
(2019) 11 DEL CK 0314

In the Delhi High Court

Case No : Civil Writ Petition No. 12233 Of 2019, Civil Miscellaneous No. 50006, 50007 Of 2019

M/S Sumat Pershad And Sons And Anr

APPELLANT

Vs

Commissioner Customs (Export) And Anr

RESPONDENT

Date of Decision : 27-11-2019

Acts Referred:

Constitution Of India, 1950 — Article 226

Customs Act, 1962 — Section 28(4), 28AA, 108, 111(d), 111(o), 112(a)(ii), 114A, 114AA, 129A, 129B, 130EE

Citation : (2019) 11 DEL CK 0314

Hon'ble Judges : Dhirubhai Naranbhai Patel, CJ;C.Hari Shankar, J

Bench : Division Bench

Advocate : Krishnan Venugopal, Dr. Sushil Gupta, Kamal Mehta, Manan Verma, Sonu Bhatnagar, Vaibhav Joshi, Anushree Narain, Abhay Prakash Sahay, Rahul Kulhari

Judgement

C. Hari Shankar, J

1. This writ petition, at the instance of the petitioner M/s Sumat Pershad & Sons, impugns Order-in-Original No.06/2019/Sunil Tated/Commr/Exp/ICD/TKD, dated 11th October, 2019, issued by the Commissioner of Customs (Export) (hereinafter referred to as "the Commissioner"), whereby (i) Customs duties (referred to, collectively, hereinafter, as "duty") of Rs. 5,40,11,525/- has been demanded, from the petitioner, under Section 28(4) of the Customs Act, 1962 (hereinafter referred to as "the Act"), along with interest, thereon, under Section 28AA of the Act,

(ii) penalty of Rs. 5,40,11,525/- has been imposed, on the petitioner, under Section 114A of the Act,

(iii) goods, imported by the petitioner under various Bills of Entry, forming subject matter of these proceedings, have been held liable to confiscation under clauses (d) and (o) of Section 111 of the Act,

(iv) penalty of Rs. 1,00,00,000/-has been imposed, on the petitioner, under Section 114AA of the Act, and

(v) penalties have been imposed on various other persons/parties, who are not before this Court and to which, therefore, it is not necessary to allude in detail.

Facts

2. Paper was imported, by the petitioner, under various Bills of Entry, between 8th March, 2011 and 21st January, 2015, at the Inland Container Depot, Tughlakabad (ICD, TKD). Duty was paid, on the said imports, by debiting various licenses/scrips, issued under the Duty Free Import Authorisation (DFIA) Scheme, Focus Product Scheme (FPS) and Focus Market Scheme (FMS), under the Foreign Trade Policy (hereinafter referred to as "FTP") of the Directorate General of Foreign Trade (DGFT). It is not necessary, for the purposes of this judgment, to enter into the specifics of these licenses/scrips. Suffice it to state that the DFIA, FPS and FMS are export promotion schemes, provided in the FTP, whereunder importers could import items duty-free, or at reduced rates of duty, subject to fulfilment of export obligations, or other obligations stipulated under the FTP for the purpose. These licenses/scrips, once issued, are, to a large extent, tradable in the market.

3. Intelligence was received, by the office of the Commissioner, that various clandestine imports of paper had been effected, through M/s Kirti Cargo, a Customs Broker, and its G-Card holder, Sharafat Hussain. Apparently, in collusion with officers of the Customs, and by accessing the online passwords assigned to these officers, Sharafat Hussain had managed to hack the Electronic Data Interchange (EDI) system, which is an online system - supposedly impenetrable - conceived by the Customs authorities, whereunder Bills of Entry are filed online, and duty is also paid online, through the Indian Customs Electronic Gateway (ICEGATE). Licenses, or scrips, which allowed for duty free import of goods, as also the extent of exemption as available thereunder, were required to be registered, under the EDI system, before duty-free import, using such scrips/licences, could be effected. Sharafat Hussain had, apparently, managed to penetrate the EDI system, using the passwords of various indulgent Departmental officials, and register, in the EDI system, scrips which were fictitious/non-existent, as also to enhance the amounts of duty exemption available under existing scrips. Using such non-existent, or "overvalued" scrips, Sharafat Hussain, representing the Customs Broker Kirti Cargo, was paying duty, against imports effected by various importers whereas, in actual fact, the duty was never paid, as the licenses themselves were fictitious, or overvalued. The licenses were shown to have been issued to various companies/firms floated by Sharafat Hussain, such as M/s. Zealous Overseas Pvt. Ltd., M/s Zealous International, and M/s Fibretech Exim, among others. In this subterfuge, Sharafat Hussain had, allegedly, enlisted the services of one Vinod Kumar Pathror, who masqueraded as an employee of Kirti Cargo and, thereby, managed access to the Export Promotion Measures (EPM) branch of the ICD, TKD.

