lacs towards making payment of earnest money to the respondent herein for the purchase of office premises at 125, Free Press House, Nariman Point, Mumbai.

3. The applicant on coming to know of the fraudulent act of Shri Nawal Kishore Bangard initiated proceedings for recovery of the drawback amount fraudulently received. The Commissioner of Customs by his order dated 11th June, 1998 was pleased to confirm the demand of drawback in terms of the order. In the order it was also noted that all proceeds and/or deposits against the properties surrendered amongst others by Smt. Vinita Lakhotia shall be appropriated and adjusted against the demand through prescribed procedure.

4. By an order of attachment dated 10th December, 1998 in respect of the persons set out therein which did not include the respondent herein, it was ordered that they are prohibited and restrained until further orders from transferring or charging the property in any way and that all persons were prohibited from taking any benefit under such transfer or charge. This included the office at 125, Free Press House, Nariman Point, Mumbai. In the said order of attachment, the name of the owner was shown as the respondent herein along with M/s. Ankit Constructions Pvt. Ltd. and M/s. Utopian Financial Solution Pvt. Ltd. We may at this stage mention that the order of attachment was also passed against M/s. Utopian Financial Solution Pvt. Ltd.

5. The respondent aggrieved by the said order filed a petition before this Court being Writ Petition No. 2517 of 1998. The same came to be disposed of by an order dated 1st February, 1999. A learned Division Judge of this Court was pleased to hold that there are disputed questions of fact. It further observed that Section 128 of the Customs Act inter alia provides that any person aggrieved by a decision or order passed under the Act by an officer of customs lower in rank than the Commissioner of Customs may appeal to the Commissioner (appeals). As in the case an appeal lay and as the respondent had an alternative efficacious remedy, the Court refused to entertain the writ petition.

6. The respondent along with M/s. Ankit Constructions Pvt. Ltd. and Kishore Jagjivandas Tanns preferred a petition for Special Leave to Appeal before the Supreme Court. Leave was granted and Civil Appeal No. 4728 of 1999 came to be filed which was disposed of by an order dated 24th August, 1999. By that order, the respondent No. 1 and M/s. Ankit Constructions Pvt. Ltd. were directed to deposit an amount of Rs. 90.93 lacs within 6 weeks from that date and on such deposit, the attachment levied on the premises which was a subject matter of the present application was to stand raised forthwith. From the said sum, the respondent pointed out that it had no claim on the sum of Rs. 45,46,500/-. Liberty was given to the respondent to withdraw that amount subject to the rights of M/s. Utopian Financial Solution Pvt. Ltd., if any, which could be established by the respondent No. 3 therein in appropriate proceedings. The balance amount was to be invested in fixed deposit. Further, liberty was given to

the respondent to take appropriate proceedings which it may be entitled to in law for challenging the orders dated 24th November 1997, 2nd December 1997 and notice of attachment dated 10th December 1998 as also the order of attachment dated 10th December 1998 against the Assistant Commissioner of Customs (the respondent No. 2 in the appeal before the Supreme Court).

7. Subsequent to that, the respondent and Anr. were pleased to prefer an appeal to the Commissioner of Customs (appeals). The stand of the respondent was that the order of attachment was without authority of law. They had entered into an agreement for sale of the property with one M/s. Utopian Financial Solution Pvt. Ltd. The agreement was terminated by a subsequent letter of 10th January 1998. The purchaser was informed of forfeiture of earnest money deposit. There were no customs dues outstanding against them and further the ownership of the property had not passed on to the proposed buyer against whom the customs dues may be outstanding and as such the order of attachment was without jurisdiction.

8. The learned Appellate Authority recorded a finding that M/s. Utopian Financial Solution Pvt. Ltd. had paid Rs. 90.93 lacs to M/s. Gem Nuts & Products Exports Co. Pvt. Ltd. (respondent herein) as earnest money for purchase of flat as per the agreement for sale dated 17th July 1997. It was also noted that Smt. Vinita Lakhotia and her minor son Abhishek Lakhotia were the only two directors of M/s. Utopian Financial Solution Pvt. Ltd. The respondent had called upon M/s. Utopian Financial Solution Pvt. Ltd. to complete the transaction and make payment of the balance consideration which was not replied to by M/s. Utopian Financial Solution Pvt. Ltd. In the meantime, on 24th November 1997 the Assistant Commissioner demanded the said earnest money paid by M/s. Utopian Financial Solution Pvt. Ltd. claiming that it was rightly due to the Government. It has also come on record that on 10th January 1998 the respondent terminated the agreement for sale and forfeited the earnest money as per the sale agreement. The learned Appellate Authority was pleased to record that considering the facts set out, the respondent could not contend that they were not aware about the source of money and fraud committed by the persons who had paid them the money and in these circumstances dismissed the appeal.

