

(2015) 09 MAD CK 0219

In the Madras High Court

Case No : M.P. (MD) Nos. 1 and 2 of 2015 and W.P. (MD) No. 14281 of 2015

Executive Director, F.Seyad Rabbani, Seyad Cotton Mills Ltd.
and Others

APPELLANT

Vs

The Additional Director, Department of Revenue Intelligence
and Others

RESPONDENT

Date of Decision : 03-09-2015

Acts Referred:

Customs Act, 1962 — Section 108, 11, 12, 13, 14

Citation : (2015) 325 ELT 721

Hon'ble Judges : R. Subbiah, J

Bench : Single Bench

Advocate : V. Kathirvelu, Senior Counsel and KA. Raamakrishnan, for the
Appellant; R. Aravindan, Advocates for the Respondent

Judgement

R. Subbiah, J—This Writ petition has been filed for issuance of a Writ of Certiorari, calling for the impugned summon issued by the 2nd respondent in file No. DRI/CZU/TTN/48/05/INT-1/2015, dated 03.08.2015 and quash the same as illegal, incompetent and arbitrary.

2. The case of the petitioners is that the petitioners company is a manufacturer of spinning yarn and its related works. The company imported machines from the foreign countries through Tuticorin Sea Port. The company is having a valid IEC Code 2890000656 allotted through Ministry of Commerce, Indian Republic. The company has availed duty exemption from the Indian Customs for importing machines and thereafter, goods were cleared from the Tuticorin Port Trust by the Customs Authority and for which, the company has executed a letter of undertaking and bank guarantee in favour of the Ministry of Revenue for the imported goods. After installing the imported machines, the company has obtained Installation Certificates from the Central Excise Department. The company has obtained exemption from Customs Duty after fulfilling Export Obligation, imposed by the Ministry of Commerce, Indian Republic under Foreign

Trade Policy and as per the policy of the Ministry of Commerce, the company has to export the allied materials to foreign countries either manufactured by the petitioners' company or through third party company, within a period of 8 years from the date of installation of the machineries. In order to fulfill the Export Obligation as mentioned above, the petitioners company has exported goods to the tune of Rs. 65,51,298/- and also through third party company namely, M/s. Avaneetha Textiles (P) Ltd., Coimbatore and M/s. Shri Ramalinga Mills, Aruppukottai. The said two companies are the members of the South Indian Mills Association (SIMA). Thereafter, the petitioners company submitted their report before the Ministry of Commerce and after scrutinizing the documents, Export Obligation Discharge Certificate (EODC) has been issued to the petitioners company. The petitioners company made a submission before the Customs Authority at Tuticorin Sea Port for discharging of the duty for obtaining licenses and to cancel the Letter of Undertaking and also Bank Guarantee. The Assistant Commissioner of Indian Customs, Tuticorin Sea Port has passed an order discharging the petitioners from the customs duty and also directed the Bank and concerned department to cancel the Letter of Undertaking and Bank Guarantee.

3. In these circumstances, on 23.07.2015, the 2nd respondent has inspected the factory of the petitioner situated at NH-7, Tiruvananthapuram Main Road, Moondradaippu, Tirunelveli District and have seized certain documents and issued summons dated 23.07.2015 under Section 108 of the Customs Act, 1962 for conducting enquiry on 29.07.2015 with regard to fraudulent availment of EPCG Scheme by way of endorsing EPCG licences with unconnected exporter's shopping bills in the third party details for obtaining EODC from DGFT. The petitioners appeared before the 2nd respondent through the petitioner's company officials, the 2nd respondent has not permitted the petitioner's company officials to attend enquiry and again sent a summon dated 03.08.2015 stating that the petitioners have to appear for enquiry on 10.08.2015.

4. The contention of the petitioners is that the summons issued by the 2nd respondent is highly arbitrary, without application of mind and without proper delegation of powers. Challenging the summon dated 03.08.2015, the petitioners are before this Court with the present Writ petition.

5. The respondents have filed a counter affidavit. In the counter affidavit it is stated that Specific Intelligence has been developed by the Directorate of Revenue Intelligence (DRI), Tuticorin Regional Unit about the petitioners. The petitioners had imported machineries through Tuticorin Port without payment of customs duty by availing import duty exemption / concession under the Customs notification issued under Section 25(1) of the Customs Act, 1962 as applicable to the Export Promotion Capital Goods (EPCG) Scheme. As per the terms of customs duty exemption, the importer is required to undertake specific export obligation to the extent of eight times import duty saved and to fulfill other conditions prescribed in the exemption notification.