4. Alleging that the petitioner was one such importer, duty, on whose imports of paper had been paid using fictitious/non-existent, scrips, or scrips in which the quantum of exemption available had been fraudulently enhanced in the EDI system by Sharafat Hussain, the petitioner was issued Show Cause Notice, dated 7th March, 2016. Reliance was placed, in the Show Cause Notice, on statements of Sudhir Kumar Jain, the partner of the petitioner, in which he admitted that duty had been paid, on the imports effected by the petitioner, by Sharafat Hussain, using scrips issued to M/s Zealous International. He, however, pleaded innocence in the matter, by asserting that, as the scrips were registered in the EDI system, there was no reason for him to doubt their genuineness. He admitted, however, that, innocence or guilt aside, if the scrips were actually fraudulent, or exemption from duty, thereunder, had been availed in excess of that which was actually available under the scrips, the liability to pay differential duty would be on the importer who had imported the goods. The duty allegedly evaded, on the imports effected by the petitioner, through Kirti Cargo, was, allegedly, Rs. 5,40,11,525/-. The Show Cause Notice did not believe the claims to innocence, as pleaded by the petitioner, and alleged that the petitioner was in collusion with Sharafat Hussain, and, therefore, a willing conspirator in the entire façade. The petitioner was, therefore, directed to show cause as to why the said duty, allegedly evaded by the petitioner "through the usage of tampered/non-existent duty-free scrips/licenses/authorisations", be not recovered, from the petitioner, under Section 28(4) of the Act, along with interest, thereon, under Section 28AA thereof, as also penalty, under Sections 112(a)(ii), 114A and 114AA thereof, and the goods themselves be not confiscated under clauses (d) and (o) of Section 111 of the Act.

5. Consequent to receiving the aforesaid Show Cause Notice dated 7th March, 2016, the petitioner addressed various communications, to the Commissioner, responding to the allegations in the Show Cause Notice and seeking certain documents/details.

6. Nearly three and a half years after the issuance of the aforesaid Show Cause Notice, the petitioner moved this Court, by way of WP (C) 7830/2019, praying that the Show Cause Notice be quashed. Vide order dated 22nd July, 2019, the said writ petition was disposed of, by this Court, noting the fact that it was highly belated but issuing, nevertheless, in the interests of justice, a direction, to the Commissioner, to adjudicate the Show Cause Notice within four weeks.

7. Within eight days of passing of the said order, the petitioner addressed a communication, dated 30th July, 2019, para-7 of which reads thus:

"7. In view of above submissions, the following documents/information may kindly be provided to us to enable us to submit reply to the Show Cause Notice. The Cross Examination of all concerned persons as requested and Personal Hearing may be granted on submission of reply:-

(i) Copy of all the Bills of Entry on prescribed format as per Computer Data Base/

