
(2011) 05 CAL CK 0037
In the Calcutta High Court
Case No : Writ Petition No. 1102 of 2009

Mahesh Phulchand Modi

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 03-05-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164
Customs (Attachment of Property of Defaulters for Recovery of Government Dues)
Rules, 1995 — Rule 3, 4, 5, 6
Customs Act, 1962 — Section 142, 142(1)
Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 — Rule 16,
16(2), 16(3), 16A

Citation : (2011) 05 CAL CK 0037

Hon'ble Judges : Debasish Kar Gupta, J

Bench : Single Bench

Advocate : Sagar Bandyopadhyay and Amit Kumar Nag, for the Appellant; N.C. Roychowdhury P.D. Mukherjee and H.N. Sahoo, for the Respondent

Judgement

Debasish Kar Gupta, J.—This writ application is directed against notices dated April 30, 2009, and June 2, 2009 issued by the Assistant Commissioner of Customs, Special Tax Recovery Cell(Port), dated June 19, 2006, dated July 15, 2009 issued by the Respondent No. 6 and dated September 15, 2009 issued by the Respondent No. 5. The instructions dated September 8 and September 9, 2009 issued by the Respondent No. 5 to the Respondent No. 7 are also under challenge in this writ application.

2. The facts of the case in a nutshell are as under:

3. The Petitioner and the Respondent No. 8 are the Directors of Srinivasa Exim Pvt. Ltd., incorporated under the Companies Act, 1956 (hereinafter referred to as the said company). In the year 2000 the said company exported 7000 dozens of basic T-shirts (white) to Dubai. The said company claimed draw back duty from the customs authorities. The customs authority issued three draw back demand confirmation orders in the year 2003 under the provisions of Rule 16A(2) of the

Customs and Central Exercise Duty Draw Back Rules, 1995 bearing Nos. S24M-459/02 DBK for Rs. 12,86,754, S34M-302/03 DBK for Rs. 5,16,416 and S34M-439/03 DBK for Rs. 1,84,706 respectively. According to the Petitioner, the said company had to close down its business operation in the year 2004.

4. Subsequently, it was ascertained by the customs authorities that the sale proceeds of the above transactions were not released. In the month of November 2005, the Petitioner was informed by the customs authority that a proceeding was initiated for recovery of the aforesaid draw back amount by the Draw Back Department of the customs. By a communication dated April 28, 2006 the Petitioner informed the Respondent No. 6 that the said company had been closed. However, the Petitioner accepted the liability of refunding the aforesaid draw back amount in installments at a minimum amount of Rs. 5000/- per month. In the mean time, the Petitioner sent Demand Drafts amounting to Rs. 10,000/- each dated January 5, 2006, February 1, 2006, March 7, 2006 and April 19, 2006 to the Customs Authority.

5. By a communication dated June 19, 2006 the Respondent No. 6 informed the Petitioner that out of total liability of Rs. 19,87,956/-, the Petitioner had paid Rs. 60,000/- only till that date. Since there was no provision under the Customs Act, 1962 for refund of Government dues on instructions, the Respondent No. 6 directed the Petitioner by the above communication to refund the balance amount within 15 days from the receipt of the above communication. In reply, the Petitioner informed the Respondent No. 6 by his communication dated June 20, 2006 that the balance government dues could not be paid at a time due to his financial stringency and he further paid a sum of Rs. 20,000/- by a Demand Draft dated June 7, 2006.

6. Subsequently, the Assistant Commissioner of Customs, Special Tax Recovery Cell (Port) informed the Petitioner by a communication dated April 30, 2009 that though there was no provision for recovery of government dues in instalments under the Customs Act, 1962, the Respondent authority had accepted the refund of aforesaid draw back amount from the Petitioner by instalments for the time being. But a total amount of Rs. 4,10,000/- had been paid against total government due of Rs. 19,87,956 plus applicable interest till that date. So, the Petitioner was directed by virtue of the above communication to remit the balance government due towards the aforesaid draw back demand within two months.

7. Thereafter, the Assistant Commissioner of Customs Special Recovery Cell (Port) issued a notice dated June 2, 2009 to the Petitioner for refund of the aforesaid balance draw back amount within seven days failing which the customs authority would initiate proceeding in terms of Customs (Attachment of Property of Defaulters for Recovery of Government Dues), Rules 1995 read with the provisions of Section 142(1)(c)(ii) of Customs Act, 1962. The Petitioner gave reply dated June 11, 2009 to the above notice through his learned Advocate requesting the Respondent authority for giving at least one month time to the

Petitioner. On receipt of the above communication the Respondent No. 6 further informed the Petitioner by a communication dated July 15, 2009 that the Respondent authority was no longer willing to accept the repayment towards refund of the aforesaid draw back amount in instalments.

