(2016) 04 BOM CK 0166

In the Bombay High Court

Case No : Writ Petition No. 929 of 2016

Khaja Mustafa Kamal APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 25-04-2016

Acts Referred:

Citation : (2016) 337 ELT 221

Hon'ble Judges : S.C. Dharmadhikari and Dr. Shalini Phansalkar Joshi, JJ.

Bench : Division Bench

Advocate : S/Shri Prakash Shah with C. Subba Reddy and Sagar Kasar, Advocates, for the Petitioner; Shri Pradeep S. Jetly, Advocate, for the Respondent

Final Decision : Allowed

Judgement

1. By this petition under Article 226 of the Constitution of India, the petitioner seeks the following two reliefs :

(a) This Hon''ble Court may be pleased to issue appropriate orders calling for record and proceedings in respect of the investigations initiated by the officers of respondent Nos. 2 and 3 for scrutinising the legality, propriety and validity of the communications addressed to the banks and after examining the same, it may kindly be quashed and set aside.

(b) This Hon''ble Court may be pleased to issue appropriate orders calling for record and proceedings in respect of the investigations resulting in the communications to the banks for scrutinising the legality, propriety and validity of the action of freezing of the accounts and after examining the same, it may kindly be quashed and set aside."

2. They are sought in the following facts and circumstances. The petitioner is a proprietor of M/s. Infinity Trading Company. The petitioner states that he is the authorised signatory and also authorised to deal with the day-to-day affairs of certain firms whose names are listed in Paragraph 1 of the petition.

3. The three firms are also proprietary concerns and are engaged in the business of export of imitation jewellery. The customers located at several places abroad place the orders and that is how the exports have been made. The petitioner says that these exports have been made after complying with the Customs Act, 1962. After setting out the complete procedure for such export in the petition, what has been urged in the writ petition itself is that wherever exports are made under any export incentive scheme and the benefit of duty drawback is claimed, the consignments are subjected to examination as per the Rules fixed by the department. The norms are also referred in Paragraph 4.4, including appraisal of the consignment by the officers. The volume of exports and the claim of duty drawback would be decided, according to the petitioner, in the hierarchy of the appraisal.

4. The petitioner points out that the entire procedure would not be known to the petitioner had he not dealt with the department from time-to-time in export of consignments and claimed drawback. The petitioner claims that as far as the present issue raised in the petition is concerned, the subject consignments were physically examined and found to be satisfactory. The exports were permitted and the export incentives were sanctioned. However, on the basis of certain intelligence received by the officers of the respondents, investigations were initiated into the exports made by certain other exporters who, according to the respondents, did not export any goods, but have claimed duty drawback on these goods. It is in these circumstances that the search was carried out in the premises of one Mr. Suhail Ansari. It is stated that the documents recovered showed that such bills were issued to the petitioner also. That is how the investigations have extended to the exports made by the petitioner in the name of the three firms. During the course of investigations, summons were issued to the petitioner directing him to appear before the Investigating Officer on 9th September, 2015. Since the petitioner was unable to appear on the said date, a letter was addressed requesting for fresh date. A copy of the summons and the reply thereto are annexed as Annexure-A collectively.

5. Then the petitioner was called to attend the office of the respondents by telephonic intimation. The petitioner attended, furnished all the explanations and claims that he was called upon to make payment towards the duty drawback claim and this was without any notice and without explaining or setting out the grounds on which such payment is demanded. The petitioner claims that since certain threats were administered, he agreed to act as per the directions of the officer. The petitioner addressed a letter to the banks informing the banks that they should credit the amount available in the balance to the Department. Annexure-B is a letter addressed, inter alia, to the Branch Manager of HDFC Bank Limited.

6. Thereafter, the respondents addressed a letter to the bank with a direction that the account of the petitioner in the said bank as well as any account in the name of the petitioner should not be allowed to be operated and any amount in

balance in the said account should not be permitted to be withdrawn. Thus, the petitioner claims that the bank accounts were frozen and attached. The bank had no option, but to comply with the demands of the respondents. That is how the petitioner claims that to show his bona fides he deposited a sum of Rs. 16,62,792.18 which was available in balance in the account of the petitioner. Fearing that the petitioner''s livelihood would be jeopardised that he claims to have made this payment and recorded this fact by a letter at Annexure-D.

