
(2011) 05 P&H CK 0040
In the Punjab And Haryana At Chandigarh
Case No : Civil Writ Petition No. 6732 of 2011

M/s Amit Enterprises

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 09-05-2011

Acts Referred:

Customs Act, 1962 — Section 110, 111, 17, 18, 2(34)

Citation : (2011) 269 ELT 314 : (2011) 163 PLR 360

Hon'ble Judges : Ajay Kumar Mittal, J; Adarsh Kumar Goel, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Adarsh Kumar Goel, A.C.J.—This petition seeks quashing of seizure memo and for permitting clearance of goods seized and detained by the Customs Authorities under the provisions of Customs Act, 1962 ("the Act").

2. The case set out in the petition is that the petitioner imported "Heavy Melting Steel Scrap" (HMSS) from South Africa under Open General License Scheme subject to Nil basic customs duty. The petitioner filed seven bills of entry for clearing the said goods in 31 containers on different dates in January 2011 but the custom authorities did not allow clearance on the ground that the material so imported was not scrap but resolvable metal attracting 5% basic custom duty. The goods were seized u/s 110 of the Act. The goods were physically examined and opinion of Chartered Engineers was taken to the effect that a part of consignment contained moon cut pieces while the remaining was old rusty but not used pipes. The petitioner deposited the amount of duty as per valuation assessed by the said Chartered Engineers and sought provisional release of the goods to avoid demurrage charges. The petitioner also requested for mutilation of the consignment. The goods having not been released, this petition has been filed.

3. Main contention raised in the petition is that when a bill of entry is filed u/s 46

of the Act for clearance of goods, the proper officer is required to make an assessment of the duty u/s 17 and on payment of the said duty, the goods have to be allowed to be cleared. Section 24 provides for mutilation of goods at the request of the importer to render the goods unfit for any other purpose to claim that lesser rate of duty was payable. Section 18 provides for provisional assessment of duty where any further investigation is required to form a final view about the valuation. Section 110 provides for seizure of goods if there are reasons to believe that goods are liable to confiscation. Section 111 provides for grounds on which the goods may be liable to confiscation. The grounds for confiscation include loading/unloading at a place other than customs port, taking a route other than the specified route, importing of prohibited goods, mis-declaration in the bill of entry about the classification of goods and then-value. A circular has been issued by the Central Board of Excise and Customs which is contained in Supplementary Manual Chapter 16 issued by the said Board providing for expeditious assessment/investigation to avoid hardship to the importer on account of continued detention of goods. The said circular further provides that the imported goods should not be detained unless prohibited on simple valuation/classification disputes. Power of confiscation has to be exercised by a proper officer as defined u/s 2(34) of the Act i.e. the officer who is assigned those functions expressly. In *Commissioner of Customs Vs. Sayed Ali and Another*, the Hon'ble Supreme Court held that the Proper Officer u/s 2(34) should be specifically authorized to act as such. Thus, the grievance of the petitioner is that action of the respondents in detaining the goods and continuing to detain the same was without jurisdiction and arbitrary.

4. The stand of the respondents in their reply is that goods were detained on account of dispute of classification and valuation. The goods were re-reliable material wrongly described as HMSS to evade payment of duty and once there is a mis-declaration, the goods are liable to be confiscated u/s 111 of the Act. Report of the Chartered Engineers suggests that there is undervaluation. All the officers of the Directorate of Revenue Intelligence were officers of Customs and could be treated as proper officers to seize the goods. Order of provisional release had been passed on 3.5.2011 to release the goods subject to following conditions:

- i) On payment of differential duty.
- ii) On furnishing a bond for the full value of the seized goods i.e. Rs. 1,24,85,736/-.
- iii) On furnishing a B/G equal to 25% of the full market value of the seized goods.
- iv) On furnishing a declaration in the form of an affidavit that the party will not challenge the value and identity of the seized goods during the course of adjudication or prosecution proceedings, if any.

5. We have heard learned counsel for the parties.

6. Main question for consideration is whether continued detention of goods can be justified.

7. Learned counsel for the petitioner submitted that the officer effecting the seizure was not authorised and simple dispute of classification and valuation did not render the goods liable to confiscation. Alternatively, it was submitted that imposing of condition of furnishing of bank guarantee equal to 25% of the full market value of goods and further condition that the petitioner will not challenge the value of goods during declaration or prosecution were arbitrary conditions. In support of his submissions, reliance has been placed on the following judgments:

i) Century Metal Recycling Pvt. Limited v. Union of India 2009 (234) ELT (P and H);

ii) Bajrangbali trading Company v. Union of India and another CWP No. 3786 of 2011 decided on 17.3.2011 (P&H);

iii) Bhoomi Sudhar Chemical Industries v. Joint Director, DRI, Ludhiana 2007 (213) ELT 494 (P and H);

iv) Sonia Overseas Pvt. Limited v. Deputy Director Directorate 2007 (216) ELT 687 (P&H);

v) MAPSA Tapes Pvt. Ltd. Vs. Union of India (UOI), .

8. Learned counsel for the respondents on the other hand submitted that once the goods are liable to confiscation, the revenue could not release the goods as on confiscation, the goods will vest in the State and requirement of at least 25% of bank guarantee was necessary to safeguard the interest of the revenue. Reliance has been placed on judgments of this Court in T.L. Verma and Company Pvt. Limited v. Union of India 2009 (234) ELT 203 and Kundan Rice Mills Limited v. The Union of India and Ors CWP No. 13914 of 2008 decided on 5.12.2008 wherein condition of bank guarantee in respect of 10% of the value of the seized goods was upheld on the ground that the case was covered by Section 110(m) of the Act.

