

(2008) 05 P&H CK 0150
In the Punjab And Haryana At Chandigarh
Case No : C.W.P. No. 537 of 2008

Prime Leathers

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 29-05-2008

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 108, 124, 128, 27, 28

Citation : (2009) 1 ILR (P&H) 923 : (2008) 4 RCR(Civil) 464

Hon'ble Judges : Sabina, J;M.M. Kumar, J

Bench : Division Bench

Advocate : Ashwani Kumar Chopra, Akshay Bhan and Rohit Sud, for the Appellant; Kamal Sehgal, Central Government Standing Counsel, for Respondent Nos. 1 and 2 and Sanjeev Kaushik, Central Government Standing Counsel, for the Respondent

Judgement

M.M. Kumar, J.—This petition filed under Article 226 of the Constitution prays for issuance of direction to the Directorate of Revenue Intelligence-Respondent No. 2 (for brevity, "DRI") to refund the sum of Rs. 70,00,000 allegedly extorted from the Petitioner illegally, arbitrarily, under duress and without any power and authority. It has further been prayed that complete record/items seized by the DRI be also released to the Petitioner.

2. Brief facts of the case are that the Petitioner is a partnership firm and engaged in the manufacture of various kinds of leather in the form of different kinds of bags and different varieties of furnished leather, which are exported in different colours like blue, grey, ivory, black, brown etc. to Thailand, Hong King, United States of America, Italy and other countries through Container Freight Station, Ludhiana and Container Freight Station, New Delhi (for brevity, "CFS").

3. On 26th December, 2007, the factory premises of the Petitioner as well as residential premises of its partners were searched by the officers of the DRI and entire records of exports, one computer and some documents were seized from

the factory premises whereas one Laptop, two mobile phones and some other records were seized from the residence of Shri Gaurav Sud, partner of the Petitioner firm (P-1 & P-2). It is alleged that Shri Gaurav Sud, Managing Partner and Shri Paramjit Singh, Production Incharge of the Petitioner were forcibly taken to Ludhiana by the officers of the DRI and they were not allowed to leave the office of DRI till next morning i.e. 27th December, 2007. During this time they were allegedly intimidated to make a self-inculpatory statement under the threat of arrest under the provisions of the Customs Act, 1962 (for brevity, "the Customs Act") and detention under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for brevity, "the COFEPOS A). The Statement was, inter alia, to the effect that the goods exported by the Petitioner were semi-finished and not finished leather. The Petitioner was further asked to deposit full amount of Drawback/ Duty Entitlement Pass Book (for brevity, "DEPB"), amounting to Rs. 70,00,000 which was availed by the Petitioner during previous five years. It is claimed that due to threat of arrest and coercion, the Managing Partner of the Petitioner agreed to tender a draft of Rs. 70,00,000 with the DRI. Shri Gaurav Sud, Managing Partner and Shri Paramjit Singh, Production Incharge of the Petitioner, were allowed to go in the morning of 27th December, 2007, only after making self inculpatory statement and handing over a cheque of Rs. 70,00,000, which was replaced by a draft of the same amount by taking loan from the bank on the next day.

4. On 2nd January, 2008, the partner of the Petitioner firm sent a retraction letter dated 28th December, 2007 to the DRI-Respondent No. 2 through registered post thereby retracting from his self inculpatory statement obtained on 26th December, 2007 (P-4).

5. As per the provisions of Section 50 of the Customs Act, an exporter is required to file shipping bill for clearance of goods to be exported. After satisfying himself that the goods entered for export are not prohibited goods and that exporter has paid the duty, if any, assessed, the Custom Officer is required to give clearance and loading of goods for exportation in terms of Section 51 of the Customs Act. The Petitioner has also elaborately explained various Schemes of the Government to protect the exporters and to facilitate them for competing in the International Market as well as various cumbersome procedures in relation to clearance of goods before they are allowed to export outside the country (from page 6 to 14 of the petition). However, we do not wish to refer the same because in the instant case it is conceded position that the goods in question at the first instance were cleared by the Customs i.e. CFS, Ludhiana and then by New Delhi. It has claimed that the factory premises of the Petitioner and residential house of its Managing Partner were searched on the basis of some intelligence reports after the goods were already exported. It is also an admitted position that no show cause notice has been issued to the Petitioner and, thus, no reply/ representation could be made by it. Accordingly, the Petitioner has approached this Court questioning the methodology adopted by the Respondents for obtaining a draft of Rs. 70,00,000 from the Petitioner by misusing the powers of

search, arrest and detention.