EDI of Customs Department,

- (ii) The copy of all the Licenses/scrips containing all Annexures and amendments, under which exemption from Customs Duty was granted, may kindly be provided;
- (iii) Copy of Statement of Sh. Sharafat Hussain recorded on 15.11.2017 and 16.11.2017 by SIIB;
- (iv) The Copy of Letters issued by DGFT for amendment of Licenses;
- (v) The Name of all the hierarchy officers who have registered, verified, checked, debited and audited the Export Licences (DFIA, DEPB, FOCUS etc) in manual system as well as on-line system involved in SCN, may kindly be informed and the cross examination of all of them to find out the facts, may kindly be allowed.
- (vi) The parametres which are required to be verified by the officers before granting Customs "out of charge" as prescribed in the relevant exemption notifications and Customs Manual;
- (vii) The name of the officers who have allowed out of charge may kindly be communicated and the cross examination of all of them to may kindly be allowed.
- (viii) The status of investigations by the Customs and Police Authorities may kindly be informed;
- (ix) The documents relating the action taken for protection of Passwords and action against the officers on password compromise in terms of Board's instructions vide F. No. 401/77/2009-CUS.III, dated 15.05-2009 under the signature of Kameshwari Subramanian (Joint S.C. of J.S) may kindly be provided;
- (x) The documents relating to action taken against the Customs Officers who have registered such licenses, debited and audited them and allowed Customs out of charge relating to clearance of goods under Show Cause Notice may kindly be provided;
- (xi) The documents relating to follow up of money trail to identify the real beneficiary, who have received the amount paid by the Importers through Banking Channels to the various License Brokers as Premium/ consideration of Licenses, may kindly be communicated.
- (xii) Statement of account in the Bank of Shrafat Hussain showing the cheques issued by him to the firms of Mr. Vinod Kumar Prathror may be provided;
- (xiii) The statement of Bank Account of Mr. Vinod Kumar Prathror in which he received amount from Mr. Shrafat and disbursement of the funds by him may kindly be provided;
- (xiv) The document relating to the status of Mr. Vinod Kumar Prathror on the basis of which the entry in Customs Computer Data/EDI room was allowed to him the may kindly be provided;

(xv) The total amount recovered pending investigations may kindly be communicated, so that the m/s Paper Merchant Association, Kagaz Bhawan, Chawri Bazar, Delhi may be requested to provide the party wise break up of amount.

(xvi) Copies of all the docket files with note-sheets/examination reports pertaining to BEs wherein alleged Licenses/Scripts used as mentioned in SCNs.

(xvii) Copies of Item wise debiting ledger wrt to Registration Number of Licenses/scripts.

(xviii) Copies of Item wise debiting ledger wrt to valid Licenses/scripts but whose values is allegedly enhance after amendments."

8. The petitioner, thereafter, approached this court once again, by way of WP (C) 9680/2019, which was disposed of, vide order dated 6th September, 2019, which read thus:

"1. We have heard learned Senior counsel for the petitioners who has submitted that application dated 30th July, 2019 (annexure P-5) has been preferred before the Respondent No. 1 for allowing the cross examination of witnesses which is referred to in the show cause notice given by the respondents to these petitioners. These petitioners have demanded certain documents so that reply to the show cause notice can be given. It is also submitted by the learned Senior counsel for the petitioner that earlier an order was passed on 22nd July, 2019 in W.P. (C) 7830/2019 whereby this Court has directed the respondents to adjudicate the show cause notice within a period of four weeks.

2. Having heard learned counsel for both sides and looking to the facts and circumstances of the case, we hereby direct the Respondent No.1 to decide the application preferred by these petitioners which is dated 30th July, 2019 (Annexure P-5) whereby the petitioners are seeking cross examination of few witnesses and also demanding certain documents from the respondents authorities.

3. The decision shall be taken by the Respondent No.1 upon application of the petitioner dated 30th July, 2019 (Annexure P-5) in accordance with law as expeditiously as possible and practicable, preferably within a period of three weeks from today.

4. With these observations, this writ petition is hereby disposed of.

5. Liberty is reserved with this petitioner to approach the appropriate Tribunal/Court/Forum if so advised, in accordance with law with proper averments, allegations and annexures.

6. In view of the aforesaid order, time limit prescribed by this Court for adjudication of the show cause notice in our order dated 22nd July, 2019 in W.P. (C) 7830/2019 is extended and the same shall be adjudicated upon as expeditiously as possible and practicable, preferably within a period of three

weeks from today."

