

(1992) 04 MAD CK 0056
In the Madras High Court
Case No : Writ Petition No. 18153 of 1991

Haran Jahveri

APPELLANT

Vs

Collector of Customs and Others

RESPONDENT

Date of Decision : 20-04-1992

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 10, 108, 110, 111, 14

Citation : (1992) 40 ECC 43

Hon'ble Judges : Bakthavatsalam, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Bakthavatsalam, J.—The Writ petition is for the issue of the writ of mandamus directing the 2nd respondent to immediately allow clearance of the goods on recovering normal rate of customs duty to the petitioner as declared consequently and to on issue a detention certificate.

2. The Petitioner, who is an importer of dyes and chemicals, and is holding REP licence to import diverse quantity and quality of disperse dyes, entered negotiations with M/s. S.I. Group of Hong Kong, for the sale and supply of one metric ton of disperse dyes blue and one metric ton of disperse dyes red, manufactured and controlled by China. Accordingly the said suppliers by their invoices dated 15-8-91 and 4-9-1991 supplied the said goods and shipped through the vessel S.S. ACX LILY and Vessel Tokyo Beg v. 10/556 from Hongkong to Madras under Bill of lading Nos. NIKS 3480117209 and 79987113 respectively. According to the petitioner, before the said goods could be examined, the Officers of the 2nd respondent seized the said goods and took away all the documents, on the landing of the goods at Madras Port suspecting under-invoicing of the goods. It is further alleged in the affidavit filed in support of this petition that though the said goods were seized by the 2nd respondent as early as September, 1991, no summon has been issued to the petitioner and on

an oral enquiry, the petitioner came to know that the petitioner had to obtain a manufacturer's invoices. i.e., sale documents as the goods in question were suspected to be under-invoicing and the said goods could not have been imported at a price of US\$ 3.10 per kilo cif Madras. Thereafter on 8-10-91, the petitioner requested the supplier at Hongkong to send copies of manufacturer's original invoices so as to produce before the respondents, but the suppliers informed the petitioner about their inability to comply with the request of the petitioner due to business secrecy. In the meanwhile, it is alleged, that the respondents had drawn the samples of the said goods and analysed the same and obtained a report that the cost of the goods imported by the petitioner must be higher than the value shown in the invoices. According to the petitioner the valuation of the imported goods are concerned, (sic) the same are guided by the provisions of Section 14 of the Customs Act read with the Customs Valuation of Imported Goods Rules 1986.- The Petitioner has made a reference to Customs Valuation Rules, 1963, in his affidavit filed in support of this writ petition (the petitioner ought to have referred to Customs Valuation of Imported Goods Rules 1988 , which has superseded 1963, Rules). It is further contended that the seizure of the goods in question is illegal and u/s 14 of the Customs Act the respondents ought to have released the goods provisionally u/s 18 of the Act and when admittedly the goods are manufactured are controlled by the Republic of China, no question of any under-invoicing the goods will arise, and therefore, the action of the 2nd respondent, suspecting and questioning the character of the supplier in China, would be totally dehors the provisions of the Customs Act. It is also further alleged that the seizure is illegal, mala fide and therefore liable to be lifted. As per the provisions of Section 18 of the Act, it is incumbent upon the respondents to have allowed clearance of the goods on provisional assessment, when the respondents have floated investigation in the matter and the provisional release of the goods is a statutory right, which cannot be denied by the respondents.

3. Notice of motion has been ordered by this Court on 31-12-91. Mr. M.R. Narayanaswamy, senior counsel and Mr. Srinivasamurthy, appear for respondents. In the counter filed by the 2nd respondent it is contended that there are many varieties of dyes and dyes having same colour, shade, etc., manufactured by various companies with a distinct price list from time to time, and the value of dyes depends upon the category of dyes, colour index, concentration, etc. It is not correct to state that before the goods could be examined, the officers of the 2nd respondent seized them, and in fact, the seizure was effected only on 30-12-1991 on the basis of a specific intelligence report about the under-valuation of the subject import, bills of entry and other connected documents. Summons were issued to the petitioner as early as on 7-10-91 u/s 108 of the Customs Act 1962, directing the petitioner to appear before the 3rd respondent on 14-10-91 to give evidence in connection with the enquiry relating to the import of disperse dyes blue and disperse dyes red along with necessary documents, followed by several telegrams on 6-11-91, and on

22- 11-91. As there was no response from the petitioner, a detailed enquiry was conducted by the respondents and also had the samples tested to find out the colour index number of the dyes imported, and according to the test report from the laboratory M/s. Sandoz (India) Ltd., at Bombay that the sample of the goods described as "disperse dyes blue" was found to be a "disperse dyestuff" with a shade similar to colour index disperse dye 165 and the sample of the goods described as "disperse dyes red" was found to be a "disperse dyestuff" with a shade similar to colour index disperse dye red 343. In view of the fact, that the imported goods are grossly under valued with intention to evade duty, they were all seized by the respondents u/s 111 of the Customs Act, 1962. It is further contended that as per the notification No. 44/90 (N.T.) Customs dated 3-8-90, an importer is bound to furnish

(a) a declaration disclosing full and accurate details relating to the value of imported goods;

(b) the invoice of the manufacturer or producer of the imported goods; and

(c) any other statement, information or document as considered necessary for the proper officer for determination of the value of imported goods under those rules-

[vide Customs Valuation (Determination of Price of Imported Goods) Amendment Rules 1990].