9. The respondent aggrieved preferred an appeal before the CEGAT. After considering the various provisions, the learned Tribunal observed that the order of the Commissioner (appeals) proceeded solely on the basis that the earnest money paid by Smt. Vinita Lakhotia was out of the money wrongly received as drawback and therefore the amount was liable to attachment. It noted the contentions but did not answer them as in the opinion of the Tribunal, the attachment was not covered by the Rules. It noted that the applicant was aware of the fraud only on 16th October 1997. The agreement was entered into on 17th July 1997 and the earnest money was paid on the said date. As such, on that date the respondent could not have known that the money was tainted or illegally obtained. Further, there was nothing on record to suggest that the

applicant knew that the money was fraudulently received. It proceeded to hold that the sum the respondent received prior to this date therefore would not fall within the scope of the order passed under Rule 4 and hence recoverable in terms of the Rules and accordingly allowed the appeal and set aside the order of the Commissioner (appeals).

10. Reference by the Revenue is in respect of the said order. We may only reiterate as noted by the Tribunal that the agreement for sale was entered into on 17th July, 1997 and the earnest money was paid on the same date. The order of termination of the agreement and forfeiture of the earnest money deposit was communicated by letter of 10th January 1998. The notice of attachment with a copy to the respondent is dated 10th December, 1998. It is therefore clear that the termination of agreement and forfeiture of the amount took place much earlier to the order of attachment. The respondent itself came to know of the fraud on 16th October, 1997.

11. At the hearing of this application, on behalf of the applicant his learned Counsel has submitted that the application raises questions of vital importance and there are substantial questions of law. It is submitted that the learned Tribunal misdirected itself in law in holding that as the respondent had received the amount after the order of 11th June, 1998 and hence not within the scope of the order passed under Rule 4 and hence not recoverable in terms of the Rules. The sum had been paid by the purchaser and received by the respondent long before the notice was issued. Learned Counsel points out that there is no dispute that the amount paid to the respondent pursuant to the agreement to sale was out of the money received by Smt. Vinita Lakhotia. In these circumstances, the applicant acted within jurisdiction in attaching the property for recovery of the amount paid by Smt. Vinita Lakhotia through M/s. Utopian Financial Solution Pvt. Ltd., of which she and her minor son were directors. It was also contended that the Appellate Tribunal would have no jurisdiction to entertain the appeal and as such on that ground also this Court should call for a reference.

12. On behalf of the respondent, their learned Counsel submitted that the Tribunal has rightly rejected the claim of the applicant and in these circumstances, the High Court would be fully justified in declining to call for a reference from the Tribunal.

It is also submitted that on the issue of jurisdiction the matter stands concluded. It is pointed out that another person similarly situated M/s. Premium Intertrade Pvt. Ltd. had filed a writ petition being Writ Petition No. 231 of 2006 wherein also a contention was raised that the appeal was not maintainable u/s 129-A of the Customs Act. A Division Bench of this Court by its order dated 18th March, 2006 was pleased to hold that the petitioners before it could file an appeal to the Appellate Tribunal u/s 129-A of the Customs Act. Against the order of the Commissioner of Customs (appeals), a revision was filed u/s 129-DD of the Customs Act. That was dismissed by the Secretary on the ground that it was not maintainable and that is how a petition came to be filed before this Court. This

Court on consideration of the provisions was pleased to hold that an appeal would lie u/s 129-A of the Customs Act. In our opinion, this answers the issue insofar as jurisdiction is concerned.

12-A. We then come to the question as to whether the applicant has made out a case for reference. We may gainfully refer to a judgment of the Supreme Court in *Commissioner of Income Tax, Punjab Vs. Chander Bhan Harbhajan Lal*, where the Supreme Court was pleased to observe that the question of law raised is not substantial and the answer to the question is self-evident. Similarly, in *Commissioner of Income Tax, West Bengal Vs. Indian Mica Supply Co. P. Ltd.*, the Supreme Court was once again pleased to observe that when the matter is self-evident the High Court was fully justified in declining to concede the prayer for reference. Therefore, if there is no substantial question of law and even if there be a substantial question of law if the matter is self-evident, the High Court need not ask for a reference.

13. Having so said, we may now consider whether the matter is self-evident. As earlier set out, there is no dispute that the respondent is not defaulters. The entire contention has been that the respondent has received monies from a defaulter and in these circumstances, the applicant was entitled to attach the property of the respondent. There is also no dispute as according to the applicant itself, the respondent is the owner of the property. Could therefore the amounts, which had passed into the hands of the respondent out of the purported money fraudulently received by way of drawback, be attached. It is also not disputed that the respondent had terminated the agreement and forfeited the earnest money. Out of the money deposited, the respondent returned the sum of Rs. 45,46,500/-, over which they have no claim. In respect of the balance amount, the Supreme Court had granted liberty to the respondent to take appropriate proceedings including for setting aside the order of attachment.

14. The provision for recovery of Government dues is as contained in Section 142 of the Customs Act. In the instant case, the notice of attachment has been placed before us on record today and that shows attachment is sought in terms of Sub-cause (ii) of Clause (c) of Section 142(1) of the Customs Act read with Customs (Attachment of Property of Defaulters for Recovery of Government Dues) Rules, 1995. At the outset itself, we may point out that insofar as the Rules are concerned, a defaulter has been defined to mean any person from whom government dues are recoverable. For attaching the property under the said Rules, a certificate has to be issued under Rule 3 setting out the amount due from the person (defaulter). In the instant case, the learned Counsel for the Revenue fairly conceded that they have not invoked this Rule. Therefore, we are confined to the provisions of Section 142 of the Act.