9. The petitioner, thereafter, filed Review Petition 431/2019, seeking review of the aforesaid order, dated 6th September, 2019, passed by this Court. The said Review Petition came up for hearing, before this Court, on 15th October, 2019, but was disposed of, as having become infructuous, in view of the passing, by the Commissioner, of the impugned Order-in-Original, on 11th October, 2019, adjudicating the aforesaid Show Cause Notice dated 7th March, 2016.

10. A reading of the impugned Order-in-Original reveals that the Commissioner has extracted, practically in extenso, the contents of the various communications, addressed by the petitioner, to him, consequent to issuance of the Show Cause Notice dated 7th March, 2016 supra. He has, thereafter, proceeded to record his findings, and has concluded by rejecting the petitioner's claims to innocence and holding that, in connivance with Sharafat Hussain and Vinod Kumar Pathror, the petitioner had succeeded in effecting imports of paper without paying appropriate duty thereon. He has, therefore, proceeded to pass the order in the terms already set out in para 1 supra.

11. Sub paras (ii) & (iii) of para 15 of the impugned Order-in-Original, read thus:

"(ii) The Noticee No.1 has also pleaded that they have not been supplied with some of the relied upon documents. Whereas on perusal of the available records and case file I find that the representative of the Noticee No.1 has given a categorical and unambiguous acknowledgement duly signed by Shri Sudhir Kumar Jain, Partner M/s SumatPershad and Sons that he has received legible copies of all the relied upon documents on behalf of the Noticee no 1 as well as on behalf of the Noticee no.2 also on 07.03.2016. Similarly, the authorised representative of Shri Sharafat Hussain, who appeared at the time of Personal Hearing on 09.09.2019 submitted that the relied upon documents have not been received by them. However from the records it has been ascertained that copies of all the relied upon documents have been supplied to Shri Sagar Rohtagi, Advocate for Shri Sharafat Hussain on 03.06.2019 and an acknowledgement to this effect is available on record.

(iii) The Noticee No.1 requested for allowing cross-examination of the officer. Relying the Hon'ble Supreme Court in the case of Surjeet Singh Chhabra vs. Union of India 1997 (89) ELT 646 (SC) I reject their request of cross-examination of the officers in the instant case as their role in clearance of imported goods is indisputed."

12. The present writ petition is directed against the aforesaid Order-in-Original, dated 11th October, 2019, passed by the Commissioner and seeks quashing thereof.

Submissions and Analysis

13. We have heard Mr. Krishnan Venugopal, learned Senior Counsel appearing for the petitioner, assisted by Dr. Sushil Gupta, and Ms. Sonu Bhatnagar, learned

Senior Standing Counsel appearing for the respondent, at length.

14. Mr. Krishnan Venugopal submitted, emphatically, that the Commissioner has passed the impugned Order-in-Original in complete ignorance of the communication, dated 30th July, 2019 *supra*, and that, for this sole reason, the Order-in-Original is a nullity, and void ab initio.

15. He submits that, while the Commissioner could have accepted, or rejected, the requests contained in the said letter, for being provided documents, details and permission to cross-examine officers, he could not have proceeded by ignoring the said communication. This, Mr. Venugopal submits, amounts to an affront to the Court, and invites evisceration of the impugned Order-in-Original from its roots.

16. We find, however, that para 11 (1) of the Order-in-Original specifically refers to the communication, dated 30th July, 2019, addressed by the petitioner. We also find, from a reading of the said paragraph, that the Commissioner referred to the requests made by the petitioner in the said communication, as well as the fact that responses, to some of the said requests, had been furnished, to the petitioner, by the department, at earlier stages during the proceedings.

17. It cannot, therefore, be said that the Order-in-Original has proceeded in ignorance of, or by overlooking, the communication, dated 30th July, 2019, of the petitioner.

18. Mr. Venugopal also voiced a complaint that the Commissioner has made no reference to the order, dated 6th September, 2019 *supra*, passed by this Court in WP (C) 9680/2019 and has, therefore, proceeded in ignorance thereof.

19. It is true that the impugned Order-in-Original makes no specific reference to the order, dated 6th September, 2019 *supra*, passed by this Court. However, this Court had, in the said order, merely directed that the application, dated 30th July, 2019, be considered and decided by the Commissioner. Inasmuch as the impugned Order-in-Original has taken stock of the said communication, as well as the demands of the petitioner therein, we do not find the lack of reference, in the impugned Order-in-Original, to the order dated 6th September, 2019, passed by this Court, sufficient justification to set aside the impugned Order-in-Original.