As the petitioner failed to co-operate in the enquiry and after making out a prima facie case of undervaluation, the consignments were seized u/s 110 of the Act 1962 on 30-12-1991. The Customs Valuation Rules framed by the Central Government in 1963, have been rescinded and in that place, in exercise of powers conferred u/s 156 of the Customs Act, 1962, the Central Government framed the Customs Valuation (Determination of Price of Imported Goods) Rules in 1988 and as per the said Rules, the onus is on the petitioner to establish that the invoice value represents the transaction value. Provisional assessment can be resorted to only in respect of certain cases specified in Section 18 of the Customs Act, 1962. The subject import being made unauthorisedly with the intention to evade payment of duty legitimately due to the Government, is liable to confiscation and on completion of the investigation adjudication proceedings will be initiated and the request of the petitioner to allow the release of the goods on provisional basis cannot be accepted.

4. In the affidavit filed by the petitioner in rejoinder, it is alleged that the petitioner had duly intimated to the 2nd respondent about his change of office to his residence on account of some repair work to his office premises, but despite that the respondents had been purposely sending summons to the then address with a view to create an adverse inference; that the onus of proving the charge of under-valuation of the goods is on the respondents; that as per Section 14(1) (a) of the Customs Act, 1962 read with Rule 4 of the Valuation Rules, the value paid by the petitioner is a transaction value which could not be rejected by the

respondent in the absence of any documentary evidence to prove the contrary; that the notification No. 44/1990-Cus (NT) dated 3-8-90 is a non-tariff notification and the same is not applicable to the petitioner's case; that the seizure u/s 110 of the Customs Act is premature, in view of the pending enquiry and investigation on the alleged under-valuation; and there is illegal exercise of power of seizure by the respondent and there was no intention of evasion of payment of duty as alleged.

5. The learned Counsel for the petitioner, by referring to Sections 17 and 18 of the Customs Act, contended that an indirect seizure has been made by detaining the goods on the ground of suspected under valuation; that the petitioner has got a statutory right to ask for provisional assessment u/s 18 of the Act. The learned Counsel also refers to Rule 2(c) and Rule 2(e) of the Customs Valuation Rules, 1988 with regard to "identical goods". It is further contended by the learned Counsel for the petitioner that since the goods have been imported through a manufacturer from China, which is controlled by Peoples Republic of China, there cannot be any under-valuation as claimed by the respondents. Though the goods were seized and the relevant documents were taken away as early as September, 1991, nothing was heard till the filing of the writ petition. It is further contended that the petitioner has not been given proper notice to the proper address of the petitioner for any alleged enquiry made in September, and December 1991. From the endorsements made by the postal authorities on the covers claimed to have been sent by the respondent, as "not known" will clearly show that the petitioner has not been given any notice on 14-10-91. The respondents cannot take shelter under the letter dt. 9-10-91 sent by the petitioner to the respondent, with regard to petitioner's inability to produce the original invoices as the said letter was sent by the petitioner during the stage of enquiry, by the respondents and the non-issuance of proper notice to the petitioner for the alleged enquiry vitiates the entire proceedings. Even assuming that the petitioner's goods were seized only on 30-12-1991, as claimed by the respondents, the learned Counsel for the petitioner contends that petitioner has got a right to get the goods released u/s 18 of the Customs Act after provisional assessment is made. The goods were seized in September, 1991 and that already more than six months period had lapsed, and on this score itself, the petitioner contends, that he is entitled to return of the goods technically.

6. Mr. M.R. Narayanaswamy, Senior counsel appearing for the respondent contends that in respect of both the consignments seized, the 2nd respondent sent notices by registered post to the petitioner and when it was returned, phonograms were sent to the petitioner repeatedly and last such phonogram was sent to the petitioner on 22-11-1991, and admittedly, the same was returned with the endorsement by the Telecommunication Department as "door locked". According to the learned senior [Counsel] all possible effective steps were taken by the 2nd respondent to serve notice on the petitioner but in vain. In such circumstances, since the petitioner did not co-operate with the respondents in the matter of enquiry the respondents themselves took the task of examining the

value of the goods imported by the petitioner and after satisfying with the prima facie case, that the petitioner had under-valued the goods with the sole object of evading duty, the goods imported were seized on 30-12-1991 under the Customs Act, 1962. Apart from that, now a show cause notice dated 10-4-1992 has been issued (obviously after the writ petition has been partly heard by this Court) and as such this Court should not interfere with the proceedings at this stage, and it is open to the petitioner to raise all his objections to the show cause notice and face the adjudication proceedings. It is further contended by the learned Senior Counsel, that the petitioner who has got a business address at Bombay has not co-operated with the Department in ascertaining the value of the goods, by producing the relevant documents and under such circumstances, this Court should not exercise its discretion in favour of the petitioner at this stage.

