(2017) 03 DEL CK 0049

In the Delhi High Court

Case No : Writ Petition (C) 12251 of 2016 and CM Appl. No. 48317 of 2016

Lal Mahal Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 16-03-2017

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 110

Citation : (2017) 3 ADDelhi 531 : (2017) 239 DLT 251 : (2017) 162 DRJ 561

Hon'ble Judges : Mr. Sanjeev Sachdeva, J.

Bench : Single Bench

Advocate : Mr. Diljit Singh with Mr. Anubhav Mehrotra, Advocates, for the Petitioners; Mr. Anil Dabas, Advocate, for the Respondent No. 1; Mr. P.C. Aggarwal, Advocate, for the Respondent No. 2

Final Decision : Disposed Off

Judgement

Sanjeev Sachdeva, J.—The Petitioner by the present petition seeks quashing of letter dated 23.12.2016 whereby the Respondent No. 2/Directorate of Revenue Intelligence has directed the Respondent No. 3 and 4 (Banks) to cease all banking activities of the bank accounts of the petitioner. The Petitioner also seeks quashing of letter dated 26.12.2016 whereby the petitioner has been informed by the Banks that all accounts of the petitioner have been stopped.

2. It is contended by the Petitioner that the petitioner has an export unit in Noida SEZ for importing gold, manufacturing jewellery and exporting the same.

3. On 22.12.2016, the officers of Respondent No. 2/Directorate of Revenue Intelligence (DRI for short) carried out searches in premises of Petitioner at Noida and Delhi. At Noida, the DRI officers seized 15 kg consignment of jewellery. The custom authorities had earlier seized 3 kgs. In total 18 kgs of gold of the petitioner has been seized.

4. On 23.12.2016, DRI officers seized of Rs. 2,48,45,500/- in demonetized

currency notes and Rs. 13,40,000/- in new currency notes and various documents. The details thereof was recorded in the panchnama dated 23.12.2016. It may be noted that the prayers in the petition are restricted to the freezing of the bank accounts and as such in these proceedings, this court is not concerned with the legality or otherwise of the seizure of the gold, currency notes (demonetized and new) and other documents.

5. On 23.12.2016, the DRI issued the impugned letters to the Banks/Respondent 4 and 5 directing them to cease all banking activities of the petitioner''s bank accounts. Consequent to the said letters the Banks have intimated the petitioner by the impugned letters dated 26.12.2016 that the bank accounts have been frozen.

6. It is submitted by learned counsel for the petitioner that neither any show cause notice was issued prior to the issuance of letter dated 23.12.2016 to the bank for ceasing all operations in the accounts nor any formal order was passed. It is further submitted that no intimation with regard thereto was ever sent to the petitioner.

7. It is further submitted that the impugned letters issued by the DRI are silent as to under which provision of law the same have been issued. It is submitted that the only power to seize is under section 110 of the Customs Act, 1962 (hereinafter referred to as the Act), which also does not confer the power on the DRI to freeze bank accounts.

8. It is submitted that the coercive action of freezing of bank accounts could not have been taken prior to adjudication of penalty and prior to any sum having been crystallized or ascertained.

9. It is further submitted that the cessation of operation of the bank accounts has virtually led to the entire business coming to a standstill and the petitioner is not in a position to carry on its day-to-day operation. It is further contended that the accounts that have been seized are cash credit accounts in which there is debit balance.

10. Reliance is placed on the decisions in the cases of

(i) Vikas Gumber v. Union of India (2009) 234 ELT 439 (Del)

(ii) MZ Handicrafts v. Union of India 2015(322) ELT 57 (All.)

(iii) Rajendra Vitthal Shinde v. Union of India 2016 (332) ELT 699 (Bom)

(iv) Khaja Mustafa Kamal v. Union of India 2016 (337) ELT 221 (Bom)

11. The respondent DRI in its counter affidavit has contended that the petitioner used to import duty free imported gold for making jewellery with the condition that it would export the entire jewellery made from the imported duty free gold. It is contended that instead of exporting the gold jewellery, the petitioner used to divert the duty free imported gold in the open market. It is contended that

approximately 431 Kg Gold, Silver, foreign Currency and Indian Currency approximately to the tune of Rs. 141 to 145 Crore has been diverted.