20. As was rightly pointed by Ms. Sonu Bhatnagar, learned Senior Standing Counsel for the respondent, the Order-in-Original has also considered the petitioner's requests for permission to cross-examine the officers who had dealt with the consignments in question, and has rejected the said requests, referring, for the purpose, to the judgment of the Supreme Court in *Surjeet Singh Chhabra* 1997 (89) ELT 646 (SC).

21. The petitioner, in the present case, sought permission to cross-examine the officers who had assessed the imports in question. In fact, the request, of the petitioner, was for permission to examine, rather than cross-examine, the said officers. Be that as it may, the Commissioner has taken a considered decision not

to summon the officers, who had assessed the concerned imports, in the witness box, as he was required to decide whether the imports themselves were in accordance with law, or not, and whether the petitioner was complicit in effecting the allegedly illegal imports. The justifiability of this decision of the Commissioner is, in our view, not amenable to examination under Article 226 of the Constitution of India, as there is an efficacious alternate remedy available, to the petitioner, by way of statutory appeal before the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as "the Tribunal"), under Section 129A of the Act.

22. Mr. Venugopal candidly conceded that the reluctance, of his client, to approach the Tribunal is because, were it to do so, it would have, in the first instance, to pre-deposit 7.5 % of the duty demand, as confirmed against it by the impugned Order-in-Original, dated 11th October, 2019, being in the nature of a mandatory statutory requirement under Section 130EE of the Act.

23. This, in our view, cannot constitute reasonable justification for avoidance, by the petitioner, of resort to the statutorily provided appellate remedy.

24. No doubt, in an appropriate case, where an adjudication order is passed by an incompetent authority, or in stark violation of the principles of natural justice, or is fatally imperiled for any similar reason, a writ court may be justified in quashing the order, without requiring the affected assessee to submit itself to the rigours of the statutory appellate process.

25. That, however, has necessarily to be the exception, rather than the rule.

26. In *Union of India v. Rubber Products Ltd.* 2015 (326) ELT 232 (SC), the Supreme Court has held that, as the Central Excise Act, 1944, provided an alternate remedy of appeal to the assessee, a writ petition, challenging the order passed by the adjudicating authority, was not maintainable.

27. In *Union of India v. Guwahati Carbon Limited* 2012 (278) ELT 26 (SC), the Supreme Court held that, though Article 226 of the Constitution of India confers vast powers on High Courts, such powers can only be exercised in those cases where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has invoked provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice.

28. Other instances, where the Supreme Court frowned on High Courts entertaining writ petitions against adjudication orders, without relegating the affected assessee to the alternate remedy provided by the statute, may be found in *Commissioner of Customs, Visakhapatnam v. Jaya Satya Marine Exports (P) Ltd.* 2001 (131) ELT 3 (SC) and *Commissioner of Sales Tax (Assistant), Kerala v. P. Kesavan & Co.* 1999 (109) ELT 3 (SC).

29. *Harbanslal Sahnia v. Indian Oil Corpn. Ltd.* (2003) 2 SCC 107 enumerates, classically, the circumstances in which, despite availability of an efficacious

alternate remedy, the High Court can interfere in exercise of its writ jurisdiction, as where (i) the petition seeks enforcement of a fundamental rights, (ii) there is failure of the principles of natural justice, (iii) the orders/proceedings are wholly without jurisdiction, or (iv) the vires of a statutory provision is challenged. *Filterco v. Commissioner of Sales Tax, Madhya Pradesh* (1986) 2 SCC 103, also permits bypassing of the appellate remedy where the appellate authority has already decided an identical controversy in another case.

