

(2017) 03 DEL CK 0209

In the Delhi High Court

Case No : 3148 of 2016

IQBAL HUSSAIN

APPELLANT

Vs

UNION OF INDIA & ORS

RESPONDENT

Date of Decision : 15-03-2017

Acts Referred:

Constitution of India, Article 226 -
Power of High Courts to Issue certain writs
Customs Act, 1962, Section 110, Section 153, Sect

Citation : (2017) 03 DEL CK 0209

Hon'ble Judges : S. Ravindra Bhat, Najmi Waziri

Bench : DIVISION BENCH

Advocate : Sangita Bhayana, Satish Aggarwala, Amish?Aggarwala, Kavita,
Pramod Bahuguna

Judgement

1. By this petition under Article 226 of the Constitution of India, the petitioner has impugned the order dated 14.08.2015, whereby the gold brought into India by him was seized by the customs authorities. It is the petitioner's case that after having worked for a few years in the UAE, on his way homewards he purchased from his earnings, gold weighing 580.67 grams for the purpose of his son's marriage. On his arrival at the Delhi Airport, while he was still waiting to receive his luggage from the conveyor belt, and even before he could take the same for declaration to the Customs Authorities at the Red Channel counter, he was questioned by the Customs Authorities. The gold which was kept in his suitcase was seized and a Panchnama was prepared confirming the quantum of gold. The difference between the versions of the petitioner and the respondent/ Customs Authorities is that, while the former claims that he had not even received his luggage and therefore could not proceed to cross the Red Channel/ customs duty declaration counter and had otherwise intended to declare the gold to the Customs Authorities, therefore, there was no question of him seeking to conceal it or to bring it into India illegitimately; the latter, however, states that

the petitioner had crossed the Green Channel and was intercepted thereafter.

2. Be that as it may, the quantum of gold seized by the Customs Authorities on 14.08.2015 is not in dispute. The petitioner has sought release of the same since no notice has been served upon him within six months of the said seizure. Such notice is mandatory under Section 110 of the Customs Act, 1962 (in short the Act), in compliance with Section 124 and in the manner prescribed in Section 153 of the Act. The respondent, however, contends that a show cause notice was issued to the petitioner on 05.02.2016, which was well within the stipulated six months from the date of seizure of the goods; the notice was posted through Speed Post on the same date. It is further contended that a copy of the show cause notice was also pasted on the Notice Board of the customs house in compliance with Section 153 of the Act; therefore, it would be deemed to be due notice, hence the petitioner's claim for release of the gold after expiry of six months' period is untenable; there has been no violation of principles of natural justice and the petitioner has failed to file a reply to the show cause notice. It is further contended that the gold was imported with mala fide intention of smuggling it into India, particularly since 21 pieces of the gold were coated in a white substance and the other four cut pieces were fitted in the body of the suitcase, which is an unusual way of carrying gold. This was an indicative of the petitioner's mens rea to smuggle the gold.

3. Before dwelling into the merits of the contentions made by the parties, it would be appropriate to examine the relevant legal framework concerning the proceedings.

4. Section 110(2) of the Act reads as under:- "110. Seizure of Goods, Documents and Things. -

(1)

(2) Where any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized:

Provided that the aforesaid period of six months may, on sufficient cause being shown, be extended by the Principal Commissioner of Customs or Commissioner of Customs for a period not exceeding six months."

5. Section 124 of the Act deals with issuance of show cause notice before confiscation of goods, which reads as under:- ".....124. ISSUE OF SHOW CAUSE NOTICE BEFORE CONFISCATION OF GOODS, ETC. -

No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person -

(a) is given a notice in writing with the prior approval of the officer of Customs not below the rank of an Assistant Commissioner of Customs, informing him of

the grounds on which it is proposed to confiscate the goods or to impose a penalty;

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and

(c) is given a reasonable opportunity of being heard in the matter:

Provided that the notice referred to in clause (a) and the representation referred to in clause (b) may, at the request of the person concerned be oral...."

6. The method of service of notice is prescribed under Section 153 of the Act, which reads as under:- "153. Service of order, decision, etc. -

Any 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 or by such courier as may be approved by the Commissioner of Customs;

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

7. Section 153 was amended with effect from 28.05.2012 to make it mandatory for service of notice by "registered post or by such courier as may be approved by the Commissioner of Customs" i.e. notice shall be served by the registered post to the person for whom it is intended or to his agent. In any case, service of notice through registered post or by courier is mandatory. It is only in the event of failure to serve by the aforesaid mode that the process of affixing the notice on the notice board of the customs house is to be followed.

8. On 14.02.2017, the respondents took time to produce the postal receipts as proof of the notice having been sent though Speed Post. However, no such document has been brought on record. Instead, the despatch register concerned has been shown to the Court and a photocopy of the relevant page has been taken on record. The show cause notice is entered at serial No.733, but it does not record the postal receipt number. Interestingly, the show cause notice bearing number "1228-C" is mentioned as "1227-C" in the despatch register. In any case, this entry is not sufficient proof or notice in terms of the requirement of Section 153 of the Act. Therefore, the same cannot be accepted as proof of service of notice within six months of seizure of the goods as mandated under the Act. Consequently, the petitioner would be entitled to return of the goods from the Customs Authorities.