8. Thereafter, the Respondent No. 6 issued the impugned communications dated September 8, 2009 to the Respondent No. 7 to stop onward transfer and/or withdrawal of any money lying in the account of the Petitioner mentioned therein with immediate effect till further orders in connection with recovery of government dues of Rs. 18,03,170/- plus applicable interest in terms of Customs (Attachment of Property of Defaulters for Recovery of Government Dues) Rules, 1995 read with Section 142 of the Customs Act, 1962 from the said company and the Petitioner. Subsequently, the Respondent No. 6 issued a notice dated September 15, 2009 to the said company as also to the Petitioner for refunding the aforesaid amount of Rs. 18,03,170/- within seven days with further notice for initiating proceeding under the provisions of Customs attachment of property of defaulters for (Recovery of Government Dues) Rules, 1995 in case of failure. But according to the Petitioner he had not received the above notice dated September 15, 2009 from the Respondent authority.

9. Again, the Petitioner was informed by the Respondent No. 5 by a communication dated October 13, 2009 that demand notice(show-cause notice), orders in original and the detention orders had been issued by the Respondent authority to the said company. Since those documents had been returned to the officer of the Respondent authority with remarks "not known", notice u/s 142(I) C(ii) of the Customs Act, 1962 to tender the amounts lying in the account of the Petitioner with the Respondent No. 7 had been issued till recovery of the government dues.

10. It is submitted by the learned Counsel appearing for the Petitioner that the actions on the part of the Respondent authorities for recovery of draw back demand amount under reference cannot be sustained in accordance with the provisions of the Customs Act, 1962 read with Customs, Central Exercise Duties and Services Tax Draw Back Rules, 1995 and Customs (Attachment of Property of Defaulters for Recovery of Government Dues) Rules, 1995. According to him, repayment of draw back amount could only be claimed from the exporter in terms of the provisions of Rule 16A of the Customs, Central Exercise Duties and Service Tax Draw Back Rules, 1995. In the instant case the said company was the exporter. But the Respondent authority initiated all the steps against the Petitioner, who was one of the directors of the said company. According to him, no step was taken against the Respondent No. 8 who was also a Director of the said company.

11. It is submitted by the learned Counsel appearing for the Petitioner that in case of erroneous or excess payment of draw back the same should be recovered in the manner laid down in Sub-section(1) of Section 142 of the Customs Act, 1962. According to him under the provision of Sub-section(c) of Section 142 of

the Customs Act, 1962 the Respondent authority should prepare a certificate signed by him specifying the amount due from such person. The above certificate should be sent to the Collector of the District in which such person owns any property or resides or carries on his business for recovery of the amount specified in the certificate as if it were an arrear of land revenue. After issuing such certificate, detention order may be passed by the Respondent authority. According to him, no certificate was issued before passing the order of detention of the money of the Petitioner lying with the Respondent Nos. 7.

12. It is further claimed by the learned Counsel appearing for the Petitioner that Rules 3 and 4 of the Customs (Attachment of Property of Defaulters for Recovery of Government Dues) Rules, 1995 prescribed the procedure for issuing certificate and notice for attachment of money recoverable towards government dues. According to him, the above procedures were not followed by the Respondent authority.

13. It is also submitted on behalf of the Petitioners that there were errors in calculation. But due to violation of the above procedures the Petitioner was deprived of the opportunity to raise objection for the purpose of pointing out the aforesaid irregularities to the Respondent authorities. Therefore, according to him, it was a case of violation of the principles of natural justice also.

14. On the other hand the above submissions made on behalf of the Petitioner are vividly opposed by the Respondent authorities. Drawing the attention of the courts towards the communication of the Petitioner dated April 28, 2006 it is submitted by the learned Counsels appearing on behalf of the Respondents that the Petitioner voluntarily accepted the liability of the refunding the draw back demands. Though there was no procedure under the Customs Act, 1962 for recovery of the above amount in instalments, payments made by the Petitioner were accepted by the Respondent authority as temporary measure. Drawing the attention of the court towards notices dated June 19, 2006 and June 2, 2009, it is also submitted that opportunities were given to the Petitioner to repay the aforesaid draw back demand. Since the Petitioner had fail to comply with the aforesaid notice, steps were taken in accordance with the provisions of Section 142(1)(c) for detention of the money of the Petitioner lying with the Respondent No. 7.

