
(2012) 02 PAT CK 0110
In the Patna High Court
Case No : CWJC No. 12738 of 2011

Maa Saraswati Traders

APPELLANT

Vs

The Union of India and Others

RESPONDENT

Date of Decision : 28-02-2012

Acts Referred:

Customs Act, 1962 — Section 108, 11, 110, 110(2), 124
Foreign Trade (Development and Regulation) Act, 1992 — Section 3(11)

Citation : (2012) 2 PLJR 307

Hon'ble Judges : S.N. Hussain, J

Bench : Single Bench

Advocate : Prabhat Ranjan, for the Appellant; Archana Meenakshee, for the Respondent

Final Decision : Allowed

Judgement

1. This writ petition has been filed on 4.8.2011 by the petitioner challenging the seizure memo dated 7.6.2011 (Annexure-5) issued by the Customs (Prev.) Division, Muzaffarpur by which 29,336 Kgs. of betel nuts and two trucks bearing Registration Nos. UP-32-C2/3395 and UP-78-AT/ 2212 were seized u/s 110 of the Customs Act, 1962 (hereinafter referred to as "the Act" for the sake of brevity) for alleged violation of Government of India, Ministry of Finance, Notification No. 9-Cus/96 dated 22.1.1996 and 37/96 dated 23.7.1996 issued u/s 11 of the Act read with Section 3(11) of the Foreign Trade (Development and Regulation) Act, 1962 as well as the provisions of Customs Tariff Act, 1975. The claim of the petitioner is that the impugned order was shown to have been made on 7.6.2011 at 18.00 hrs although the trucks and their drivers were detained on 6.6.2011 itself while the drivers had parked their trucks at the Petrol Pump for taking tea, but the said trucks and drivers were produced before the Magistrate on 9.6.2011. Learned counsel for the petitioner stated that this practice has been severely deprecated by a Division Bench of this court in case of Rajjan Lal Sri Lal Man vs. The Union of India through Commissioner of Customs & Ors., reported in 2011(4) PLJR 635.

2. Learned counsel for the petitioner also submitted that in the pleadings and the orders of the respondents no "reason to believe" has been spelt out nor any material was admittedly available with them at the time of seizure. Hence there being neither any material nor any "reason to believe" there was no occasion for the authorities to make the aforesaid seizure. In this regard, learned counsel for the petitioner relied upon two decisions of Division Benches of this court in case of Angou Golmci Vs. Union of India and Others and in case of Shiv Kumar Bhagat Vs. State of Bihar and Others and he also relied upon two decisions of the Supreme Court in case of Pukhraj vs. D.R. Kohli, Collector of Central Excise, Madhya Pradesh and Vidarbha and Another, reported in AIR 1962 1559 and in case of State of Gujrat vs. Mohanlal Jitmalji Porwal and Another, reported in AIR 1987 1321.

3. Learned counsel for the petitioner further claimed that on 24.10.2011 learned counsel for the respondents took adjournment for bringing important facts and materials, but in their supplementary counter affidavit filed on 13.12.2011 they had merely annexed the seizure report dated 7.6.2011 (Annexure-A), show-cause notice u/s 124 of the Act dated 18.11.2011 (Annexure-B), order of the Commissioner of Custom in another case dated 23.3.2009 (Annexure-C) and provisions of the Act (Annexure-D). Hence, out of the said documents Annexures-C and D are not the facts and materials of the instant case, whereas Annexure-A has already been annexed to the writ petition as Annexure-5 and Annexure-B is of a much subsequent date 18.11.2011 and had been given merely to circumvent the provision of Section 110(2) of the Act according to which if no show-cause notice is given within six months of the seizure, the goods had to be returned.

4. Learned counsel for the petitioner also argued that the facts of this case are exactly similar to the facts of the earlier case bearing C.W.J.C. No. 11938 of 2011, which was decided on 14.11.2011, except only that during the pendency of that writ petition a show-cause notice in confiscation proceeding had been issued. He also argued that the aforesaid show-cause notice is absolutely frivolous and when the base, namely the seizure goes, every structure thereon including confiscation also goes. In this connection, learned counsel for the petitioner relied upon a decision of the Apex Court in case of Chairman-cum-Managing Director, Coal India Limited and Others vs. Ananta Saha and Others, reported in (2011)5 Supreme Court Cases 142 as well as a decision of a Bench of this court in case of Malti Gupta Vs. The State of Bihar and Others, .

