

(1997) 12 MAD CK 0133

In the Madras High Court

Case No : Writ Petition No. 13793 of 1997 and W.M.P. No's. 22155 and 22156 of 1997

Dcp Associates Pvt. Ltd.

APPELLANT

Vs

Commissioner of Customs, Chennai-1

RESPONDENT

Date of Decision : 10-12-1997

Acts Referred:

Constitution of India, 1950 — Article 19, 21, 226
Customs Act, 1962 — Section 108, 110, 11A, 17, 18

Citation : (1998) 103 ELT 210

Hon'ble Judges : S.S. Subramanian, J

Bench : Single Bench

Advocate : Shri B. Kumar, for the Appellant; Shri V.T. Gopalan for Udayakumar, ACGSC, for the Respondent

Judgement

1. The petitioner seeks issuance of a Writ of Mandamus, directing the respondent to release and deliver goods viz. Synthetic PU Lining covered under Bills of Entry Nos. 50525 & 50523, dated 12-10-1995, Bills of Entry Nos. 52442, dated 26-10-1995, No. 62321, dated 20-12-1995, No. 5017, dated 30-1-1996, No. 16781, dated 8-4-1996, and No. 18072, dated 15-4-1996, pending adjudication of the DEEC Scheme licences, without insisting on payment of demurrage and container detention charges.

2. In the affidavit filed in support of the writ petition, sworn to by the Director of the Company, it is stated that the petitioner company has been primarily engaged in the business of imports since its inception. From the year 1992-93 onwards, the petitioner used to import consignments of PU Leather/PU Synthetic lining in full container loads at Chennai Port, and the same had been duly cleared in accordance with law of Customs Act under the DEEC scheme i.e., duty free without paying any customs duty for the goods imported and cleared.

3. The petitioner filed the Bills of Entry Nos. 50525 and 50523, dated 12-10-1995 of Synthetic PU lining for clearance under DEEC scheme in Group VII

of the Custom House, Chennai. Likewise, another Bill of Entry No. 52442, dated 26-10-1995 of Synthetic PU lining was filed for clearance in the same group of the customs house. It is said that on 1-11-1995, examination of the goods was done, and the inspection report along with sealed samples was sent to appraising group. It is said that in November, 1995, the Customs Officers took over the Bill of Entries for investigation with regard to these three consignments. On 8-12-1995, the petitioner made representation to Assistant Commissioner of Customs, for the release of goods under the above Bills of Entry, and since the goods were incurring heavy demurrage and detention charges, the petitioner even showed willingness to pay duty in case DEEC duty free licence is not accepted.

4. Another Bill of Entry No. 62321 was filed on 20-12-1995 for clearance of Synthetic PU lining under DEEC Scheme, which was also simultaneously taken over for investigation by the officers. For the release of the goods covered under the said Bill of Entry also, the petitioner addressed a letter dated 29-12-1995 to Assistant Commissioner of Customs, and showed his willingness to pay for the consignments and clear the same provisionally u/s 18 of the Customs Act, 1962. On 30-1-1996, another Bill of Entry No. 5017 was filed for clearance of Synthetic PU lining under the DEEC scheme, and was also taken over by the Customs Officers. Thereafter, on 19-2-1996, the statement of the petitioner was recorded u/s 108 of the Customs Act.

5. On 22-2-1996, show cause notices were issued by the Assistant Commissioner, in compliance to the orders of the Commissioner of Customs, the respondent herein. Another Bill of Entry No. 16781, dated 8-4-1996 was filed for clearance of identical Synthetic PU lining under DEEC Scheme, which was also taken over by SIIB for which no seizure notice/mahazer of detention of goods was given to the petitioner till date. On 15-4-1996, the petitioner filed another Bill of Entry No. 18072, for clearance of certain items of goods, and the same was also taken over by the department.

6. It is the case of the petitioner that it requested provisional release of the goods u/s 18 of the Customs Act, pending adjudication by its various letters dated 8th, 9th, 12th October, 23rd August, 27th September, 1st and 7th November, and 6th December, 1996 etc. which were went in vain. It is further seen that on 30-8-1996, all the goods pertaining to the above seven Bills of Entries were removed to the custom bonded warehouse. Thereafter also the petitioner addressed letter to the Additional Commissioner of Customs to release the goods, on the ground that more than one year had passed, since the goods were detained, and the goods were liable to be deteriorated, because of their prolonged detention, for which no reply nor any action was taken by the department. It is further stated by the petitioner, that u/s 110 of the Customs Act, the goods shall not be kept in suspense for more than one year as to whether the concerned officer is going to take steps or not for confiscation of the goods, and therefore, the goods are liable to be released. It is also the case of

the petitioner that the total period for issuance of show cause notice shall not exceed one year and the one cannot be extended by any law. It is said that in most of the cases, more than 14 months have elapsed, and the same violates Section 110(2) of the Customs Act.