6. In the written statement filed on behalf of DRI Respondent Nos. 1 and 2 a preliminary objection has been raised that u/s 27 of the Customs Act, there is provision for refund of duty erroneously paid. It has been asserted that under the provisions of Section 28 of the Customs Act, the party against whom investigations are underway, can deposit the disputed amount of Customs duty on their own during the pendency of investigation and even before the proceedings of adjudication to project that there was no mens rea of evasion of Customs duty and also to avoid mounting up of heavy interest. With regard to non-issuance of show cause notice, it has been submitted that as per the provisions of Sections 124 and 28 of the Customs Act, a show cause notice is to be issued on conclusion of the investigations, which is to be adjudicated for confiscation of the goods, imposition of fine and penalty in quasi-judicial proceedings before the proper officer. It has been further asserted that any order during the stage of investigation would affect the rights of the revenue and complete facts may not come to surface. The dismissal of the writ petition has been sought on the ground that the petitioner itself has presented different set of documents to the Customs and the bank, which in itself is a confession of preparation of parallel documents and mis-declaration and that the Petitioner has not brought true facts before the Court.

7. It has been stated that intelligence report was received by the DRI to the effect that some of the Jalandhar based exporters of leather are engaged in the misuse of export incentives by actually exporting "crust leather", which is a "semi-finished leather" terming it as "finished leather" in order to avail the benefits of various Export Incentive Schemes of the Government. Specific information in respect of M/s Raghu Exports India Pvt. Ltd., Jalandhar, was also received and searches were conducted on 17th December, 2007 on the premises of the said concern. During the course of investigation statement of one Karthi Anabalgan, son of Shri Anabalgan, resident of Kanpur was recorded, who was allegedly acting as inspecting agent on behalf of various Italian buyers of crust leather for upholstery. In his statement, Karthi Anabalgan is stated to have admitted procuring of crust leather from M/s Raghu Exports, Jalandhar, M/s Prime Leathers (Petitioner) and M/s Gee Kay International of Jalandhar in addition to various suppliers of Kanpur.

8. As a sequel to the aforementioned investigation, the premises of the Petitioner were also searched on 26th December, 2007. It has further been asserted that the managing partner of the Petitioner firm Shri Gaurav Sud and Shri Paramjit Singh, Production Incharge, have admitted in their statements dated 26th October, 2007, recorded u/s 108 of the Customs Act, that they were engaged in the manufacturing of garment leather, bag leather, shoe leather, upholstery leather, exporting bags, bags leather, finished leather for shoes, upholstery leather in addition to leather jackets and also exported both finished and crust leather in various shipments by mentioning the same as finished upholstery

leather on export, document in all the cases. Since the petitioner was sending the goods illegally and in contravention of various provisions of the Customs Act, therefore, when their activities came to surface, the managing partner of the Petitioner showed his willingness to make good the loss to the Government and accordingly cheque of Rs. 70,00,000 was voluntarily presented on 26th December, 2007, towards their estimated duty liability, which was replaced with a demand draft of equal amount on 27th December, 2007 afternoon. The allegation of illegal detention to appear before the SIO to tender evidence and the allegations of use of force, coercion and intimidation, as have been levelled in the writ petition, have been denied.

9. Controverting the averment made in the written statement filed on behalf of Respondent Nos. 1 and 2 and reiterating the averments made in the writ petition, a replication has been filed by the Petitioner stating that despite lapse of four months it has not received any notice or any other formal intimation for violation of any of the provisions of the Customs Act. It has also been submitted that the Petitioner is facing undue harassment, loss of work capital and loss of good will due to the hasty action on the part of the DRI. It has been claimed that the DRI has prima facie no information/evidence against the Petitioner to proceed further with the search and seizure operation.

10. In the written statement filed on behalf of Respondent No. 3, after explaining various procedures and provisions of the Customs Act, it has been asserted that in the case of the Petitioner all the consignments were subjected to physical examination by the Customs Officials and the examination report was endorsed on the back of shipping bills or in the electronic Data Interchange (DI) Systems. All the goods where the order from drawl of sample was not given, the same were verified with naked eye. After satisfying with the declaration of the description of goods made by the Petitioner, the same were allowed for stuffing by the Examining Staff. The samples were drawn as per the guidelines laid down by the Ministry in the presence of representative of the Petitioner. The same were forwarded in sealed cover to the Regional Centre for Extension & Development (Central Leather Research Institute), Chennai, Leather Complex, Kapurthala Road, Jalandhar, for test report. Two test reports dated 29th February, 2008 and 8th January, 2007 of such consignments have been forwarded by the laboratory certifying that the leather satisfies the norms and conditions laid down for the type of finished leather i.e. Buffalo Retanned Shoe Upper Leather [R-3/1 (Colly)]. In nut shell, the written statement filed by Respondent No. 3 it has been asserted that after complying with the provisions of the Customs Act and instructions on the issue, the assessing officer after satisfying himself in all respects, allowed the goods to be exported out of India.