9. The petitioner has relied upon the judicial decisions of this Court in precedents, namely, Auto Creators Vs. Union of India, 2015 (325) E.L.T 49 (Del.) and Purushottam Jajodia Amit Kumar Vs. Directorate of Revenue Intelligence &Anr. And K.M. Udyog Vs. Deputy Commissioner (Anti Evasion) Central Excise &

Anr., 215 (2014) DLT 78. The former judgment held that if no notice was issued within six months time, as mandated under Section 110(2) of the Act, the goods would have to be released back to the party from whom the goods were seized. The latter judgment held that notice would be regarded as having been served when it is actually received or deemed to have been received by the person from whom the goods were seized. The object is to inform the person concerned of the proposed confiscation or imposition of penalty and to provide them with an opportunity to make representations in writing. Insofar as the respondents have not been able to prove that the notice was either posted or served, there can be no presumption in that regard. Consequently, there could not be any question of notice having been received by the petitioner.

10. The respondents rely upon the judgment of the Jharkhand High Court in *Milan Poddar Vs. Commissioner of Income-Tax &Anr.*, [2013] 357 ITR 619 (Jharkhand) to contend as under:- "5. The first question, according to the learned counsel for the appellant, is a question of jurisdiction of the Assessing Officer, as notice was not served within the stipulated period as provided under section 143(2)(ii) of the Act of 1961 and it is settled law that unless a notice is served upon the assessee within a period of 12 months (as the limitation prescribed at the relevant time), the Assessing Officer cannot proceed to make an assessment order. According to the learned counsel for the appellant, the Commissioner of Income-tax (Appeals) gave cogent reasons and held that there was no valid service of notice under section 143(2) of the Act of 1961 whereas the Tribunal ignored the relevant provisions of law and particularly, section 292BB of the Act of 1961, which provides that in a case where an assessee has appeared in any proceeding or co-operated in any inquiry relating to an assessment or reassessment, it shall be deemed that any notice under any provision of this Act, which is required to be served upon him, has been duly served upon him in time in accordance with the provisions of this Act and in that situation the assessee shall be precluded from taking any objection in any proceeding or inquiry under this Act that the notice was not served upon him or not served upon him in time or it was served upon him in an improper manner. According to the learned counsel for the assessee, the Revenue cannot take help of this provision in view of the fact that, in the same section it has been provided that such deeming provision will not apply, if the assessee raised the objection of service before making amendment order by the Assessing Officer. Here in this case, the appellant-assessee came to know about the proceedings taken by the Assessing Officer before completion of the assessment and submitted an objection clearly stating that notice under section 143(2) of the Act of 1961 was not served upon the assessee. The provision clearly says that upon furnishing such objection by the assessee, deeming clause will not come into operation so as to declare the service to be valid. ...

16 ...

28. In the case before us, the assessee has led no evidence to prove that the

impugned notice was not received by him or that he was not responsible for its non-service. The details given by the AO in the assessment order included not only the receipt no. under which speed post was sent but also the tracking code. Perusal of the assessment order shows that the AO had apprised the assessee of the aforesaid facts in the course of assessment proceedings also. It was therefore for the assessee to adduce relevant evidence to prove that the said notice was not served upon him and also that he was not responsible for its non-service. However, the assessee has not adduced any evidence to prove so in spite of the fact that he could have done so with the help of details made available in the assessment order and also in the notice issued to him in the course of the assessment proceedings. Additionally, the AO has verified his records and found that the impugned notice was not received back in his office. In this view of the matter, the legal fiction by which the service of the impugned notice is deemed to be effected on the assessee stands on a much stronger footing.

We are in full agreement with the reasons given by the Tribunal with respect to the interpretation given by the Tribunal on various issues decided by the Tribunal which we have quoted above."

11. However, the aforesaid judgment is not applicable to the facts of the present case because it held that once the authorities have produced proof regarding service of notice then it becomes incumbent upon the assessee to prove that the said notice was not served upon it. In the present case, not only have the custom authorities failed to provide proof regarding service of notice, but also their counter affidavit is unsupported by any material proof of service. In the aforementioned case, notice was deemed to have been served in the event that the assessee has appeared in any proceeding or cooperated in any enquiry relating to an assessment or re-assessment and "in that situation, the assessee shall be precluded from taking any objection in any proceeding or inquiry under this Act that the notice was not served upon him or not served upon him in time or was served upon him in an improper manner." In the present case, there has been no initiation of any formal enquiry or proceedings by the Customs Authorities after the seizure of the goods on 14.08.2015. Lastly, there is no deeming provision of service having been effected under Section 153(a) of the Customs Act, 1962. As stated in para 7 (supra) the records of service by affixing the notice on the notice board of the customs house would arise only in the event that the notice "cannot be served in the manner prescribed under the said clause" as laid down under Section 153 (a). Therefore, in terms of the unambiguous language of Section 110(2), in the absence of notice within six months of the seizure of the goods, they would have to be released back to the petitioner.

12. For the aforesaid reasons, the petitioner is entitled to release of the gold seized on 14.08.2015. Accordingly, the respondents are directed to release the same to the petitioner within three weeks from today.

13. The writ petition is allowed in the above terms.