30. To our mind it is not possible to pigeonhole the present case into any of the above categories.

31. In the present case, the Commissioner has, in para 11 (1) of the Show Cause Notice, adverted to all the communications, of the petitioner, by way of response to the Show Cause Notice dated 7th March, 2016. The petitioner has, till date, not chosen to file a final reply to the Show Cause Notice on merits. Nonetheless, para 11(1) of the Order-in-Original takes stock of all the contentions advanced by the petitioner, in his various representations, in response to the Show Cause Notice, including the communication dated 30th July, 2019 supra.

32. The Commissioner has also rejected the request, of the petitioner, for being allowed cross-examination of the officers who had assessed the imports in question. As to whether this decision, of the Commissioner, was justified, or not, would more appropriately fall to be decided in appeal, by, the Tribunal.

33. We take note of the fact that this is not a case in which the Commissioner has relied on any statements, recorded under Section 108 of the Act, without permitting cross-examination of the deponents thereof.

34. It is also obvious that the impugned Order-in-Original involves intricate and complex issues of fact. Mr. Venugopal did make an attempt to convince us that the scrips, whereunder duty was paid on the imports effected by his client, were genuine. He further sought to contend that, even if they were not genuine, his client, being innocent, could not be mulcted with duty liability. Mr. Venugopal placed reliance on the judgment, of this Court, in *Farha Hussain v. Union of India* 2018 SCC OnLine Del 9352, particularly paras 5,42 and 43 thereof, which read thus:

"5. For clearing of shipments and use of scripts for payment of duty, a separate portal is used by the traders and vendors. It is explained in the petition that the above portal cannot be accessed by outsiders, including the license holders themselves. Any use of the scripts for payment of import duty is verified by at least by five officers of the Department including three IRS rank officers and an Inspector and a Superintendent at five different stages. In the second stage of verification, the scrip is forwarded to the Customs Cell for physical verification which is done by a group of officers from the entries in the computer system using their exclusive passwords.

42. There is merit in the contention that the sponsoring authority erred in not referring to the various circulars issued by the Commissionerate which demonstrates how the verification of the genuineness of the scripts was to be done. Without the participation of various customs officers, it would have not been possible to hack the system and tamper with the details concerning the scripts/licenses. There being a two-layer verification process by means of a secret password allotted to the Superintendent, it would have been impossible for an individual to tamper with or hack into the system. The exact manner of tampering with the system has not been explained.

43. Further, since the investigation into the role of the Customs officers is still said to be underway, the only conclusion that can be drawn is that there is no material available with the Detaining Authority to justify the conclusion that the Detenue had the potential of continue to tamper with the licenses/scripts even in future, after his release. There appears to be no material with the detaining authority to justify such a conclusion. In particular, the Respondents have not satisfactorily responded to the following averments in the petition:

"Further the EDI is completely secured system and can only be accessed by the Customs officials since a unique single sign on identity ("SSOID") is only issued to Customs officer and a password is required to access the online EDI system and it is not conceivable as to how all the unique SSOID and passwords of all officers working at ICD, Tughlakabad, from 2011-2015 have been accessed when the password is required to be changed every 15 days/fortnightly."

35. We do not wish to make any comments to this submission, advanced by learned Senior Counsel for the petitioner, as they might prejudice the proceedings which the petitioner may, if so advised, choose to prosecute before the Tribunal. The applicability, to the present proceedings, of the decision in Farha Hussain 2018 SCC OnLine Del 9352 - which, incidentally, was a challenge to an order of preventive detention, passed under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1973 - could also be examined by the Tribunal.

36. Despite the fervent efforts of Mr. Venugopal, we are of the firm view that there is no such fatal flaw, in the impugned Order-in-Original, as would justify its premature decapitation, at our hands, without requiring the petitioner to avail, in the first instance, the appellate remedy provided by the statute.

37. For the aforesaid reasons, we are of the view that, as an efficacious alternate remedy is provided, to the petitioner, under Section 129B of the Act, by way of appeal to the Tribunal, any interference, by us, with the impugned Order-in-Original, would, in the facts and circumstances of the present case, be unjustified.

38. Without, therefore, expressing any opinion on merits, on any of the contentions advanced in this writ petition, we decline to interfere with the impugned Order-in-Original and, accordingly, dismiss the present writ petition in limine, with no orders as to costs.

39. All pending applications stand disposed of accordingly.