9. We may now proceed to adjudicate on the issue involved.

10. Even though, prima facie, the officer effecting the seizure is not shown to be the officer specifically authorized to do so nor justification has been shown for the seizure on a simple dispute of classification and valuation, we leave these questions to be finally adjudicated in appropriate proceedings in view of the stand of the learned counsel for the petitioner that at this stage, the relief required to be pressed was of immediate release of goods on reasonable conditions.

11. We find merit in the contention that requirement of giving a declaration that the petitioner will not challenge the value of the goods, is unreasonable and arbitrary. The petitioner cannot be debarred from asserting its version as to the value and classification of goods. If such a condition is allowed to be imposed,

the department can unilaterally allege any valuation and continue to keep the goods under detention unless the affected party agrees to withdraw the challenge to the valuation. This will amount to denial of justice. Similarly, requirement of furnishing bank guarantee equal to 25% of the full market value of the seized goods is also, in the facts and circumstances of the case, arbitrary. Mere fact that condition of 10% of bank guarantee was upheld by this Court in T.L. Verma and M/s Kundan Rice Mills cannot be justification to impose such conditions in each and every case. In those cases, this Court was satisfied that the importers had adopted fraudulent tactics which, prima facie, justified opinion for confiscation of goods. The said judgments cannot apply to every case of detention. Mere allegation of liability to confiscation is not enough. Circumstances and grounds justifying opinion about liability to confiscation is open to judicial scrutiny.

12. Power of detention of goods is a drastic power and exercise of such power has to be hedged by safeguards to check its abuse and limit its exercise only to situation where it is intended by law to be exercised. Existence of power and exercise of power are independent. Mere fact that there is a power to confiscate does not mean that such power could be exercised mechanically or arbitrarily. The authority exercising such power must strictly justify the same. Balance has to be maintained between the need for exercise of such power for the purpose for which the same has been conferred and adverse effects on rights of a citizen.

13. As held in *Mapsa Tapes Pvt. Limited*, power of search and seizure to check evasion of tax has been upheld as temporary interference with the right of a citizen. At the same time, seizure is not only invasion of right of property but also right of privacy. Such right can be affected only by fair and reasonable procedure as held in *Mrs. Maneka Gandhi Vs. Union of India (UOI)* and *Another*, . Referring to this aspect, in a recent decision in *Distt. Registrar and Collector, Hyderabad and Another Vs. Canara Bank Etc.,* , it was observed:

33 Intrusion into privacy may be by -

(1) legislative provisions,

(2) administrative/executive orders, and

(3) judicial orders, the legislative intrusions must be tested on the touchstone of reasonableness as guaranteed by the Constitution and for that purpose the court can go into the proportionality of the intrusion vis-a-vis the purpose sought to be achieved.

(2) So far as administrative or executive action is concerned, it has again to be reasonable having regard to the facts and circumstances of the case.

(3) As to judicial warrants, the court must have sufficient reason to believe that the search or seizure is warranted and it must keep in mind the extent of search or seizure necessary for the protection of the particular State interest In addition, as stated earlier, common law recognized rare/exceptions such as where warrant

less searches could be conducted but these must be in good faith, intended to preserve evidence or intended to prevent sudden danger to person or property.

(underlining supplied)

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55. In *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, a 7 Judges bench decision, P.N. Bhagwati, J.(as His Lordship then was) held that the expression "personal liberty" in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status distinguishing as fundamental rights and give additional protection under Article 19 (Emphasis supplied). Any law interfering with personal liberty of a person must satisfy a triple test; (i) it must prescribe a procedure (ii) the procedure must withstand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation; and (iii) it must also be liable to be tested with reference to Article 14. As the test propounded by Article 14 pervades Article 21 as well, the law and procedure authorizing interference with personal liberty and right of privacy must also be right and just and fair and not arbitrary, fanciful or oppressive. If the procedure prescribed does not satisfy the requirement of Article 14 it would be no procedure at all within the meaning of Article 21.

14. Reasonableness being part of fundamental right under Article 14, doctrine of proportionality can be invoked so that unequal are not treated as equals. The exercise of discretion has to be proportionate to the wrong which has led to the action. The doctrine of proportionality has been explained in *Om Kumar v. Union of India* AIR 2000 SC 3689, wherein it was observed:.

28. By "proportionality", we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least-restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the legislature and the administrative authority "maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve". The legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the court. That is what is meant by proportionality.

15. In the present case, dispute is about the classification and valuation. The petitioner already paid duty even as per valuation of the department. The department has not kept in mind guidelines of expeditious investigation and of not detaining the goods on simple dispute of valuation/classification. The department has not shown prima facie case for exercise of power of confiscation and has only relied upon existence of power. In these circumstances, the

requirement of bank guarantee equal to 25% of the value of goods is clearly arbitrary and malafide and the said condition cannot be sustained.

16. Accordingly, this petition is allowed and detained goods are directed to be released forthwith subject to the conditions contained in the order of provisional release except requirement of a declaration by the petitioner that it will not dispute the value and requirement of furnishing bank guarantee. It is, however, made clear that this order will not affect the merits of the controversy which will be finally adjudicated upon in accordance with law independently.