7. In view of the detention for more than one year, the goods have also deteriorated, and they are in a very bad shape. The attitude of the respondent in not permitting the petitioner to release the goods is in violation of Articles 19 and 21 of the Constitution of India. The petitioner is entitled to release the goods, especially when they are getting deteriorated in the Custom bonded warehouse, and that too without any payment of duty as per the conditions of Duty Free Import Licence. Since the attempts made by the petitioner is not successful till date, the petitioner has come to this Court for the grant of reliefs stated above.

8. A detailed counter affidavit has been filed on behalf of the respondent, wherein they say that the writ petition itself is not maintainable, and even if there is any delay, the same was caused only by the petitioner, and the petitioner cannot take the advantage of the same. It is further said that there is no violation of the provisions of Section 110 of the Act. It is said that within a period of six months from the date of seizure, show cause notice has been issued, and the petitioner for one reason or other is prolonging the matter, and when the matter is pending consideration by the authority, interference under Article 226 of the Constitution of India, is not warranted. It is also said that no writ petition can be entertained at the stage of show cause notice, as that will affect the investigation as well as the enquiry, which the respondents are entitled to conduct as per the statute.

9. In regard to various Bills of Entry, it is said that Bills of Entry Nos. 50523, 50525 and 52442, were filed on 12-10-1995 and 26-10-1995 respectively, and the goods covered under same were seized on 4-1-1996, and show cause notice was issued on 22-2-1996. Likewise, Bill of Entry No. 5017, dated 30-1-1996, Bill of Entry No. 62321, dated 20-12-1995, Bill of Entry No. 18072, dated 15-4-1996 and Bill of Entry No. 16781, dated 8-4-1996 were all received from the Customs House Agent, only on 1-8-1996, and thereafter, the petitioner was informed by summons to appear before the authorities on ---8-1996 and on 23-8-1996. On both days, the petitioner did not appear and requested time. Therefore, the goods covered by Bill of Entry No. 16781, were seized on 2-9-1996, and show cause notice regarding the same was issued on 19-2-1997, within a period of six months. In regard to the other Bills of Entry, the petitioner was directed to appear by summons on 18-9-1996, 23-9-1996, 7-10-1996, 8-10-1996, 31-10-1996, 27-11-1996 and 12-12-1996. For none of this posting, the petition appeared and wanted only adjournments for one reason or other. Therefore, on 20-1-1997, the goods covered under the Bills of Entry No. 5017 were seized, and show cause notice in regard to the same was issued on 5-2-1997.

10. Again the petitioner was asked to appear on 28-1-1997. A supplementary show cause notice was also issued to the petitioner. Again a notice was issued to

the petitioner to appear on 18-2-1997 and 22-2-1997. There was no response from the petitioner. Therefore, on 21-3-1997, the goods covered by Bills of Entry No. 18072 were seized, and the goods covered by Bill of Entry No. 62321 were also seized on 29-3-1997. Show cause notices were also issued in regard to the last two seizure on 12-6-1997. The petitioner was informed about the further dates of hearing on 10-7-1997 and 2-9-1997. It is in the meanwhile, the petitioner has filed the present writ petition on 8-9-1997.

11. It is the case of the respondent, that only because of the non-co-operation of the petitioner, the matter could not be proceeded with. From the date of seizure, show cause notice had been issued within six months, as contemplated u/s 110 of the Customs Act, and once show cause notice has been issued, the Court should not interfere with the matter, and the same will affect the investigation that is going on. It is further said that u/s 110 of the Act, the date of seizure of the cargo is relevant and not filing of the Bills of Entry.

12. It was found that the declaration given by the Customs House Agent was not true, and the petitioner has manipulated invoices along with the Bills of Entry and misdeclaration of quantity. Only after receiving the information from the reliable sources and only after recovering the incriminating documents, the respondent had reason to seize the goods, and therefore, it seized the goods covered by each and every entry. It says that the present writ petition is misconceived and is liable to be dismissed.

13. At the time of argument, learned Counsel for the petitioner agreed that the goods covered under Bills of Entry Nos. 50523, 50525 and 52442, dated 12-10-1995 and 26-10-1995 respectively were seized on 4-1-1996, and the show cause notices were also issued in time. So, in regard to the goods covered by the above three Bills of Entry, nothing survives in this writ petition.

14. We are only concerned with the four remaining Bills of Entry. According to the respondent, in regard to the goods covered under the above four Bills of Entry also, show cause notices were issued within six months from the date of seizure. But the learned Counsel for the petitioner submitted that all these goods were all along with the custody of the department i.e., from 20-12-1995 (goods covered by Bill of Entry No. 62321), 30-1-1996 (goods covered by Bill of Entry No. 5017), 8-4-1996 (goods covered by Bill of Entry No. 16781) and 15-4-1996 (goods covered by Bill of Entry No. 18072). If the goods are already under the custody of the Customs Officials, they are not entitled to withheld the same after the statutory period and they cannot think of seizing the same or issuing show cause notice, according to their whims and fancies.