11. It is apposite to mention here that on 15th January, 2008, while issuing notice of motion, the Division Bench of this Court passed an interim order that no coercive step be taken for effecting recovery of any further amount. It has been further directed that the cheques/drafts obtained from the Petitioner, allegedly

under coercion, shall be encashed subject to decision of instant petition. Thereafter, the Petitioner filed an application bearing Civil Misc. No. 744 of 2008, for issuance of direction to the DRI-Respondent Nos. 1 and 2 to return the demand draft bearing No. 152960, dated 27th December, 2007, amounting to Rs. 70 lacs. A further prayer was also made for directing the Respondents to accept the bank guarantee of equal amount in exchange of the draft.

12. On 28th January, 2008, when the aforementioned application came up for consideration, the Division Bench, of which one of us (M.M. Kumar, J.) was also a member, specifically asked the learned Counsel for Respondent Nos. 1 and 2 to find out as to why the goods at the first instance were cleared by the CFS, Ludhiana and New Delhi. However, to the aforementioned query no reply has been filed either in the written statement filed to the writ petition or to the reply filed to the application. Reply to the aforementioned query was considered extremely significant because once goods have been cleared by the Customs Department for export or import then there is sufficient justification for the exporter or importer to feel secure and safe that it has paid duty or revenue in accordance with law. It is evident from the written statement filled by Respondent No. 3 that in accordance with the provisions of the Customs Act and other elaborate formalities mentioned at Page 8 to 13 of the written statement to which the consignment of goods belonging to the Petitioner were subjected, the goods in question were found matching with the declaration made in the shipping bills. However, on the basis of some intelligence report, the premises of the Petitioner were raided on 26th December, 2007 and they were summoned at Leather Complex, Jalandhar, although the managing partner of the Petitioner along with its Production Manager Shri Paramjit Singh were taken to Ludhiana. Some confessional statement made u/s 108 of the Act is stated to have been recorded. As already noticed the Petitioner is stated to have voluntarily issued a cheque of Rs. 70 lacs which was later on replaced by a demand draft. The Division Bench, however, did not stay encashment of demand draft, which was actually encashed on 25th February, 2008.

13. On 5th March, 2008, Mr. A.K. Chopra, learned Senior counsel for the Petitioner placed reliance on a judgment dated 21st August, 2002 passed by a Division Bench of this Court in the case of Bhagwati International, Faridabad and Anr. v. Union of India and Ors. (CWP No. 8672 of 2001, decided on 21st August, 2002). Learned Counsel raised the argument that no demand has ever been raised for which an amount of Rs. 70 lacs could have been realised from the Petitioner. However, Mr. Sehgal, learned Counsel for Respondent Nos. 1 and 2 had contended that there is likely to be huge demand as there has been evasion of duty because parallel documents have been prepared which would show that the item in question, is buffalo crest upholstery leather and not finished leather.

14. The Division Bench found that the stand of Respondent Nos. 1 and 2 is not only unfair and unreasonable but extremely arbitrary because admittedly there was no demand raised by Respondent Nos. 1 and 2 against the Petitioner till that

day. Secondly, the goods exported by the Petitioner were subjected to multiple rigorous tests, as has been disclosed by Respondent No. 3 in para 2 (at pages 6 to 18) of their written statement. The goods were even matching with the declaration made in the shipping bills. The Petitioner might have given another description of the same goods in the invoices issued to its foreign buyers. Prima facie, the Division Bench had found that it would not constitute a basis for doubting the assessment by Respondent No. 3 and specifically observed in the order dated 5th March, 2008 as under:

...In this era of globalisation it is highly dangerous to permit such a course because the goods exported or imported by an entrepreneur do not leave the custom house without proper assessment". A number of provisions including Sections 50 and 51 of the Customs Act, 1962, are required to be followed. It is only after complete satisfaction by the Customs Department and payment of duty on the goods that the entrepreneur is permitted to proceed further. It would be extremely difficult for any genuine entrepreneur to bear the onslaught by a third agency like Directorate of Revenue Intelligence-Respondent No. 2 to undertake further operations without associating the Customs Department. As to how the classification of the goods was accepted by the Customs Department, which in the opinion of the Directorate of Revenue Intelligence is different than the one recognised by the Customs Department. If such a course is allowed then every consignment of export or import cleared by the Customs Department would be exposed to any questioning at the instance of Respondent No. 2. At the first instance Respondent No. 2 is required to associate the Customs Department before taking any steps against an entrepreneur.