15. Drawing the attention of this Court towards the provisions of Rules 3,4 and 5 of the Customs (Attachment of Property of Defaulters for Recovery of Government Dues) Rules, 1995, it is also submitted that steps were taken against the Petitioner adhering to the above provisions. It is further submitted by the learned Counsel appearing for the Respondents that there is no scope for refunding any amount of money to the Petitioner. Because it was paid by him voluntarily. The rest of the government due towards refund of draw back demand is now to be recovered in accordance with the provisions of Customs Act, 1962 read with the provisions of Customs, Central Exercise Duties and Service Tax Draw Back Rule, 1995 and customs (Attachment of Property of Defaulters for

Recovery of Government Dues) Rules, 1995.

16. Having heard the learned Counsels for the respective parties as also after giving thoughtful considerations to the facts and circumstances of this case, I find that the repayment of drawback and interest was not in dispute in this case. Dispute with regard to quantum of money claimed towards refund cannot be taken up in a writ application. It appears from the materials on record that the Petitioner accepted the liability of refunding drawback as also prayer was made for paying the same in instalments. The Respondent authority also accepted refund of aforesaid drawback from the Petitioner in instalments. It further appears from the communication dated April 30, 2009 of the Assistant Commissioner of Customs, Special Tax Recovery Cell(Port) that the Petitioner stopped payment after paying a total amount of Rs. 4,10,000/-. It prompted the Respondent authority to take steps for recovery of drawback and interest which had been paid to the said company erroneously or in excess. The validity of the procedure followed by the Respondents for such recovery is under scrutiny in this writ application.

17. Rule 16A of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 prescribes the procedure for recovery of amount of drawback where export proceeds not realised and the above provisions are quoted below:

16A. Recovery of amount of Drawback where export proceeds not realised. (1) Where an amount of drawback has been paid to an exporter or a person authorised by him (hereinafter referred to as the claimant) But the sale proceeds in respect of such export goods have not been realised by or on behalf of the exporter in India within the period allowed under [the Foreign Exchange Management Act, 1999 (42 of 1999)], including any extension of such period, such drawback shall be recovered in the manner specified below:

provided that the time-limit referred to in this sub-rule shall not be applicable to the goods exported from the Domestic Tariff Area to a special economic zone.]

(2) [If the exporter fails to produce evidence in respect of realisation of export proceeds within the period allowed under the Foreign Exchange Management Act, 1999, or any extension of the said period by the Reserve Bank of India, the Assistant Commissioner of Customs or the Deputy Commissioner of Customs, as the case may be] shall cause notice to be issued to the exporter for production of evidence of realisation of export proceeds within a period of thirty days from the date of receipt of such notice and where the exporter does not produce such evidence within the said period of [thirty days, the Assistant Commissioner of Customs or Deputy Commissioner of Customs, as the case may be] shall pass an order to recover the amount of drawback paid to the claimant and the exporter shall repay the amount so demanded within [thirty days] of the receipt of the said order:

Provided that where a part of the sale proceeds has been realised, the amount of drawback to be recovered shall be the amount equal to that portion of the

amount of drawback paid which bears the same proportion as the portion of the sale proceeds not realised bears to the total amount of sale proceeds:

(3) Where the exporter fails to repay the amount under Sub-rule (2) within said period of [thirty days] referred to in Sub-rule (2), it shall be recovered in the manner laid down in Rule 16.

(4) Where the sale proceeds are realised by the exporter after the amount of drawback has been recovered from him under Sub-rule(2) or Sub-rule (3) and the exporter produces evidence about such realisation within one year from the date of such recovery of the amount of drawback, the amount of drawback so recovered shall be repaid by the [Assistant Commissioner of Customs or Deputy Commissioner of Customs] to the claimant.]

18. Sub-rule(2) of the above Rules provides for causing a notice to the exporter for repayment of drawback amount within thirty days. In case of failure of the exporter to repay such amount, the same should be recovered in the manner laid down in Rule 16 of the above Rules. In the instant case the said company was the exporter. The Petitioner was one of the directors of the said company. But the Petitioner himself accepted the liability to repay the drawback amount by a communication dated April 28, 2006. After stoppage of repayment by the Petitioner the Respondent No. 5 issued demand notice (show-cause notice) to the said company. It was returned back to the Respondent No. 5 by the postal authority with the remarks "not known". No material is available on record to show that the Respondent authority took steps for proceeding against both the directors, namely the Petitioner and the Respondent No. 8 by issuing notices under the provisions of Sub-rule (2) of Rule 16A of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995. Therefore, there was procedural impropriety in the actions taken by the Respondent authority against the Petitioner alone.