15. Counsel submitted that u/s 17(1) of the Customs Act, 1962, duty is cast on the department to make an assessment of the duty payable "without undue delay", and the same must be examined and tested by the proper officer. Learned Counsel also submitted that if it is the statutory duty, the respondent cannot take his own time. Counsel also relied on Sections 47 and 110 of the Act,

for the said purpose. As per in Section 47 of the Act, where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for "home consumption." u/s 110(1) of the Act, "if the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods."

16. Learned Counsel wanted Sections 17, 47 and 110 read together, and if there is no explanation on the part of the department for the long delay in the seizure, the company is entitled to get release of the goods. Counsel also relied on the decision reported in *National Industries Vs. Assistant Collector of Customs Madras*, for the said purpose. I do not think that the submission of the Counsel could be accepted. On going by the facts, it is the definite case of the department, that all these Bills of Entry were received by it from the Customs House Agent only on 1-8-1996. If the Bills of Entry were in the custody of the Customs House Agent, and the same were handed over to the respondent only on 1-8-1996, either Section 17 of the Act or Section 47 of the Act will help the petitioner in any way.

17. Immediately after receiving the Bills of Entry, the respondent issued notice to the petitioner to appear before them and for one reason or other, the petitioner was seeking adjournments. It is seen that these Bills of Entry were handed over to the respondent only on 1-8-1996. The goods covered by Bills of Entry Nos. 16781 and 5017 were seized on 2-9-1996 and 20-1-1997 respectively. In regard to the remaining two Bills of Entry viz., Nos. 62321 and 18072, the petitioner was issued with a notice for investigation, u/s 108 of the Act, and he did not appear, and thereafter the goods covered under the above two bills were seized on 29-3-1997 and 21-3-1997 respectively. Thereafter, show cause notices were also issued within the statutory period.

18. Now-let us come to the decision relied on by the Counsel. It is true that in that case, a Full Bench of this Court has held that under Sections 17 and 45 of the Act, there is a duty cast on the authorities to conduct the test and examination without undue delay. Their Lordships have held in that case that "the right to detain the goods u/s 45 of the Act and the right to conduct necessary test and examination without undue delay u/s 17 of the Act, imposes a corresponding duty on the Customs authorities to issue detention certificate, if there is any undue delay on the part of the Customs authority." The question whether there is any undue delay, as referred to in Section 17 of the Act, has to be decided on the facts and circumstances of each case.

19. In this case, immediately after the Bills of Entry were filed, the respondent issued summons to the petitioner and the petitioner failed to appear. Only when the respondent got some reliable information, that the Directors of the petitioner company have not disclosed the true facts in the various Bills of Entry, they thought of issuing notice u/s 110 of the Act, and seized the goods. It is further

seen that the Director of the petitioner company was also arrested and released on bail, and that was one of the reasons mentioned by the Counsel for the petitioner, for not appearing before the respondent for enquiry. Under the above circumstances, it cannot be said that there was undue delay from the date of filing the Bills of Entry till the date of seizure.

20. Learned Counsel for the petitioner also relied on the violation of sub-section (2) of Section 110 of the Customs Act. If we go by the date of seizure and the show cause notice, there is no violation of Section 110(2) of the Act, as it was given within six months period. Only when the show cause notice was not served within six months from the date of seizure, the petitioner is entitled to get the release of the goods, as was held in the decisions reported in *The Collector of Customs and Central Excise, Somajiguda, Hyderabad Vs. Amruthalakshmi and Others*, , in *Chuharmal Vs. Union of India (UOI) and Others*, and in *I.J. Rao, Asstt. Collector of Customs and Another Vs. Bibhuti Bhushan Bagh and Another*, .

21. In this connection, we must also note that a seizure cannot be effected unless there is reason to believe. Merely because these goods are in the custody of the Customs department, and are retained by them, and without their permission it cannot be removed, it does not amount to seizure. Seizure under law means, a deprivation of possession and not merely custody. The authorities by seizing, takes control of the goods and prohibits the owner from taking possession. Till then they are only the custody. When the goods are retained by the Customs department, it is only for the purpose of assessing the duty, and to verify whether the duty has been paid. But seizure could be effected only when a doubt enters in the minds of the authority, that the declaration by the declarant is not correct, and the goods that are imported are liable to be confiscated. It is at that moment, there is reason to believe, that the goods are liable to confiscation and gives the power to the proper officer to seize the same.