The relevant part of Section 142 reads as under:

142. Recovery of sums due to Government.

(1) Where any sum payable by any person under this Act including the amount

required to be paid to the credit of the Central Government u/s 28-B is not paid,-

a)....

(b)....

(c) if the amount cannot be recovered from such person in the manner provided in Clause (a) or Clause (b)-

i)....

(ii) the proper officer may, on an authorisation by Commissioner of Customs and in accordance with the rules made in this behalf, distain any movable or immovable property belonging to or under the control of such person, and detain the same until the amount payable is paid; and in case, any part of the said amount payable or of the cost of the distress or keeping of the property, remains unpaid for a period of thirty days next after any such distress, may cause the said property to be sold and with the proceeds of such sale, may satisfy the amount payable and the costs including cost of sale remaining unpaid and shall render the surplus, if any, to such person.

15. Perusal therefore would show that monies can be recovered through attachment of any movable or immovable property belonging to or under the control of such person. Section 142, as noted earlier, starts with the word "any sum payable by any person". Therefore, it could be contended that the expression "any person" considering the expression "under the control" in Section 142(1)(c)(ii) is wide enough and it would also be a person like the respondent who has received the monies from the defaulter. Therefore, the expression "person" can include a person other than the defaulter and may include a person like the respondent who had received moneys for purchase of a flat purportedly out of the draw able amount.

16. The first question to be answered would be what is the movable or immovable property belonging to or under the control of such person. What the respondent had received was earnest money deposit towards an agreement for sale of their property (flat). Money had been paid. The question would be whether, in these circumstances, that money could be attached and/or directed to be returned. For that purpose, we may gainfully consider the judgment of the Supreme Court in State Bank of India Vs. Rajendra Kumar Singh and Others, . In that case, the 3rd respondent before the Supreme Court had come in possession of a sum of Rs. 1,50,000/- in government currency notes by cheating the 1st and 2nd respondents. The currency notes seized from the appellant were said to be part of the property obtained by Kishan Gopal by commission of the said offence. The case of the appellant was that it had come in possession of the said currency notes in the usual course of its business partly through the Bank of Rajasthan Ltd. and partly through the Mahalaxmi Mills Company Ltd. without any knowledge that the said currency notes had been the subject matter of an offence. It is not necessary to refer to some other facts because there was some

finding that the respondent Nos. 1 and 2 admittedly had handed over the currency notes to the respondent No. 3 for criminal purpose of duplication. The Supreme Court dealing with the issue whether the currency notes could be returned was pleased to hold as under:

The reason is that the property in coins and currency notes passes by mere delivery and it is the clearest exception to the rule *Nemo dat quod non habet*. This exception was engrafted in the interest of commercial necessity. But the exception only applies if the transferee of the coin, or currency notes takes in good faith for value and without notice of a defect in the title of the transferor. The rule is stated by Wills, J., in *Whistler v. Forster* (1) as follows:

The general rule of law is undoubted, that no one can transfer a better title than he himself possesses: *Nemo dat quod non habet*. To this there are some exceptions; one of which arises out of the rule of the law merchant as to negotiable instruments. These, being part of the currency, are subject to the same rule as money: and if such an instrument be transferred in good faith, for value, before it is overdue, it becomes available in the hands of the holder, notwithstanding fraud which would render it unavailable in the hands of a previous holder.

In the instant case, the Appellate Tribunal had recorded a finding of fact that at the time the money was paid by way of an earnest money deposit, the applicants themselves were not aware of the fraud and as such the respondent would not be aware that the money received was a part of the fraud. The money must have been paid by cheque or draft as the law requires such payment to be so done. Considering the ratio of the Supreme Court in *State Bank of India* (supra), it is thus material to show that the respondent had knowledge of the fraud and, therefore, that money could be recoverable in the hands of the respondent. Even otherwise, what is attached is not the money but the immovable property of the respondent.

17. The evidence on record is that the respondent terminated the agreement and forfeited the earnest money deposit on 10th January, 1998 much before the notice for order of attachment. The respondent, therefore, appropriated the money by way of penalty for breach of the contract. There is no decree of a Court or any authority holding that the transaction itself was fraudulent and/or the money could not have been forfeited by way of penalty. As long as the respondent holds on the money as its own and not on behalf of the defaulters, in the absence of any finding against the respondent that the act of forfeiture of the earnest money deposit is not legal, it cannot be said that the respondent would be that "other person" from whom recovery could be made of the money which was the subject-matter of the fraud. If the money cannot be attached, the property which belongs to the respondent who is not a defaulter cannot be attached. In our opinion, the matter is self-evident. The issue has been pending in this Court since 2003.

18. The property admittedly belongs to the respondent and would not be the subject-matter of attachment u/s 142(1)(c)(ii) on that.

19. Considering the above, we are of the opinion that the Tribunal ultimately was right in its conclusion that the money could not be recovered from the respondent on the facts as they stood. As no substantial question of law arises, we decline to direct the Tribunal to make a reference.