7. Again, on 13th October, 2015, the petitioner claimed that because of the freezing of the account, his business is adversely affected. His cheques would be dishonoured. The petitioner claims that he had been explaining to the respondents that further compliance with the law and given that the respondents have a power to investigate that does not mean that the bank account should be frozen and endlessly. The petitioner was pressurised to make further payments and that is how the petitioner, relying upon certain judgments, pointed out by a letter of 28th January, 2016, followed by another one dated 15th February, 2016, that the bank account be released.

8. The respondents, on the other hand, informed the petitioner in writing on 25th February, 2016, that he has failed to appear before them by giving some reason or the other. This was denied by the petitioner and he stated that had he not appeared there would have been no question of some amount being recovered.

9. It is in these circumstances that the petitioner has knocked the doors of this Court and Mr. Shah, learned counsel appearing for the petitioner, relying upon series of judgments of this Court and the final one rendered by a Division Bench to which one of us (S.C. Dharmadhikari, J.) was a party, in the case of Rajendra Vithal Shinde v. Union of India and anr., Writ Petition No. 12728 of 2015, decided on 22nd December, 2015 [2016 (332) E.L.T. 699 (Bom.)], permits that attachment of movable and immovable property in the manner done is impermissible.

10. On the other hand, Mr. Jetly learned counsel appearing for the respondents would submit that a detailed reply has been filed in the writ petition, a copy whereof is forwarded to the petitioner. Mr. Jetly would submit that fraudulent claim of drawback by the petitioner is being investigated. Mr. Jetly protested that even though several summonses have been issued for the presence of the petitioner before the Directorate of Revenue Intelligence officers, he has failed to do so. Since the duty drawback is availed fraudulently, the respondents are justified in what they have done.

11. The writ petition is a abuse of the process of Court. Mr. Jetly would submit that sufficient material has been placed on record to establish that the petitioner amongst other exporters was indulging in fraudulent exports by inflating the Prevailing Market value and free on board value (for short PMV and FOB) in order to claim duty drawback and other benefits. Mr. Jetly has invited our attention to Paragraph 7 of the affidavit-in-reply to submit that the modus operandi used

requires to be investigated in depth. The statement of Parvez Mohammed Sharif Ansari was recorded. The petitioner has admitted this fact in Paragraph 4.9 of the petition. Thus, the petitioner has accepted that he has obtained bogus purchase bills from Parvez Ansari. The fraud has been properly assessed and determined at Rs. 24 lakhs. The duty drawback is availed of and the duty scrips are amounting to Rs. 74 lakhs. It is in these circumstances that Mr. Jetly would submit that there is a power and once there is a power this Court should not interfere in writ jurisdiction. Reliance is also placed upon a voluntary payment or deposit of Rs. 25,48,572/-. Reliance is also placed upon the affidavit-in-reply to submit that the petitioner does not respond to any summonses and that is why the action ultimately deserves to be upheld.

12. With the assistance of both counsel, we have perused the petition and the annexures thereto. Pertinently, the petitioner''s letter and which has been addressed on 8th September, 2015, acknowledging receipt of a summons dated 1st September, 2015, is not disputed. The petitioner has explained in this letter that the summons was received only on 5th September, 2015, and that is why he will not be able to appear on 9th September, 2015, due to prior engagements. The petitioner prayed for a fresh date of appearance. He also requested that the nature of documents, if any, required be kindly intimated so that the same can be produced before the Special Investigating Officer.

13. Then, the petitioner does not dispute that on 11th September, 2015, he addressed a letter to the Branch Manager of HDFC Bank Limited and informed that his account had been frozen by the DRI, Mumbai Zonal Unit in connection with on-going investigation into the exports. In order to prove his bona fides, he had deposited an amount in Government exchequer. That is how the entire credit in the account which has been specifically described in this letter should be made over by a demand draft in the name of the respondents. Thereafter, the intimation of export proceeds being received in the HDFC Account be also furnished to the DRI.