15. The Division Bench further noticed its earlier orders passed in such like matters which included interim order passed in C.W.P. Nos. 9553, 9554 and 9918 of 2006, on 11th July, 2006 and C.W.R 18601 of 2007. In the last case, following directions were issued on 20th December, 2007:

(i) The goods which are lying seized in the premises of the Petitioners, and have already been subjected to the payment of duty at the time of import shall be released to the Petitioners on their furnishing bank guarantee to the extent of duty leviable on the goods by assessing the value thereof @ US \$ 3 per kg. However, the amount of duties already paid to the Petitioners on these goods shall be reduced.

(ii) As far as the goods lying at the port are concerned, the same shall be released to the Petitioners on payment of duty on the value of the goods, as declared by the Petitioners and complying with other formalities for release of goods. The Petitioners will be further required to furnish bank guarantee of difference of duty in case the value of the goods is assessed @ US \$ 3 per kg.

(iii) Seizure of the bank account of the Petitioners shall be released forthwith.

The above arrangement is by way of interim measure. However, the Petitioners shall abide by final order determining their liability in appropriate proceedings

under the Act (subject to their statutory remedy). The Petitioners shall cooperate with the Respondent-department.

16. The Division Bench further noticed that somewhat in similar circumstances another Division Bench of this Court in the case of M/s Bhagwati International Faridabad (supra), passed the following order by rejecting the similar contention, which reads as under:

Petitioner No. 1 is a hundred per cent export oriented unit registered with the Ministry of Commerce, Government of India. It is claimed that the Respondents under coercion got a sum of Rs. 50 lacs deposited from the Petitioners even when there was no demand for any duty or tax outstanding against them. This amount was deposited more than three years back in the year 1999. The Petitioners have filed this petition under Article 226 of the Constitution for a mandamus directing the Respondents to refund the aforesaid amount with interest.

In response to the notice of motion the Respondents have filed their reply. It is pleaded that the Commissioner of Customs, New Delhi has issued a notice dated 19th January, 2000 to the Petitioners calling upon them to show cause why a sum of Rs. 3,84,43,296 be not demanded and recovered from them u/s 28 of the Customs Act. It is admitted that final adjudication of this notice has yet to be made and there is no amount outstanding against the Petitioners.

We have heard counsel for the parties. The learned Counsel appearing for the Department strenuously contends that as and when the demand against the Petitioners is finalised the amount of Rs. 50 lacs deposited by them in June, 1999 will be adjusted against that demand and, therefore, this Court should not direct the Respondents to refund the aforesaid amount of Rs. 50 lacs to the Petitioners. We are unable to agree with the learned Counsel. Since the adjudicating authority has not yet determined any amount as due which is payable by the Petitioners, there is no justification for the Department to retain the sum of Rs. 50 lacs which was admittedly deposited by the Petitioners way back in June, 1999. If as and when any demand is created, it will be open to the Department to recover the same from the Petitioners in accordance with law. We, therefore, allow the writ petition and direct the Respondents to refund the sum of Rs. 50 lacs to the Petitioners along with interest at the rate of 9% per annum from the date of deposit till the date of its return. The needful must be done within three months from the date of receipt of a copy of this order.

17. On the basis of the aforementioned discussion, the Division Bench as an interim measure,--vide order dated 5th March, 2008, directed Respondent Nos. 1 and 2 to refund the amount of Rs. 70 lacs within a period of one month from that day. However, in order to secure the interest of the department-Respondent Nos. 1 and 2, the Division Bench further directed that bank guarantee of equal amount be furnished by the Petitioner. Respondent Nos. 1 and 2 were further directed to file reply in terms of order dated 28th January, 2008 because

Respondent No. 3, Customs Department had in their reply defended their action by quoting Sections 50 and 51 of the Customs Act, as well as various other processes to which the goods of the Petitioner were subjected.

18. On 25th April, 2008, the Petitioner filed Civil Misc. No. 8209 of 2008 for issuance of appropriate directions in furtherance of order dated 5th March, 2008, passed by the Division Bench. In para 11 of the application, the Petitioner made an averment that amount of Rs. 70,00,000 is required to be returned unconditionally or at the most against adequate surety/security. On 9th May, 2008, cheque amounting to Rs. 70,00,000 was handed over to the counsel for the Petitioner and the Petitioner was directed to furnish a bank guarantee in terms of the order dated 5th March, 2008. It was also conceded that the Petitioner had already furnished a bank guarantee dated 19th May, 2008 from Canara Bank as per the directions of this Court, clearly guaranteeing the payment of Rs. 70,00,000 till the disposal of the writ petition.