6. It is stated in the counter affidavit that the intelligence pointed out that the importer had obtained Export Obligation Discharge Certificate (EODC) from the Joint Director General of Foreign Trade (JDGFT), Madurai, by submitting irrelevant export documents, showing exports have been done on their behalf and in order to evade customs duty payable for non-fulfillment of export obligation as undertaken by the importer, at the time of importing the capital goods machineries. The petitioners had submitted shipping bills in respect of exports made by third party exporters, by filing false certificates to the effect that the goods covered under shipping bills were manufactured by the petitioners. The factual position was that there is no commercial relationship or transaction between the third party exporters and the 2nd petitioner herein, had issued a false certificate certifying that the goods covered under shipping bills had been manufactured by the petitioners.

7. Based on the above, on 23.07.2015, the officials of DRI, Tuticorin and Madurai Regional Unit have verified the records maintained in respect of EPCG licences. On such verification, it was came to be known that the petitioners had not made any direct exports or Form-H (for exports through third party) in respect of fulfilling export obligation. It was also found that the petitioners had got the endorsements of their five EPCG licences in the shipping bills, which were filed by unconnected exporters, who had no transaction with the petitioners and completed the formalities with the office of the JDGFT. On obtaining the EODC from the JDGFT, they got the bond and Bank Guarantee, furnished at the time of import of the machinery under EPCG scheme and had then cancelled from the Custom House, Tuticorin. Evidences recovered from the petitioners indicate that they got the endorsement of their EPCG licences in the shipping bills of third party exporters on payment of a commission, calculated at the rate of 3% of the EO, to the third party exporters and officers connected with issuing EODC. The documents recovered from the petitioners clearly exposes their illegal mode of completion of Export Obligation (EO) by way of getting their EPCG licenses endorsement in the shipping bills of unconnected exporters, thereby violated the EPCG conditions stipulated in the relevant Foreign Trade Policy (FTP).

8. Under these circumstances, a summon under Section 108 of the Customs Act, 1962, was issued to the petitioners to appear before the 2nd respondent in person to give evidence in connection with the above issue.

9. It is stated that the Export Promotion Capital Goods (EPCG) Scheme has been framed to extend concessions in import duty on capital goods for promoting exports. The exporters shall be directed to export goods in the name of the EPCG licence holder. However, the export through third party as defined in Chapter 9 of the Policy is also permitted under the EPCG scheme.

10. Chapter 9 of the Policy defines the "Third-party exports" as exports made by an exporter or manufacturer on behalf of another exporter(s). In such cases, export documents such as shipping bills, etc., shall indicate the name of both the manufacturing exporter/manufacturer and third party exporter(s). However, the

petitioners, in order to escape for payment of the duty involved on the unfulfilled portion of the EO, has conspired with the assistance of the consultant and the above two exporters, managed to get their EPCG licence numbers, filed false certificates along with the 2nd petitioner and got their export obligation discharged and shared the benefit.

11. It is stated that the summon had been issued to the Executive Director of the petitioners company directing them to appear before the authority. Subsequently, another summon was issued requiring the appearance of the petitioner on 03.08.2015. It is stated that the Central Board of Excise and Customs (CBEC) vide Circular No. 4/99-Cus dated 15.02.1999 has directed that Directorate of Revenue Intelligence (DRI) officers to undertake investigations of cases and to issue the show cause notices on completion of investigation. Further, the circular empowers the officers of DRI to undertake investigation and issue show cause notice in cases, where they have investigated and the adjudication is to be done by jurisdictional Commissionerates. In the absence of the petitioners, on the basis of the above statutory circular issued by the CBEC, the investigating agency cannot open an investigation.

12. It is further stated in the counter affidavit that under Section 108 of the Customs Act, 1962, any gazetted officer of customs is empowered to summon any person either to give evidence or to produce documents or any other thing during enquiry. The Government of India vide notification No. 31/97 Cus (N.T) dated 07.07.1997, in exercise of the powers conferred by sub section (1) of Section 4 of the Customs Act, 1962, all officers of the Directorate of Revenue Intelligence are the officers of customs. Therefore, the 2nd respondent is empowered to issue summons under Section 108 of the Act. It is the prime duty of the respondents to collect intelligence on evasion of customs duty and smuggling of goods and to prevent the same action investigation has to be taken. The 2nd respondent, who is the subordinate to the 1st respondent, is duty bound to initiate action to prevent smuggling. The respondents in the counter affidavit stated that summons had been issued to the petitioners as part of investigation to bring out the truth and complete the investigation and only thereafter, show cause notice will be issued and then opportunity will be given to the petitioner to defend. Hence, the 2nd respondent prayed for dismissal of this Writ petition.