5. With respect to the statements of drivers in detention are concerned, it was stated by learned counsel for the petitioner that in the instant case the drivers were detained on 6.6.2011 and their arrest was recorded on 7.6.2011, but they were produced before the Magistrate on 9.6.2011. Hence, learned counsel for the petitioner claimed that the alleged confessional statement made u/s 108 of the Act is not legal and proper. In this connection, he relied upon a decision of the Supreme Court in case of Noor Aga vs. State of Punjab and Another, reported in (2008)16 Supreme Court Cases 417 and also a decision of Bombay High Court in

case of Ashak Hussain Allah Detha Alias Siddique and another Vs. Assistant Collector of Customs (P.), Bombay and another, .

6. I.A. No. 8361 of 2011 has also been filed by the petitioner annexing show-cause notice u/s 124 of the Act issued during the pendency of this writ case by the Assistant Commissioner Customs (P) Division," Muzaffarpur dated 18.11.2011 (Annexure-1 thereof) and challenging the same vide amendment in paragraph-1 of the writ petition by way of adding the following relief:--

That this writ application is also for quashing of the notice to show-cause dated 18.11.2011 issued u/s 124 of the Customs Act and the stay of the operation of the same during the pendency of the present writ application.

7. On the other hand, learned counsel for the respondents argued that the petitioner had no locus to file this writ petition as it is merely a transporter and Annexure-1 is Power of Attorney only for transportation and not for the sale of betel nuts, but no copy of any such agreement has been brought on record rather during investigation it was found that there was no firm named as M/s M.L. International, New Delhi.

8. Learned counsel for the respondents also stated that Annexure-A to the supplementary counter affidavit is Form DRI-2 of seizure report sent immediately to the Headquarters of Customs, Patna giving details of seizure and facts of the case after the seizure was completed, whereas Annexure-B is the show-cause notice dated 18.11.2011 issued under the provision of Section 124 of the Act with respect to the confiscation proceeding.

9. Learned counsel for the respondents also averred that petitioner's prayer for quashing the order of seizure and the show-cause notice of confiscation should not be entertained at this stage as a civil action has been "brought into action by the seizure and Chapters XIV, XIV-A and XV of the Act lay down a complete statutory framework under which a civil action initiated under the Act has to be determined and hence this process of law cannot be thwarted under writ jurisdiction.

10. Learned counsel for the respondents also stated that there were grounds available and sufficient "reasons to believe" at the time of seizure that seized betel nuts being transported on the trucks concerned were smuggled goods, as the authorities had specific informations that two trucks loaded with betel nuts of third country origin were coming from Purnia side and going to Kanpur and the said trucks were found parked near Teghra and on seizure the driver produced two envelopes containing original and duplicate copies of tax invoice issued by Assam Agro Trading, Gayari in favour of Salasar Traders, Delhi and money receipt issued by Market Yard Dhupguri and transport receipt issued by Matro Transport, Siliguri and transport builtly mentioning the petitioner as consigner and tax invoice issued by the petitioner etc. and on enquiry the driver revealed that the said betel nuts were loaded on the trucks at Kaliaganj near Indo-Nepal Border and on demand of papers of betel nuts the driver could not produce any

documents. In this connection learned counsel for the respondents relied upon a decision of a Bench of this court in case of Bikaner-Assam Road Lines India Ltd. Vs. Union of India(UOI), .

11. Hence he claimed that there is no occasion to quash the entire process as articles can be released on production of security specially when a proceeding u/s 108 of the Act is a judicial proceeding, but in spite of that the petitioner never complied the impugned summons although the petitioner was bound to comply the same, in this connection learned counsel for the respondents relied upon a decision of the Apex Court in case of Union of India vs. Lexux Exports Pvt. Ltd. and Another, reported in (1997)10 Supreme Court Cases 232.

