
(1997) 12 DEL CK 0073
In the Delhi High Court
Case No : C.W. 112 of 1996

Rajesh Arora

APPELLANT

Vs

Collector of Customs

RESPONDENT

Date of Decision : 19-12-1997

Acts Referred:

Customs Act, 1962 — Section 110(2), 111, 118, 47

Citation : (1998) 44 DRJ 799 : (1998) 101 ELT 246

Hon'ble Judges : Arun Kumar, J

Bench : Single Bench

Advocate : Mr. Rajesh Tyagi and Mr. A.K. Vali, for the Appellant;

Judgement

Arun Kumar, J.—The petitioner entered into an agreement dated 30th, October, 1992 for purchase of a car manufactured abroad with one Rajan Sabharwal, a person of India origin. Rajan Sabharwal was settled in Australia for a long period and returned to India on 11th August, 1992 with the intention of permanently settling down in this country. The consideration for the car had already been paid aboard. The car was cleared by the customs authorities at New Delhi after payment of the customs duty on 5th June, 1993. The petitioner had obtained the delivery of the car in view of his agreement with Rajan Sabharwal.

2. According to the petitioner he is a dealer in imported cars and there being no restrictions under the rules regarding further sale of the car in question, he approached one S.P.Bagla, a dealer in purchase and sale of imported cars for arranging its further sale. The car had been taken to the premises of S.P.Bagla for this purpose. As ill-luck would have it there was a raid on 11th June, 1993 by the Enforcement Directorate at the premises of Bagla and the petitioner's car was also caught in the net. According to the petitioner since then he has no denied possession of no car. The car has been all along in the control and domain of no respondents. The present writ petition has been filed for quashing the impugned action on the part of the respondents in detaining the petitioner's said car and for the release of the car. The petitioner further claims exemplary costs

in view of the fact that he has been deprived of the use of the car for such a long period on account of illegal acts of respondents and the deterioration of the car in the process on account of its remaining idle and in disuse for such a long time.

3. According to the petitioner the policy at the relevant time with regard to import of foreign made cars was as under:-

[This is as per Import Trade Control Public Notice No.21-ITC(PN)/92-97 dated 26.6.1992].

Subject : Import of cars/vehicles, etc. without a licence.

Attention is invited to the Export Policy April 1992 March 1997, published under the Ministry of Commerce Public Notice No.1-ITC(PN)/92-97 dated the 31st March, 1992. Passenger cars and automobile vehicles are included in the Negative List of Imports in Chapter XV of the Policy. This Public Notice specifies the conditions under which such vehicles can be imported.

Import of passenger cars and automobile vehicles may be made without a license by the categories of eligible importers specified in this, Public Notice subject to the following conditions:

(i) the payment for the vehicle is made abroad and such payment does not involve, directly or indirectly, any remittance of foreign exchange from India;

(ii) the payment of the customs duty is made in foreign exchange, unless expressly exempted in the case of any particular category of importer in this Public Notice;

(iii) the conditions specified against each category of eligible importers in this Public Notice are fulfilled; and

(iv) in the case of those importers returning to India for permanent settlement, a declaration to that effect is given to the Customs at the time of the clearance of the car.

A. Indian nationals or foreign nationals of Indian origin coming to India for permanent settlement.

(a) Import of one passenger car with engine size not exceeding four cylinders and not exceeding 1600 c.c. is permitted, whether the car is new or old. Alternatively, import of one passenger car is also permitted provided the car has been in the use of the importer for more than a year prior to his return to India.

(b) The importer has stayed abroad continuously for a period of at least two years prior to his coming to India for permanent settlement.

(c) The payment for the car is made abroad before his return to India.

(d) If the importer transfers his residence out of India again, he will be entitled to import another car under this Policy only after a minimum period of five years

from the date of importation of the previous vehicle.

(e) The importer is free to sell the car in the open market after his return to India without any restriction as regards the period of retention of the vehicle.

(f) Import of any other type of automobiles vehicle may be permitted by the Chief Controller of Imports & Exports on merits.

4. The respondents have to justify their action keeping the above policy been in view.

5. Rajan Sabharwal was an Indian national settled abroad who was returning to India for permanent settlement. The car in question was admittedly a brand new passenger car not exceeding four cylinders and not exceeding 1600 c.c. Rajan Sabharwal, the importer had been abroad continuously for a period more than two years prior to this return to India for permanent settlement. The payment for the car was made abroad before his return to India which is apparent from a letter dated 10th August, 1992 issued by M/s. BMW Asia (P) Limited, Singapore. The above-quoted Policy also shows that there is no restriction on the importer regarding further sale of the car in open-market. The question for consideration is, on the basis of these facts and the further fact that the customs authorities had cleared the car and delivered its possession to the petitioner after compliance of all the formalities and payments of customs duty, is the seizure or detention of the car by the respondents not wholly illegal, arbitrary and unjustified?