14. Then the petitioner annexes a copy of the letter addressed by the DRI to the Branch Manager of the HDFC Bank Limited at page 30 of the paper book. This letter reads as under :

"Directorate of Revenue Intelligence Mumbai Zonal Unit, UTI Building, 13, Vithaldas Thakersey Marg,

New Marine Lines, Mumbai - 400 020

F. No. DRI/MZU/D/Int-31/2015

11th September, 2016

To

The Branch Manager,

HDFC Bank Ltd.,

Shop No. G1 and G2,

Arihant Apartment Plot No. 2,

Jawahar Nagar, S.V. Road,

Mumbai.

Gentleman,

Sub : Enquiry into exports of M/s. Infinity Trading Co., M/s. Shingar Products & M/s. Vista International-request for not allowing the operation of accounts-operation of accounts - reg.

This office is investigating fraudulent/bogus exports and its Drawback of M/s. Infinity Trading Co., M/s. Shingar Products and M/s. Vista International - under the provisions of the Customs Act, 1962. During the investigations, it has come to notice that below mentioned persons and their firms have account(s) with your bank.

2. It is requested that the debit or withdrawal or transfer operations in any form/type in the following accounts may not be allowed till further instructions are received by your bank from this office in this regard.

3. The available balance in the aforesaid account and any other Account in the name of above firm or in the name of the proprietor/Director of the firm may please be intimated to his office at the earliest.

4. In case the above mentioned account holders are having a locked in this branch, the operation of locker should not be allowed and the details of the same should be intimated to this office immediately.

5. Any fixed deposit related to this account or to the aforesaid persons may not be allowed to be transferred or paid in cash to them and the details of the same should be intimated to this office immediately.

6. An immediate action in the matter is requested.

7. Action with reference to the above should be intimated to this office on the above mentioned fax number.

Sd/-

(Varsha D. Nimbalkar)

Deputy Director

Dri, Mzu, Mumbai."

15. If this letter is addressed on 11th September, 2015 and the petitioner is applying from 21st September, 2015, that his bank account be released and the freeze order be withdrawn, then, we do not see how Mr. Jetly can justify the action impugned in the writ petition. It is common ground that when such is the

letter addressed to the bank and to the petitioner alleging fraud and terming all exports as bogus so as to avail of a duty drawback, then, a one sided or unilateral version of the Revenue is not determinative or conclusive. It is not a case of an established and proved fraud but an alleged fraud. The fact that the petitioner has admitted that there was some liability but the circumstances in which he has paid the sum of Rs. 16,62,794.18 has been duly explained by him. He terms the payment as ad hoc and when he states that this is only to cooperate in the investigation that the petitioner has made this payment, then, we do not find any justification for the continued action. In a letter addressed on 4th January, 2016, to the Senior Intelligence Officer, copy of which is at page 34 of the paper book, the petitioner specifically complains that the investigation started in the month of September, 2014. He has appeared and has given evidence. He was asked to submit copies of all shipping bills and related export documents. They have been submitted. He claims that no wrong has been committed by him in relation to the exports nor any undue benefit is availed of, still a total amount of Rs. 25,48,573/- being deposited, he should be allowed to continue his business activities. He claims that he is a exporter in imitation jewellery for past several years. He has also set out as to how he has throughout acted bona fide. He has also pointed out that there are documents which would evidence that the exports are genuine.

16. As indicated that he had bills from one Suhail Ansari but same were issued to several exporters. That is no ground to presume that petitioner''s exports were not genuine. All exports were made in accordance with the provisions of law and the practise and procedure of the department. He has explained the entire modus operandi to the Investigating Officer in this letter which is fairly detailed and running into about 15 paragraphs. He has claimed that once he is familiar with the system and has not defrauded the Revenue at all nor made any attempt since 2011, his bank account being frozen is causing serious prejudice and loss to him.