12. After hearing learned counsel for the parties and considering the materials on record it is quite apparent that the trucks in question alongwith the betel nuts and drivers were detained on 6.6.2011 and the impugned order of seizure was passed on 7.6.2011. The respondents have not disputed the statement of fact of the petitioner that the said drivers alongwith the articles were produced before the Magistrate on 9.6.2011. in the said circumstances, the drivers in question were detained by the authorities concerned for more than two days before they were produced in the Court of Magistrate. This appears to be in complete violation of the provision of Sections 108 and 138B of the Act, which provides that there should be in the first instance statement made and signed by a person before a competent custom officer and it must have been made during the course of enquiry and proceeding under the Act as the law intends to put a stop to the extortion of confession from any person according to the whims of the authorities. This is also apparent from a well considered decision of the Apex Court in case of Noor Aga (supra). In this connection learned counsel for the respondents has relied upon a decision of the Apex Court in case of Union of India (supra), but in the said case the question involved was entitlement of release of goods on payment of fine in lieu of confiscation and the entitlement of any person to export the goods during the pendency of the statutory adjudication. Hence, the said decision does not interpret the provisions of law in any way affecting the aforesaid claim of the petitioner and the specific provisions of law.

13. The respondents have claimed that they had issued memos to the petitioner informing him that the trucks in question loaded with betel nuts had been detained and the matter was being investigated, but without even waiting for petitioner's reply the respondents seized the trucks in question alongwith the betel nuts loaded on them assuming that the betel nuts loaded on the trucks were brought from Nepal. The respondents have enumerated the papers obtained from the drivers of the seized trucks but none of them could show that either the consignment had come from Nepal or it was of a third country origin, rather the said documents clearly showed that the consignment was from Maa Saraswati Traders of Dhupguri, West Bengal (petitioner) sent to M/s M.L. International, New Delhi through the trucks in question.

14. The petitioner has been able to show that it was a firm having its office at Dhupguri (West Bengal) with VAT RC No. 19834068017 and CST RC No. 19834068211 registered under the West Bengal Value Added Tax Act, 2003 and it was a wholesaler dealing in reselling and processing of betel nuts. Hence, merely because the drivers could not produce the agreements between the consignor and the consignee the authorities were not justified in seizing the articles without waiting for reply of the petitioner. In the said circumstances and in view of the documents produced by the drivers including certificates, invoices, challans and built up etc. the action of the authorities concerned cannot be held to be sustainable in law.

15. In this connection reference may be made to a decision of the Apex Court in case of *Indian Nut Products and Others vs. Union of India and Others*, reported in (1994)4 Supreme Court Cases 269 in which it was held that if a statute requires an authority to exercise power, when such authority is satisfied that conditions exist for exercise of that power, the satisfaction has to be based on the existence of grounds mentioned in the statute. The grounds must be made out on the basis of the relevant material. If the existence of the conditions required for the exercise of the power is challenged, the courts are entitled to examine whether those conditions existed when the order was made. A person aggrieved by such action can question the satisfaction by showing that it was wholly based on irrelevant grounds and hence amounted to no satisfaction at all. In other words, the existence of the circumstances in question is open to judicial review.

16. So far the question regarding "reasons to believe" is concerned, a Division Bench of this court in case of *Angou Golmei (supra)* specifically held that the reason for formation of the belief having been spelt out, it is open to the court to consider whether the reasons exist or not and the test would be whether a reasonable, prudent person on the basis of materials relied upon would hold the same belief. The so-called belief of the officials was at the most mere suspicion, far away from belief which could be said to be reasonably based on materials and hence the condition precedent for the exercise of power u/s 110 of the Act was absent and the seizure on the basis of such belief cannot be said to be in accordance with law.

17. In this connection reference may also be made to a decision of a Bench of Bombay High Court in case of *M.G. Abrol vs. Amichand Vallamji*, reported in AIR 1961 Bombay 227 in which it has been held as follows:--

The Customs Officers should seize the goods covered by S. 178A in a reasonable belief that they are smuggled goods before the burden of proving that they are not smuggled goods could be on the person from whose possession such goods were seized. This position would be very much clear if it can be contrasted with a case where Customs Officer seizes any of such goods merely on suspicion that they are smuggled. A suspicion can arise from peculiar kind of movement on the part of the person who is supposed to be in possession of some smuggled goods.