19.. In response to the Civil Misc. No. 8209 of 2008, an affidavit has been filed by Shri Dheeraj Rastogi, Joint Director, DRI, Ludhiana, dated 27th May, 2008, stating that in case the prayer made by the Petitioner for unconditional refund to Rs. 70,00,000 is accepted, the revenue would suffer irreparable loss and injury. Faced with this situation, Shri Gaurav Sud, managing partner of the Petitioner, has filed an affidavit dated 26th May, 2008, giving an undertaking that he is joint owner of the property bearing No. 343-A, Block No. B, Sushant Lok Colony, Gurgaon, Haryana alongwith his father Shri Narinder Kumar Sud. It is asserted that there is no charge existing on the said property. He has undertaken that he would not create any charge or encumbrance on the said property without prior permission of this Court. It has also been deposed that the aforesaid plot is worth more than Rs. 70,00,000. The aforementioned affidavit was further supplemented by affidavits dated 28th May, 2008 filed by Shri Gaurav Sud, managing partner of the Petitioner and his father Shri Narinder Kumar Sud. Shri Narinder Kumar Sud also gave similar undertaking as that of Shri Gaurav Sud.

20. Mr. Ashwani Kumar Chopra, learned senior counsel for the Petitioner has argued that the Division Bench judgment of this Court as noticed in the order dated 5th March, 2008, in the case of M/s Bhagwati International {supra} in unmistakable terms lays down that in the absence of demand the DRI or any other authority could not ask the Petitioner to deposit any amount much less by using coercive method. Learned Counsel has maintained that a period of about six months have expired, yet, no demand has been raised and the bank guarantee of Rs. 70,00,000 furnished by the Petitioner may be released so as to enable the Petitioner to make use of that money by circulating the same in the business. He has further argued on the basis of the affidavit that there is adequate property available with the Petitioner, which would be sufficient even if the revenue subsequently raises a demand. The property is a residential plot bearing No. 343-A, Block No. B, Sushant Lok Colony, Gurgaon. The property is jointly owned by Sarvshri Gaurav Sud and Narinder Kumar Sud, who have filed

their respective affidavits to the effect that the property is free from all encumbrances, no charge is existing on it and no charge would be created without the prior permission of this Court.

21. Mr. Kamal Sehgal, learned Counsel for Respondent Nos. 1 and 2 has opposed the release of bank guarantee by asserting that it was on the application and the affidavit filed by the Petitioner that the order dated 5th March, 2008 for furnishing of bank guarantee of Rs. 70,00,000 was passed. He has also submitted that the assessment is likely to take some time and the recovery may come to crores of rupees.

22. In view of the detailed order passed by the Division Bench on 5th March, 2008 and following the same reasoning noticed therein, we are of the view that the Respondents have no legal or moral right to ask the Petitioner to furnish any bank guarantee in the absence of any demand raised. Order dated 5th March, 2008 categorically support the aforementioned proposition as it has noticed Division Bench judgment of this Court in the case of M/s Bhagwati International {supra}. However, the interest of the revenue still remains protected by virtue of the affidavits dated 26th May, 2008 and 28th May, 2008 filed by Shri Gaurav Sud, managing partner of the Petitioner as well as affidavit dated 28th May, 2008 filed by his father Shri Narinder Kumar Sud. Therefore, the main prayer made by the Petitioner in the writ petition deserves to be accepted.

23. For the reasons mentioned above, the bank guarantee dated 19th May, 2008, furnished by the Petitioner is ordered to be released. However, the property bearing No. 343-A, Block No. B, Sushant Lok Colony, Gurgaon (Haryana), owned jointly by the Managing Partner Shri Gaurav Sud and his father Shri Narinder Kumar Sud, which is free from any encumbrances shall be kept as security to meet any future demand of the revenue, although strictly speaking it is not required by law. The inquiry/investigation initiated against the Petitioner by the DRI shall be finalized expeditiously but not beyond the period of one year from today. We also make it clear that any observation made in this order shall not be considered as an expression of opinion on the merits of the controversy and neither of the parties should feel prejudiced about their rights as available in law, which shall remain intact.

24. The writ petition stands disposed of in the above terms.

25. A copy of the order be given dasti on payment of usual charges.