22. The arguments of the Counsel that the goods were liable to be deteriorated, because of their prolonged detention and that the petitioner has issued various representations to release the goods etc., are not the basis to come to the conclusion that there is no reason to believe for confiscation. When some other materials were obtained by the department, they thought of seizing the goods. The petitioner mainly rely on handing over of the bills of entry, and contended that six months period has expired from that date. I do not think that the argument of the Counsel can be accepted. It is not the filing of the Bills of Entry, that is to be considered.

23. Learned Counsel for the respondent also submitted that the writ petition itself is not maintainable in view of the decision reported in *Medopharam Vs. Superintendent of Central Excise, Madras*, , wherein a Division Bench of this Court has held thus :-

"We are of the view that whenever a show cause notice is issued under the provisions of Central Excises & Salt Act, which provides for adjudicatory forum

and also right of first appeal to the Collector and second appeal to the CEGAT, exercise of jurisdiction under Article 226 of the Constitution is not warranted. In such cases, the exercise of jurisdiction under Article 226 would amount to by-passing the statutory remedy provided under the Central Excises and Salt Act, which is not just and proper."

The above referred to case arose under the Central Excises and Salt Act. The provisions of the Customs Act are also similar.

24. In Loharu Steel Industries Ltd. Vs. Collector of Central Excise, , a Division Bench of the Karnataka High Court, in the case of Loharu Steel Industries Ltd. v. Collector of Central Excise, relied on by the Counsel for the respondent, it was held thus :

"We may also point out that certiorari jurisdiction is not intended to by-pass the statutory provisions. In Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, while considering the scope of Article 226 of the Constitution, the Supreme Court has held as follows :-

"3. In Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, , A. P. Sen, E. S. Venkataramiah and R. B. Misra, JJ. held that where the statute itself provided the petitioners with an efficacious alternative remedy by way of an appeal to the Prescribed Authority, a second appeal to the Tribunal and thereafter to have the case stated to the High Court, it was not for the High Court to exercise its extraordinary jurisdiction under Article 226 of the Constitution ignoring as it were, the complete statutory machinery. That it has become necessary, even now, for us to repeat this admonition is indeed a matter of tragic concern to us. Article 226 is not meant to short circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the Court must have good and sufficient reason to by-pass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters. We can also take judicial notice of the fact that the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged."

In addition to this, we may point out here a Division Bench of this Court in Karnataka State Road Transport Corporation and Another Vs. Karnataka State Transport Authority and Another, , had an occasion to consider as to under what circumstances the extraordinary jurisdiction of this Court under Article 226 of the Constitution can be exercised when there exists an equally efficacious alternative remedy of appeal and it was held thus :

"Even where an equally efficacious alternative remedy exists, where, however, fundamental rights are affected where rules of natural justice are violated, or where there is a failure on the part of the authority concerned to confine itself within the bounds of its legitimate jurisdiction or where there is a failure to exercise a jurisdiction on vested in it or where there is an error of law apparent on the face of the record, a person aggrieved can invoke the extraordinary jurisdiction of this Court under Article 226 without reference to any remedy however equally efficacious it be. The existence of an alternative remedy does not oust the jurisdiction of the High Court under Article 226"

The case on hand does not fall in any one of the exceptions mentioned above. There is not even a determination made about the liability of the appellant. The facts stated in the show cause notice are yet to be determined after the cause is shown and the evidence, if any, adduced by the appellant. As far as the jurisdiction is concerned, it has already been pointed out that the grounds stated in the show cause notice clearly falls within the jurisdiction of the Collector as per Section 11A of the Act."

From the counter statement it is clear, that after the show cause notice was issued, the petitioner was seeking time on number of occasions. This writ petition is also filed only to get some more time, so that the adjudication u/s 110 of the Customs Act, could be prolonged. I do not find any bona fides in the writ petition. Consequently, the writ petition is dismissed.

(Paragraph number as per certified copy) 24. The petitioner also moved ho W.M.Ps. In W.M.P. No. 22155 of 1997, the petitioner wanted an appointment of independent surveyor at the cost of the petitioner to make a survey and report on the status of the goods lying with the respondent department. When the matter came up for arguments on 15-10-1997, in the absence of Standing Counsel for the Central Government, I allowed that miscellaneous petition, and I also directed the petitioner to submit a panel of names of surveyors within a period of ten days. On the date on which it was posted, Mr. K. V. Krishnan's name was printed as Counsel for the respondent. In fact, on that date, he was not the Standing Counsel for the Central Government, and that fact was brought to my notice, after the above order was passed. Thereafter, I directed the Counsel for the petitioner to argue the main petition and he also did not submit the panel of surveyors.

25. W.M.P. No. 22156 of 1997 has been filed seeking injunction restraining the respondent from proceeding with the adjudication of the show cause notice. I granted an interim injunction for a period of one month from 15-10-1996. Since I am dismissing the main writ petition, both the W.M.Ps., also stand dismissed.