19. With regard to the other allegations of the Petitioner, I find from the provisions of Sub-rule (3) of Rule 16A of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995, that in case of failure on the part of the exporter to repay the amount of drawback, it should be recovered in the manner laid down in Rule 16 of the above Rules. According to the provisions of Rule 16 of the above Rules such recovery should be made in the manner prescribed in Sub-section (1) of Section 142 of the Customs Act, 1962.

20. In order to examine the decision making process of the Respondents in the light of the provisions of Sub-section(1) of Section 142 of the Customs Act, 1962, those provisions are quoted below:

142. Recovery of sums due to Government.- (1) [Where any sum payable by any person under this Act [including the amount required to be paid to the credit of the Central Government u/s 28B] is not paid,-

(a) the proper officer may deduct or may require any other officer of customs to

deduct the amount so payable from any money owing to such person which may be under the control of the proper officer or such other officer of customs; or (b) the [Assistant Commissioner of Customs or Deputy Commissioner of Customs] may recover or may require any other officer of customs to recover the amount so payable by detaining and selling any goods belonging to such person which are under the control of the [Assistant Commissioner of Customs or Deputy Commissioner of Customs] or such other officer of customs; or

(c) if the amount cannot be recovered from such person in the manner provided in Clause (a) or Clause (b)-

(i) the [Assistant Commissioner of Customs or Deputy Commissioner of Customs] may prepare a certificate signed by him specifying the amount due from such person and send it to the Collector of the district in which such person owns and property or resides or carries on his business and the said Collector on receipt of such certificate shall proceed to recover from such person the amount specified there under as if it were an arrear of land revenue; or

(ii) the proper officer may, on an authorisation by [Commissioner of Customs] and in accordance with the rules made in this behalf, distain any movable or immovable property belonging to or under the control of such person, and detain the same until the amount payable is paid; and in remains unpaid for a period of thirty days next after any such distress, may cause the said property to be sold and with the proceeds of such sale, may satisfy the amount payable and the costs including cost of sale remaining unpaid and shall render the surplus, if any, to such person.]

[Provided that where the person (hereinafter referred to as predecessor), by whom any sum payable under this Act including the amount required to be paid to the credit of the Central Government u/s 28B is not paid, transfers or otherwise disposes of his business or trade in whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeds in such business or trade by any other person, all goods, materials, preparations, plants, machineries, vessels, utensils, implements and articles in the custody or possession of the person so succeeding may also be attached and sold by the proper officer, after obtaining written approval from the Commissioner of Customs, for the purposes of recovering the amount so payable by such predecessor at the time of such transfer or otherwise disposal or change.]

21. In the instant case, there was no scope for recovery of the amount of drawback from the exporter in the manner provided in Clause (a) or (b) of Sub-section (1) of Section 142 of the Customs Act, 1962. So, the Respondent authority was under obligation to proceeded under the provisions of Clause (c) of Sub-section (1) of Section 142 of the Act, 1962. In doing so, the Respondent authority was required to proceed either under the provisions of clause C(I) or C(ii) of Sub-section (1) of Section 142 of the Customs Act, 1962. In the instant case the Respondent authority took recourse to the provisions of clause C(ii) of

Sub-section (1) of Section 142 of the Customs Act, 1962. So, the Respondent authority was under obligation to adhere to the provision of rules made in this behalf, namely Customs (Attachment of Property of Defaulters for Recovery of Government Dues) Rules, 1995.

22. For the purpose of examining the validity of the actions taken by the Respondent authority in the light of the provisions of the Customs (Attachment of Property of Defaulters for Recovery of Government Dues) Rules, 1995, the relevant provisions are quoted below:

Rule 3. Issue of Certificate.- Where any Government dues are not paid by any defaulter, the [Assistant Commissioner of Customs or Deputy Commissioner of Customs] may prepare a Certificate signed by him specifying the amount due from such person and send the same to the Commissioner having jurisdiction over the place in which the defaulter owns any movable or immovable property or resides or carries on his business or has his bank accounts.

Rule 4. Issue of Notice. - On receipt of the Certificate mentioned in Rule 3 above, the Commissioner may authorise any officer subordinate to him to cause notice to be served upon the defaulter requiring the defaulter to pay the amount specified in the Certificate within seven days from the date of the service of the notice and intimate that in default, such subordinate officer is authorised to take steps to realise the amount mentioned in the Certificate in terms of these rules.