17. Now it is indeed surprising that in the affidavit-in-reply in Paragraph 7, the deponent states as under :

"7. I say that in the present case, sufficient material had been placed on record to establish that the petitioner amongst other exporters was indulging in fraudulent exports by inflating the Prevailing Market Value (for short PMV) and free on board value (for short FOB) in order to claim excess Duty Drawback and other export benefits. I say that investigations have revealed that the petitioner was procuring bogus purchase bills from fictitious firms which existed only on paper. In fact no goods were purchased from these firms. I say that this modus operandi was used in order to claim excess Duty Drawback by inflating the PMV as per the value shown on the bogus purchase bills. I say that there exists a linkage between the monies which have been held in the bank accounts with the modus operandi of illegally obtaining the benefit of a drawback by showing inflated FOB value. I say that the data/information gathered was confirmed by

Shri Parvez Mohammed Sharif Ansari, the person who was involved in issuing the bogus purchase bills to exporters, in his statement recorded under Section 108 of the said Act. I say that this fact has been admitted by the petitioner albeit differently in Para 4.9 of the petition. I say that the petitioner has accepted that he has obtained bogus purchase bills from Shri Parvez Mohammed Sharif Ansari. I say that initial investigations have revealed that the petitioner has fraudulently availed Duty Drawback amounting to Rs. 24,00,000/- (Rupees twenty four lakhs only) and availed of duty scrips amounting to Rs. 74,00,000/- (Rupees seventy four lakhs only)."

18. We have found from a reading of the above paragraph that the petitioner is attributed a clear admission of the guilt. Once there is an admission of guilt, according to the Revenue, then, it is enough justification for their act is the submission of Mr. Jetly. Far from reading any admission of guilt, what we do in order to completely reject the submissions of Mr. Jetly is a reading of the documents annexed to the petition as also the above reproduced paragraph in the affidavit-in-reply as a whole. We cannot pick and choose certain sentences or portions thereof. We are not denying to the Revenue an opportunity of investigating or unearthing huge fraud. We are also not denying them their powers, but surely if drastic powers have to be exercised by public bodies, they must be exercised reasonably and fairly. We fail to understand if a huge and systematic fraud is alleged and perpetrated not only on the Revenue but on the public as a whole resulting in a voluntary deposit from the petitioner, then, why the investigations could not be concluded nor a show cause notice issued nor any steps taken till date. When such petitions are filed, it is our experience that detailed affidavits are filed in order to justify the act, but there is not a word about the delay. On 21st April, 2016, the deponent has time to file a very detailed affidavit-in-reply and file it in Court, but it is surprising that the Directorate and whole of it does not have time to proceed against those indulging in fraud on the public. A justification of this nature comes promptly only when parties like the petitioner complain of a freezing or attachment of their bank accounts and refusal to release them even if bona fides are shown.

19. We are of the firm view, therefore, that this is not a case of an admitted fraud or a liability which is undisputed. Once there are allegations of fraud the Revenue has a larger responsibility and duty to the public. It cannot refuse to take all steps and rest only on freezing of bank accounts of the alleged defaulters. That such an act and which is to be found traceable to different powers and of the nature conferred in the Customs Act, 1962, will not permit the respondents to deprive parties like the petitioner of their source of livelihood. They cannot stop their business by continued freezing of their bank accounts. It is further very clear and requires no reiteration that what is prohibited directly cannot be achieved indirectly or in an oblique manner. A refusal to carry out a duty in accordance with law cannot be justified by such a continued attachment and freezing of the bank accounts. In the given facts and circumstances, we do not see any justification for the same.

20. In the circumstances, we allow the petition. We direct that the bank accounts shall be released. This direction shall apply to all such accounts and which are bearing the name of the petitioner in HDFC Bank and other banks whose names are also notified to the Revenue. The release shall become effective within 48 hours from today. However, we clarify that we have expressed no opinion on the rival contentions. Equally, our order and direction does not mean that the investigation cannot be taken to its logical end or if it has concluded, then, the further steps cannot be initiated in accordance with law. Our order and direction is not in any manner limiting the power of the Revenue in that behalf nor do we express any opinion on the stand of the petitioner. The adjudicating authority shall pass an order in accordance with law uninfluenced by the directions in the writ petition.