13. The only submission made by Mr.V.Kathirvelu, learned Senior Counsel appearing for the petitioners is that the summons has been issued by the Senior Intelligent Officer under Section 108 of the Customs Act, 1962. However, the Senior Intelligent Officer is not a competent person to issue such a summons. In this regard, the learned Senior Counsel invited the attention of this Court to Section 2(34) of the Customs Act and submitted that under Section 2(34) only "proper officer" in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the (Commissioner of Customs). In this regard, the learned Senior Counsel

appearing for the petitioners also invited the attention of this Court to the notifications issued under Customs Act, 1962 and submitted that Senior Intelligent Officer has no power to function under Section 108 of the Customs Act. The learned Senior Counsel further submitted that Section 148 of the Customs Act deals about the issuance of summons and production of the documents. Section 108 speaks about any gazetted officer of the customs, who has the power to summon the concerned, either to give evidence or produce the documents for enquiry under the Act and the Senior Intelligence officer cannot be construed as customs officer. Hence, he has no power to issue summon.

14. In support of the contention the learned Senior Counsel appearing for the petitioner relied on a judgment reported in Commissioner of Customs Vs. Sayed Ali and Another, (2011) 184 ECR 51 : (2011) 265 ELT 17 : (2011) 2 JT 360 : (2011) 2 RCR(Civil) 780 : (2011) 2 SCALE 515 : (2011) 3 SCC 537 : (2011) 2 SCR 1045 : (2011) AIRSCW 1517 : (2011) 2 Supreme 153 .

15. The learned standing counsel appearing for the respondents submitted that as per the Notification No. 31 of 1997-Cus.(N.T.), dated 07.07.1997 in exercise of powers conferred under Section 4(1) of the Customs Act, 1962, the Government of India has appointed all officers to the Directorate of Revenue Intelligence to be the officers of Customs. Therefore, the 2nd respondent being the gazetted officer of the Customs, is empowered to issue summons under Section 108 of the Customs Act.

16. The learned standing counsel for the respondents relied on a learned Single Judge of this Court in W.P.(MD)No. 12136 of 2014 (Abhishek Mundhra Vs The Additional Director General, Directorate General of Revenue Intelligence, Chennai) wherein this Court has held as follows:

"...To support such arguments the definition of proper officer as defined under Section 2(34) is pressed into service and by relying on the decision in the case of Sayed Ali & Anr., (supra), it is submitted that only such officers of customs, who have been assigned specific functions would be proper officers in terms of Section 2(34) of the Act. After the decision was rendered by the Hon'ble Supreme Court in the case of Sayed Ali & Anr., (Supra) on 18.02.2011, Section 28 of the Act underwent an amendments by Customs (Amendment and Validation) Act, 2011, firstly on 08.04.2011, then again on 16.09.2011. By virtue of the amendment, sub section (11) was inserted to Section 28. Thus, the objection, which is being raised based on the decision in the case of Sayed Ali & Anr., (Supra) is no longer available in the light of the insertion of sub section (11) of Section 28. Learned Senior counsel appearing Thus it is submitted that by way of insertion of Sections 11 to 28, the Senior Intelligence Officer is empowered to issue summon.

17. The learned standing counsel appearing for the respondents would also rely on a decision of the Hon'ble Supreme Court reported in 2010(15) SCC 647 (Commissioner of Customs, Calcutta and others Vs M.M. Exports and another).

18. Heard the learned Senior Counsel appearing for the petitioners and the learned standing counsel appearing for the respondents and also perused the entire records.

19. Though it is submitted by the learned Senior Counsel for the petitioners that the Senior Intelligence Officer cannot be construed as Customs Officer, in the subsequent notification by inserting Section 28(11) all the officers of the Directorate of Revenue Intelligence are to be construed as the officers of Customs and the DRI officials have been appointed as customs officers in exercise of the powers conferred under Section 4(1) of the Act. When that being so, I do not find any merit in the submission made by the learned Senior Counsel for the petitioner that a senior intelligence officer cannot be construed as a gazetted customs officer as he has no authority to issue summons. As per the decision of the Supreme Court reported in 2010(5) SCC 647 (cited supra), the High Court should not interfere at the stage of issuance of summons.

20. Secondly, I am of the opinion that it is only a summon, which has been issued to the petitioners directing them to appear before the authority under Section 108 of the Customs Act, 1962, to give evidence in connection with the above issue. Hence, at this stage this Court cannot make any interference.

21. In view of the above, the Writ petition is premature in nature and on this ground, this Writ petition is liable to be dismissed. Accordingly, dismissed. No costs. Consequently, connected M.Ps. are closed.