12. It is contended that as on 22.12.2016 a total quantity of 430 Kg of imported gold was found short. Out of the same, 196 Kg of gold, which was stated to have been sent to job worker, had not returned and the remaining 235 Kg gold had been illegally taken out of SEZ, which resulted in shortage of 235 Kg gold in the factory.

13. It is submitted that further investigation of the case is going on and involvement of the other persons is yet to be worked out. It is submitted that since investigation is at a primary stage and the time for the issuance of show cause notice is six months, no show cause notice has been issued till date.

14. Reference is made to section 110(3) of the Act to contended that since investigation of the case is going on, the proper officer may seize any documents or things which in his opinion, would be useful for, or relevant to any proceedings under this Act. It is submitted that it would also include sale proceed of the Gold in question. It is submitted that there is every possibility that sale proceed of the Gold in question may be deposited in the bank accounts of the petitioner and therefore in order to save or to recover the sale proceeds, the bank accounts of the petitioner has been frozen.

15. Further reference is made to Section 111 of the Act to contend that as petitioner had imported duty free Gold in a special economic zone unit being run by him and the import was subject to the conditions that Gold in question would be used only for making jewellery and thereafter the jewellery would be exported and as the petitioner did not fulfil the said condition and sold the duty free Gold in open market, therefore the Gold imported by the petitioner is liable to be confiscation. It is submitted that in the present case as the Gold in question has been sold, the sale proceeds of the gold are liable to be confiscated. The sale proceeds may be kept in the bank accounts of the petitioner.

16. Further reliance is placed on section 121 of the Act to contend that because the petitioner did not fulfil the condition of duty free import of the Gold and disposed off the Gold in open market, it comes within the definition of smuggling and the sale proceeds of smuggled goods is also liable to be confiscated. It is submitted that in these circumstances also, freezing of the bank accounts of the petitioner was required as there was every possibility that sale proceeds may be kept in the said bank accounts. Reliance is placed on the decision of the Supreme Court in Commissioner of Customs, New Delhi v. Euroasia Global (2009) 6 SCC 58 and of this court in Ravi Corp Science v. Union of India 2015 (323) ELT 558 (Del).

17. The Impugned letter dated 23.12.2016 issued by the DRI to the Bank Manager of the Banks of the petitioners reads as under:

"It is to inform you that an investigation is being carried out against Shri Lal

Mahal Limited, B-058506, Bhagwan Dass Nagar, New Delhi - 110026. In this regard, you are requested to submit the bank account statement of Account Number 61005373144 maintained in your branch for the period from 01.04.2011 to 23.12.2015 at the above mentioned address within two days time and it is also requested to cease all the banking activities such as withdrawal, deposit, RTGS, NEFT etc. of the sais account until the prior permission of the undersigned officer. It is also requested that any banking activity in any other account related to Shri Lal Mahal Limited or their PAN AAEC5532EC be ceased and account statement of the said account may also be provided for the above said period."

18. It is an admitted position that prior to the issuance of the impugned letters to the bank, no show cause notice was issued to the petitioners. The impugned letters are also silent about the provision of law under which the powers have been exercised by the DRI for directing the banks to cease the operation of the bank accounts.

19. The counter affidavit refers to section 110 (3), 111 and 121 of the Act. Let us examine the applicability of the said provisions to the facts of the present case.

20. Section 110 of the Act reads as under :

110. Seizure of goods, documents and things. -

(1) If the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods :

Provided that where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer.

(1A) ***** ***** *****

(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.

(3) The proper officer may seize any documents or things, which, in his opinion, will be useful for, or relevant to, any proceeding under this Act.

(4) The person from whose custody any documents are seized under sub-section (3) shall be entitled to make copies thereof or take extracts there from in the presence of an officer of customs.

21. Section 111 of the Act provides for confiscation of improperly imported goods and section 121 provides for confiscation of sale proceeds of smuggled goods.

22. In support of the impugned letters dated 23.12.2016, the respondents have neither relied upon nor produced any order or decision to show that the proper officer has formed any opinion that the bank accounts are liable to be confiscated

or are useful for or relevant to any proceedings under the act and consequently required to be seized.