7. I have considered the argument of the learned Counsel for the petitioner and the learned Senior counsel for the respondents. I have also perused the relevant files produced by the 2nd respondent in this connection. First of all, the primary question is whether notice has been served on the petitioner. From the files produced by the 2nd respondent, it is clear that in between September, 1991 and December, 1991, the respondents took all possible efforts to ascertain the value of the goods imported by the petitioner, and on coming to know that the petitioner had under-valued the goods imported, in December, 1991 the goods had been seized. Actually the writ petition has been filed presented (sic) on 9-12-1991 and notice of motion has been ordered on 31-12-1991. By that time the goods were seized by the Department on 30-12-1991 itself. In such circumstances, whether notice has been served on the petitioner before the time prescribed under the Act, in my view, is purely an academic one. Even assuming that the contention of the petitioner with regard to the non-service of notice is accepted, that will not in any way alter the situation. In this connection it is useful to quote the Section 153 of the Customs Act, which runs as follows:

153: Service of Order, decision, etc.: Order or decision passed or any summons or notice issued under this Act shall be served--

(a) by tendering the order, decision, summons or notice or sending it by registered post to the person for whom it is intended or to his agent; or

(b) if order, decision Summons or notice cannot be served in the manner provided in Clause (a) by affixing it on the notice board of the customs house.

According to the said section, notice can be sent by registered post. That has been done in this case. It is true that notice has been returned as "not known" after the date of enquiry. Thereafter, the Department started to issue phonograms, which is not provided for u/s 153 of the Act. The mode of service of notice is only by registered post. However, in my considered view, that will not alter the situation in view of the subsequent developments. It is seen that the Department itself has taken the task of testing the goods imported by the petitioner and arriving at the correct value thereof. This is because the petitioner

has clearly stated that he is unable to get the original invoices from the manufacturers/suppliers, from whom the petitioner had obtained the supply of the goods in question due to business secrecy. I am unable to agree with the stand taken by the petitioner that due to business secret, he could not get the copies of original invoices from the supplier. If the Department is not provided with the copies of the documents as asked for, in my view, that itself will entitle the Department to take all possible efforts in arriving at the correct value of the goods imported, especially when the Department had received some intelligence reports as to the under-valuation of the goods imported in the instant case. At any rate, the goods have been seized under a mahazar on 30-12-1991. I do not think that the petitioner can rely upon the proviso to Section 10 of the Customs Act. Apart from that, as already stated, when the writ petition was heard partly, a show cause notice had been issued to the petitioner for adjudication on 10-4-92. Obviously the notice has not yet been served on the petitioner due to the fact that the period between 10-4-1992 to 15-4-1992 happened to be public holidays. It is well settled that the Courts can take note of the subsequent events also, while hearing petition under Article 226 of the Constitution of India. In view of the admitted fact that a show cause notice has been issued to the petitioner on 10-4-1992, I do not think that it is possible for the court to issue a writ of mandamus as prayed for. It is now clear that the provisions of the Customs Act have been set in motion, and it is for the petitioner to face the adjudication proceedings and wait for the outcome of it. Further, I am unable to agree with the learned Counsel for the petitioner that issue of show cause notice when the writ petition was heard partly, will clearly show the mala fide intention on the part of the respondents. So long as the enactment confers powers on the authorities to issue show cause notice pursuant to the preliminary enquiry made already, no question of any mala fide intention on the part of the respondents will arise. Even otherwise, whether there was any mala fide intention on the part of the respondents in issuing a show cause notice to the petitioner, is not a matter to be gone into under Article 226 of the Constitution of India, on the facts and circumstances of this case.

8. It is relevant to notice the decision of this Court in *A. Sanjeevi Naidu Vs. The Deputy Commercial Tax Officer and Others*, with regard to service of notice, wherein it has been held as follows:

The various modes of service referred to in Clauses (a) to (c) of Rule 52 of the Tamil Nadu General Sales Tax Rules, 1959, are only alternative and not cumulative, and, therefore, it cannot be said that all the above three modes have to be exhausted before the service by affixture can be effected under Clause (d), where the service contemplated under Clause (c) (service by registered post) was found to be ineffective, the assessing authority would be justified in proceeding to serve the assessment order by affixing it in the assessee's place of business under Clause (d). The Assessee however would be entitled to a certified copy of the order from the assessing authority, even though the same had been served by affixture, and the assessing authority might not be justified in refusing

to supply it to the assessee when demanded.

9. In view of the foregoing reasons, I see no merit in the writ petition and is dismissed. No costs.