Rule 5. Attachment of property. - If the amount mentioned in the notice issued in terms of the preceding rule is not paid within seven days from the date of service of this notice, the Proper Officer may proceed to realize the amount by attachment and sale of defaulter's property. For this purpose, the proper officer may detain the defaulter's property until the amount mentioned in the Certificate together with the cost of detention is paid by the defaulter.

Rule 6. Attachment not to be excessive.- Attachment by arrest or distrain of the property shall not be excessive, that is to say, the property attached shall be as nearer as possible proportionate to the amount specified in the Certificate.

23. In the instant case, no material is available record to show that a certificate was prepared or signed by the proper officer specifying the amount due from the defaulter towards Government dues. So, there was no scope for sending that certificate to the Commissioner of Customs for the purpose of obtaining authorisation in favour of any officer subordinate to him or to serve any notice to the defaulter by the authorised officer for payment of the amount mentioned therein within seven days from the date of service of notice. Therefore, the instructions dated September 8, 2009 and September 9, 2009 were issued by the Respondent No. 5 to the Respondent No. 7 to stop any outward transfer of shares/securities or onward transfer and/or withdrawal of any money lying in the account of the Petitioner as mentioned therein in gross violation of the provisions of rules 3,4 and 5 of the Customs (Attachment of Property of Defaulters for Recovery of Government Dues) Rules, 1995. Since the direction was to stop

onwards transfer and/or withdrawal of the entire money lying in the bank account of the Petitioner, there was violation of the provisions of Rule 6 of the Customs (Attachment of property of Defaulters for Recovery of Government Dues) Rules, 1995.

24. I do not find any substance in the submissions made on behalf of the Respondents that the bank account of the Petitioner was laying within the jurisdiction of the Respondent No. 5 and there was general authorisation in favour of the Respondent No. 5 by the Commissioner of Customs and as a result the above provisions were complied with. It is the settled principles of law that if a power is given to an authority to do certain thing in a certain manner, that thing must be done in that manner or not at all. Reference may be made to the decision of *Ram Phal Kundu v. Kamal Sharma*, reported in (2004) 2 SCS 759 (at page 772 and 773) and the relevant portions of the above decision are quoted below:

The rule laid down in *Taylor v. Taylor* that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden, was adopted for the first time in India by the Judicial Committee of the Privy Council in *Nazir Ahmad v. King Emperor*. The question for consideration was whether the oral evidence of a Magistrate regarding the confession made by an accused, which had not been recorded in accordance with the statutory provisions viz. Section 164 Code of Criminal Procedure would be admissible. The First Class Magistrate made rough notes of the confessional statements of the accused which he made on the spot and thereafter he prepared a memo from the rough notes which was put in evidence. The Magistrate also gave oral evidence of the confession made to him by the accused. The procedure of recording confession in accordance with Section 164 Code of Criminal Procedure had not been followed. It was held that Section 164 Code of Criminal Procedure having made specific provision for recording of the confession, oral evidence of the Magistrate and the memorandum made by him could not be taken into consideration and had to be rejected. In *State of U.P. V. Singhara Singh* a Second Class Magistrate not specially empowered, had recorded confessional statement of the accused u/s 164 CrPC. The said confession being inadmissible, the prosecution sought to prove the same by the oral evidence of the Magistrate, who deposed about the statement given by the accused. Relying upon the rule laid down in *Taylor v. Taylor* and *Nazir Ahmad v. King Emperor* it was held that Section 164 Cr PC which conferred on a Magistrate the power to recorded statements or confessions, by necessary implication, prohibited a Magistrate from giving oral evidence of the statements or confessions made to him. This Principles had been approved by this Court in a series of decisions and the latest being by a Constitution Bench in *CIT v. Anjum M.H. Ghaswala* (SCC para 27). Applying the said principle, we are of the opinion that the question as to who shall be deemed to have been set up by a political party has to be determined strictly in accordance with paras 13 and 13-A of the Symbols Order and extrinsic evidence

cannot be looked into for this purpose unless it is pleaded that the signature of the authorised person on Form B had been obtained from him under threat or by plying fraud upon him. Where signature is obtained under threat or by plying fraud, it will be a nullity in the eye of the law and the document would be void. (Emphasis Supplied)

25. In view of the discussion and observation made hereinabove, the impugned instructions dated September 8, 2009 and September 9, 2009 issued by the Respondent No. 5 to the Respondent No. 7 are quashed and set aside. However, this order will not prevent the Respondents from recovery of amount of drawback under reference upon due compliance of law as discussed hereinabove.

26. This writ application is thus disposed of.

27. There will be a cost of Rs. 3,600/- only payable by the Respondent authority to the Petitioner towards the fees of his learned advocate.

28. Urgent Photostat certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.