It may arise from the kind of dealing that the person might be having in regard to certain goods, which the Customs Officer might thereupon subject to be smuggled. One may conceive of a number of other ways in which a suspicion may arise in the mind of the Customs Officer that any particular person is possessed of smuggled goods. A belief, on the other hand, cannot arise merely in the circumstances in which a suspicion can arise. A belief in the existence of a thing requires a more solid foundation than in the case of a mere suspicion. It may be based upon some definite information acquired from a reliable source that a certain person is in possession of smuggled goods. The belief again, as required by S. 178A of the Sea Customs Act, must be a reasonable one, not a belief of a man who just catches at some slight circumstances which only creates a sort of guess or speculation in his mind that something might exist or might not exist. The belief must be such as any other reasonable man in the circumstances of the case would entertain about the existence or non-existence of a thing.

18. From the aforesaid well settled principles of law, it is quite apparent that so far the point of time at which reasonable belief should exist is concerned, whenever the goods are seized, the officer seizing the goods must at the time of seizure have a reasonable belief that the goods he was seizing were smuggled goods and any subsequent acquisition of knowledge of such belief would be of no avail. So far the allegation that betel nuts in question were of foreign origin is concerned, a Division Bench of this court in case of Commissioner of Customs, Patna Vs. Dwarika Prasad Agarwal, had specifically held that it was not in dispute that betel nut was non-notified item and, as such, the onus to prove that the same was of foreign origin lay on Custom authority.

19. In the instant case the Custom authorities did not at all consider the shape and size of the seized betel nuts nor there is any expert trade opinion that the seized betel nuts were in any manner different from the betel nuts available in the country. In the present case neither there is any trade opinion nor any significant decisive difference has been found and hence the seized betel nuts cannot be said with certainty to be of foreign origin. The aforesaid questions have also been considered in detail by another Bench of this court in case of Sri Lalu Prasad Vs. The Commissioner of Income Tax, Central, Patna and Others . In the said circumstances and in view of absence of any material to show that the goods were smuggled goods or were of any third country origin, the respondents authorities should not have detained the truck and betel nuts loaded on it nor they should have seized the same which acts are clearly violative of the well settled principles of law.

20. In this connection learned counsel for the respondents has relied upon a decision of a Bench of this court in case of Bikaner-Assam Road Lines India Limited & Ors. (supra), but the facts of that case is completely different from the facts of this case and the said court in paragraphs 5 of its order had specifically stated that the meaning of the word "reasonable belief" is well settled and the

question as to whether in a particular case the grounds are sufficient to form a "reasonable belief" that the goods are smuggled ones or not, depends upon the facts of each case and as such decision in another case having different sets of facts that the grounds are not sufficient to form a reasonable belief that the goods are smuggled goods cannot be a binding precedence in the other case and the conclusion has to be arrived at on appreciation of the evidence available in the case in hand. In the said circumstances the respondents cannot take benefit of the said decision.

21. The documents on record clearly show that the petitioner was not only the consignor but also the transporter of articles in question arranging the trucks from Mandies for reaching betel nuts to their destinations, namely to the consignee. The petitioner had also produced vouchers and registers alongwith the Income Tax Return of the consignee of both the trucks, namely M/s M.L International, whereas there is nothing to show that any firm named as "Salasar Traders" was consignee of one truck as claimed by the respondents and has anything to do with the instant matter. In the said circumstances petitioner is the main aggrieved person and clearly has the locus to file this writ petition.

22. Considering the facts and the materials in entirety, this court has no option but to come to the conclusion that the impugned order of detention and seizure of betel nuts and the trucks on which it was loaded are illegal, arbitrary and perverse. Furthermore, the impugned confiscation notice dated 18.11.2011 issued u/s 124 of the Act during the pendency of this writ petition is based merely on the aforesaid seizure, which has already been held to be illegal, arbitrary and perverse and hence when the base, namely the seizure goes every structure thereon including the confiscation notice also will have to follow. A confiscation proceeding arising from a seizure held to be illegal cannot be sustained nor can, in such a case, an objection regarding the maintainability of the writ petition be raised effectively. This view is fully supported by a Bench of this court in case of Yogendra Prasad (supra). Accordingly, this writ petition is allowed and the impugned order of detention and seizure of the betel nuts and the trucks on which it was loaded as well as the impugned confiscation notice dated 18.11.2011 are hereby quashed and the authorities are directed to release the trucks and the betel nuts loaded thereon immediately to the petitioner after receipt/ production of a copy of this order.