6. At this stage certain further facts in relation to the present case may be noted. After the raid at the premises of Bagla on 11th June, 1993, the car in question was impounded resulting in petitioner being deprived of its custody and possession. The petitioner addressed a letter dated 4th August, 1993 by registered post to the customs authorities requesting them to release the car stating that the action of the authorities in detaining the car was wholly illegal and unjustified. There was no response to that letter. The petitioner sent a reminder to the same effect to the customs authorities on 6th April, 1994. Again there was no response. However, in the meanwhile the customs authorities started issuing summons u/s 108 of the Customs Act to various persons. Including S.P.Bagla, the present petitioner, Rajan Sabharwal, etc. etc. The car, however, remained impounded all throughout though it was not removed to the customs warehouse. The car was ultimately moved to the customs warehouse on 29th April, 1995 though a panchnama had been prepared on 5th March, 1995 in this connection. The customs authorities issued a show cause notice dated 8th May, 1995 under sections 110 and 111(b) and (o) of the Customs Act, 1962. The petitioner has challenged the show cause notice in the present writ petition mainly on two grounds, i.e., the show cause notice was issued beyond the statutory limit of six months as provided in section 110(2) of the Customs Act and secondly that once the car was cleared after compliance of the formalities and payment of customs duty u/s 47 of the Customs Act, the customs authorities

had no jurisdiction to issue the impugned show cause notice.

7. In the counter affidavit filed on behalf of the respondents, it is stated that the custody of the car remained with S.P.Bagla till 5th March, 1995. The car was seized on 5th March, 1995 by the customs authorities. They admit in the counter affidavit that the car still remained with S.P.Bagla because a superdaginama dated 5th March, 1995 was prepared leaving the car in the superdagi of S.P.Bagla. The superdaginama was vacated only on 29th April, 1995 when the car was moved to the customs warehouse. Relying on these averments it is stated on behalf of respondents by their learned counsel that the show cause notice was thus issued within six months of the seizure of the car.

8. So far as the second point raised by the petitioner is concerned, the reply, of the respondents is that the valid customs clearance claimed by the petitioner was questionable because the car was not cleared in accordance with all the conditions of the notification No. 202 dated 30th March, 1995 which was filed as Annexure R-1 to the counter affidavit. Besides taking up the above defenses, the learned counsel for the respondent urged that the proper course for the petitioner is to reply to the show cause notice and face the adjudication proceedings and abide by their result.

9. I have carefully considered the stand of the respondents. So far as the aspect of valid customs clearance is concerned, the basic fallacy in the stand of the respondents in their reliance on a notification, i.e., Public Notice No.202/(PN)/92-97 dated 30th march, 1994. The import in the present case was during the period 1992-93. Rajan Sabharwal returned to India in August 1992. The agreement between the petitioner and Rajan Sabharwal is of 30th October, 1992. The car arrived in India in the middle of 1993 because it was cleared from customs after payment of duty and compliance of all other formalities on 5th June, 1993. In these facts I fail to understand how the public notice containing the policy regarding import of cars which came into force on 30th March,1994 can be made applicable. The public notice which is relevant according to the petitioner is the one which has been quoted in the earlier part of this judgment. The learned counsel appearing for the respondents was unable to refute this. He only kept on harping on the March 1994 public notice without explaining how in the face of the public notice dated 26th June, 1992 quoted hereinbefore, reliance could be placed on a notification which came into operation much later. The petitioner has satisfactorily explained compliance of all the requirements under the Public Notice dated 26th June, 1992. If the respondent rely on a different public notice it is for them to satisfy the court that the public notice of 30 March, 1994 would be applicable. The March 1994 Public Notice is prospective and not retrospective. It follows that the respondents have failed to justify their stand that the import of the car in the present case was not valid or the customs clearance of the car was not valid. If there was nothing wrong in the importation of the car and its customs clearance by the customs authorities, I fail to understand how section 111 of the Customs Act can be invoked for confiscation

of the car. Section 111 applied to confiscation of improperly imported goods. The goods in the present case, i.e. the foreign manufactured car was not imported contrary to any prohibition imposed by Customs Act or any other law for time being in force. Therefore, sub-section (d) of section 111 is not attracted in the facts of the present case at all. For the same reason sub-section (e) of section 111 is not attracted in the fact of the present case. Thus the impugned show cause notice in the present case is on the face of it illegal, untenable and misconceived and is liable to be quashed.

10. The allegations in the show cause notice dated 8th May, 1995 at best indicate that possibly violation of some provision of the Foreign Exchange Regulation Act may be under investigation. This may be relating to how and by whom the payment for the car was made in the foreign country in foreign exchange and how the foreign exchange came for payment of the customs duty at the time of customs clearance of the car in India. But these aspects need not detain this court for two reasons : First, the Public Notice dated 20th June, 1992 under which the car was imported by Rajan Sabharwal as a person of Indian Origin settled abroad for more than two years and returning to India for permanent settlement, does not talk about source of money, i.e, as to from where the money for payment of the price of car came. It also does not talk of source of money for payment of customs duty in foreign exchange. Therefore, import and clearance of car cannot be said to be illegal. Secondly, at best it may turn out to be a case of violation of the Foreign Exchange Regulation Act, for which we note that no action has been taken so far. Thus the impugned action of the customs authorities is wholly arbitrary, unjustified and unwarranted by law.