23. The impugned letters only state that an investigation is being carried out against the petitioner. No show cause notice or order has either been communicated to the petitioner nor copy thereof filed in court. The only reason forthcoming is by way of the reply in the counter affidavit, wherein it is stated as under :

"10. That so far the submission of the petitioner that the impugned letters are silent of the provision of law under which they have been issued. In this connection it is submitted that since investigation of the case is going on and as per the provision of the sub section 3 of section 110 of the Customs Act the proper officer may seize any documents or things which in his opinion, will be useful for, or relevant to any proceedings under this Act. After perusal of the aforesaid provision of law it is clear that proper officer may seize any document or thing, which includes sale, proceed of the Gold in question. Since there is every possibility that sale proceed of the Gold in question may be deposited in bank accounts of the petitioner, therefore in order to save or to recover the sale proceed the bank accounts of the petitioner is to be freeze otherwise sale proceed in question may be disbursed by the petitioner.

11. That as per provision of the section 111 of the Custom Act improperly imported goods, the goods brought from a place outside India shall be liable to be confiscation. As per section 111(o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition if not observed unless the non-observance of the condition was sanctioned by the proper officer. Herein in the present case petitioner has imported the huge quantity of duty free Gold in a special economic zone unit being run by him and said import was subject to the conditions that Gold in question was to be used only for making jewellery and after making the jewellery, same was to be exported but in the present case petitioner has not fulfil the said condition and sold the duty free Gold in open market, therefore the Gold imported by the petitioner come in the purview of section 111 (o) of the Customs Act and is liable to be confiscation. Since in the present case Gold in question has been sold out, therefore sale proceed of the same is liable to be confiscation, which may be kept in the bank accounts of the petitioner.

12. That since petitioner did not fulfil the condition of duty free import of the Gold and disposed off the Gold in question in open market, its come in to the definition of smuggling and as per section 121 of Customs Act sale proceed of the smuggled goods is liable to be confiscation. Here again freezing of the bank accounts of the petitioner is required because there is every possibility that sale proceeds may be kept in the said bank accounts."

(underlining supplied)

24. The reason forthcoming from the counter affidavit is that the Gold, which was imported by the petitioner and which is not available is liable to be confiscated. It is stated that since the gold is not available, it may have been sold and the sale proceeds of the Gold may be kept in the bank accounts of the petitioner and accordingly the said bank accounts have been frozen. The officers of DRI are not certain that the money lying in the accounts is the sale proceeds of Gold. There is not even a reasonable belief on the part of the DRI officers.

25. The categorical stand of the petitioner is that the bank accounts are cash credit accounts with credit limit of Rs. 1000 Crore. The accounts have a balance of only Rs. 1,69,00,000/-. The Petitioner in the petition has averred as under :

"J. Because however, respondent has ceased all bank accounts of the petitioner at Delhi, asphyxiating the running business into closure and exposing it to huge liabilities, both domestic and international. How this act does not satisfy the twin tests of necessity and least invasiveness is that while the seizing of the accounts does not protect the interests of revenue as the accounts have deposits of only Rs. 1,69,00,000/- (Rupees One Crore Sixty Nine Lac), it has a cascading effect on the business as these accounts are Cash Credit accounts, wherein, Petitioner has credit limits of more than Rs. 1000 crores, which are being used by Petitioner to do business, with the proceeds being used to repay to the bank. If the accounts remain seized, not only will the business of Petitioner be destroyed but it would expose it to legal challenges from international buyer."

26. To the categorical stand of the petitioner that the bank accounts that have been seized are cash credit accounts, there is no denial by the respondents. The freezing of the accounts have a cascading effect on the business, as these accounts are Cash Credit accounts, which are being used by Petitioner to do business. There is no credit balance in the accounts that have been seized. The only credit balance that is stated to be there in the accounts is Rs. 1,69,00,000/-.

27. The petitioners have offered to give a security of Rs. 10,00,00,000/- (Rupees ten crores) in the form of property over and above the amount of Rs. 7.5 Crores in the form of gold and currency seized by the Respondents.

28. A coordinate bench of this court in Vikas Gumber (supra), relying upon the view taken by the Division Bench of the Gujarat High Court in AM Overseas v. UOI (2006) (194) ELT 267 (Guj), directed de-freezing of the Bank accounts as the petitioner was not dealing in currency or was not charged with illegally transacting in currency and further as no show cause notice was issued nor any formal order had been passed by virtue of which the bank accounts were seized.

29. Similar view has been taken by the Division Bench of the High Court of Judicature at Allahabad in M.Z. Handicrafts (supra), Division Bench of the High Court of Judicature at Bombay in Rajendra Vitthal Shinde (supra) and Khaja Mustafa Kamal (supra). The consistent view taken is that the Section 110 of the Act does not enable the proper officer to attach the bank accounts. The authorities cannot stop business by freezing of bank accounts.

30. The Division Bench of the High Court of Judicature at Allahabad in Raghuram Garh Pvt. Ltd. v. Commissioner of Central Excise and Service Tax 2005 (186) E.L.T. 50 (All) directed de-freezing of the bank accounts where the bank accounts were not been frozen under section 110 of the Act but had been frozen as investigation was being carried out.

31. In the present case also the stand is that the accounts have been frozen as investigation is going on. There is no reference to any provision of law under which the impugned letters to the banks have been issued. No order under section 110 has been alleged to have been passed or produced. The counter affidavit merely states that the bank accounts have been seized as investigation is going on.

32. The Judgment of the Supreme Court of India in Euroasia Global (supra) is not applicable to the facts of the present case as in the said case, during search of the residential house of the petitioner therein currency amounting to Rs. 23.90 lakhs was recovered. The information given by the wife of the petitioner to the officer of DRI was that the amount constituted sale proceeds of imported goods. The said amount was seized under section 110 of the Act on the reasonable belief that the said currency was liable for confiscation as it represented sale proceeds of smuggled goods.

33. Per contra, in the present case, there is no confiscation under section 110 of the Act. The stand is that as the gold is not available, it may have been sold and the sale proceeds of the Gold may be kept in the bank accounts of the petitioner. There is not even a reasonable belief that there are any sale proceeds in the bank accounts. On the contrary, the stand of the petitioner is that the bank accounts are cash credit accounts.

34. The Judgment of the Division Bench of this court in the case of Ravi Crop Science (supra) relied upon by the Respondents is also not applicable to the facts of the present case. In the said case the categorical stand of the DRI was that the investigation had showed amounts had been received into the account that was seized. There was a reasonable belief that the subject account was opened only to facilitate easy transfer of money to non-existent firms. A case had been made out that the monies in the frozen account were sale proceeds of smuggled goods. In the present case, apart from a vague statement that the Gold may have been sold and the sale proceeds may be kept in the frozen accounts, there is not even a reasonable belief expressed that the sale proceeds are lying in the frozen bank accounts. As already noticed the frozen accounts being cash credit accounts, there is no amount of the petitioner lying in the said accounts on the contrary, the petitioner has been provided with a facility by the banks to draw upto a particular limit from the accounts. Thus there can be no justification in freezing the cash credit accounts of the Petitioner.

35. The stand of the DRI is that 430 Ks of imported Gold is short and unaccounted. Investigations are going on. Certainly, DRI would be entitled to

take appropriate steps, in accordance with law, with regard to the imported Gold that is alleged to have been diverted and its sale proceeds, if the competent officer of the DRI is of a reasonable belief that the sale proceeds are lying in a particular account or accounts. Until such time that there is such a reasonable belief expressed, there can be no justification in a blanket order of freezing of bank accounts that are cash credit accounts in which there is no credit balance and the effect of which is that the entire business operations of the petitioner come to a standstill.

36. Accordingly, I am of the view that the impugned letters dated 23.12.2016 issued by the Deputy Director DRI is liable to be quashed in so far as they relate to the cash credit accounts and the Bank accounts that are cash credit accounts are liable to be de-frozen.

37. The question then arises is whether the same are to be unconditionally de-frozen or the petitioner is to be put to some terms. The petitioner has offered to give a security of Rs. 10,00,00,000/- (Rupees ten crores) in the form of property over and above the amount of Rs. 7.5 Crores in the form of gold and currency seized by the Respondents.

38. In view of the above, the impugned letters dated 23.12.2016, in so far as they relate to Bank accounts that are cash credit accounts, are quashed. The petitioner shall be permitted to operate the cash credit accounts in Respondents No. 3 and 4 Banks. The petitioner shall, within a period of one week, furnish a security of Rs. 10,00,00,000/- (Rupees ten crores) in the form of an unencumbered property, over and above the amount of Rs. 7.5 Crores in the form of gold and currency seized by the Respondents. The parties shall bear their own costs.

39. It is clarified that this order is without prejudice to the right of the Respondent/DRI to take such further steps as they may be entitled to in law, in respect of the investigation with regard to the alleged diversion of duty free imported Gold and the sale proceeds thereof.