11. This brings me to the next point, i.e., the show cause notice having been issued beyond the period of six months as provided in section 110(2) of the Customs Act. The respondents are taking the effective date of seizing the vehicle in question as 5th March, 1995 when they proposed the impugned panchanama but still left the car in the superdagi of S.P.Bagla. From the date the show cause notice is obviously within six months. But according to the petitioner, he was deprived of the custody of the car in June 1993 and, Therefore, taking that date into consideration, the show cause notice is much beyond six months and the respondent are liable to return the car in question in view of the provisions of section 110(2). In this context it is to be noted that according to the respondents themselves as stated by them in the counter affidavit, a reference with respect to the car in question was made to the customs department by the Enforcement Directorate on 4th October, 1993. The customs department started the enquiries in relation to the car thereafter but this assertion on the part of the respondents does not tally with the fact that on 10th August, 1993 the customs authorities had started issuing summons u/s 108 of the Customs Act. Further it is to be noted that the petitioner had sent two letters dated 4th August, 1993 and 6th April, 1994 to the customs authorities challenging their action of detaining the car in question and calling upon them to release the same. These notices have been annexed as annexures to the writ petition along with the registration slips

because they are alleged to have been sent by registered post. There is no response to these notices by the customs department. Thus the customs department never disputed the fact that the car in question was being detained by them. If they were not detaining the car they would have immediately responded to the notices of the petitioners and said that the car was not being detained by them and the petitioners was free to take away the same. The customs authorities thus are trying to be clever and in order to overreach the court have now taken the stand that they never detained the car. The fact remains that the car even when it was kept at the premises of Bagla was impounded and the petitioner in any case was deprived of its possession or custody. Moreover the respondents have themselves admitted in sub-para (D) of the submissions about brief facts of the case that S.P.Bagla submitted a letter dated 22nd September, 1993 wherein he submitted the keys of the car in question to the department with an undertaking not to use the car without the permission of the department. Thus admittedly the car was within the control and custody of the respondents. In law this is sufficient for purposes of treating it as a seizing u/s 110 of the Customs Act. Reliance has been placed by the learned counsel for the petitioner on *Gain Chand and others Vs. State of Punjab* 1983 E.L.T. 1365 which is a judgment of the Supreme Court. It was held in that case that seizure involves a deprivation of possession and not merely of custody of goods. What follows from this is that physical deprivation of the custody or enjoyment of the goods in question is that test for determining whether there was seizure of goods. Whether the goods are kept at place A or place B is not so much material. If the goods are detained against the wishes of a party, that is good enough as a seizure. Moreover, as noted earlier, the respondent should always say in response to the notices of the petitioner that the goods were not seized by them. The stand now being taken by the respondents is by way of taking advantage of their own conduct. The respondents cannot be permitted to do this. From the facts on record it necessarily follows that the show cause notice dated 8th May, 1995 was issued much beyond the period of six months from the date of seizure of the vehicle, as prescribed u/s 110(2) of the Custom Act and for this reason also the respondents are liable to return the car in question to the petitioner.

12. In the above view of the matter it cannot be said that the petitioner should be asked to face the adjudication proceedings in response to the show cause notice. The show cause notice itself is without any legal basis or authority. It will be wholly unjust and unreasonable to drive a party to face the adjudication proceedings in such a case. The unfairness will be further magnified in view of the fact that till the adjudication proceedings are concluded the car will remain in custody of the respondents and an imported car which came to India in June 1993 will be reduced to junk by being kept in disuse for such a long period.

13. As a result of the above discussion the impugned show cause notice dated 8th May, 1995 is hereby quashed. The respondents are directed to return the car in question to the petitioner forthwith. The learned counsel appearing for the

petitioner has pointed out that the authority concerned with the registration of motor vehicles in Delhi be directed to register the car as it is because in the meanwhile a requirement of catalytic convertor has been introduced before a new car can be registered. When the car in question was imported there was no such requirement and today it is almost impossible to meet that requirement so far as the car in question is concerned. Keeping in view the fact that if the car had been registered in the year 1993 when it arrived in India and was cleared by the customs authorities, there would not have been any such hurdle and the hurdle which may now be faced by the petitioner in registration of the car is the result of illegal acts on the part of the respondents, the registration authorities are directed to register the car in question without insisting on the requirement of catalytic convertor and without any penalty for late registration.

14. The writ petition is disposed of with these directions. The Petitioner is entitled to costs. But quantifying the costs at this stage is difficult because the petitioner cannot give an estimate of damages suffered by him on account of wrongful acts of respondents without inspection of the car. The petitioner will be able to assess the damages suffered by him on account of the car remaining in disuse for such a long time and being improperly kept in custody only after its delivery. The petitioner is given liberty to move this court for award of damages after he is in a position to assess the same after taking delivery of the car in pursuance of this order. At that time the court will also consider the question of damages suffered by the petitioner on account of deprivation of the use of the car after having parted with its full sale consideration.