

**(1997) 08 MAD CK 0062**

**In the Madras High Court**

**Case No :** Writ Application No. 882 of 1997 and C.M.P. No. 10119 of 1997

S. Bavani

APPELLANT

Vs

Dy. Director of Revenue Intelligence, Chennai

RESPONDENT

**Date of Decision :** 19-08-1997

**Acts Referred:**

Central Excises and Salt Act, 1944 — Section 37  
Customs Act, 1962 — Section 110, 115, 124, 134, 153  
Foreign Exchange Regulation Act, 1973 — Section 41

**Citation :** (1998) 98 ELT 327

**Hon'ble Judges :** Thanikkachalam, J; K.P. Sivasubramaniam, J

**Bench :** Division Bench

**Advocate :** Shri Abdul Naseer, for the Appellant; Shri V.T. Gopalan, Senior Central Government Standing Counsel, for the Respondent

## Judgement

Thanikkachalam, J.—The writ petitioner is the appellant herein. The writ petition was filed for issuance of a writ of mandamus directing the

respondents 1 and 2 to release the trailer bearing registration No. TMT 5637 to the petitioner on such condition pending investigation in F. No.

VIII/48/3/97-DPI on the file of the respondents. In the writ petition a Writ Miscellaneous Petition No. 8635 of 1997 was filed praying for grant of

interim custody of the trailer bearing Registration No. TMT 5637 to the petitioner pending disposal of the above writ petition. The learned single

Judge, who heard the writ petition and W.M.P. dismissed both the petitions. As against this order the petitioner in the writ petition is in appeal

before this Court.

2. In the affidavit filed in support of the writ petition, the writ petition stated as under : Her husband late G. V. Siva was the proprietor of Om

Sakthi Vinayaka Transport, Royapuram, Chennai. He was murdered on

22-1-1997 and after his death the petitioner in the writ petition was looking after the business. On 16-1-1997 a trailer bearing registration No. TMT 5637, which was owned by the husband of the petitioner, was taken on hire by an exporter and the respondents-officers seized the trailer under a mahazar dated 16-1-1997. Since according to the respondents, on 10-1-1997 sandalwood logs from a container No. TRIV 3409802 (Export Cargo) meant for Singapore by vessel M. V. Tiger wave as per shipping bill No. 01253, dated 6-1-1997.

3. After the death of her husband, the petitioner sent a letter to the first respondent on 12-3-1997 requesting him to return the trailer in order to run her business. She received a reply from the first respondent stating that the trailer cannot be returned at this stage as the investigation is in progress. It is stated in that letter that 11.146 Metric Tons of sandalwood was found from a container from Chennai Harbour and the investigation is pending. It is also stated in that letter that M. M. Sivakumar, Proprietor M/s. Changoo Exports, Sri Jaya - a staff of the Company, the driver and cleaner were absconding and they have to be questioned. The trailer is parked at C.W.C. Virugambakkam and it is exposed to sun and rain. If it is kept in that condition the tyres would be deflated and the vehicle would get damaged. The trailer was purchased under a hire purchase agreement and she has also got to pay the dues.

[Paragraph number as per certified copy.] 3. It was submitted that u/s 115 of the Customs Act, if the owner of the vehicle has no knowledge, then the vehicle cannot be confiscated. Further proviso of sub-section 3 of Section 115 also provides that if the conveyance is used for the carriage of goods for hire the owner of the vehicle shall be given an option to pay fine in lieu of the confiscation of the conveyance. Her husband is not an exporter. The trailer was sent only for rent. Under such circumstances, it was stated that the respondents 1 and 2 should be directed to release the trailer on condition imposed by this Court.

4. In the counter filed by the respondents it is stated that the value of the sandalwood and other articles seized valued for over Rs. 1 crore from two containers. The containers were examined while they were lying in the harbour. On investigation it came to know that the petitioner's husband is the owner of the trailer, who hired the vehicle for transporting the container to

the harbour. The show cause notice was issued to the owner of the vehicle as well as to the persons concerned. The show cause notices have been served on the petitioners. The remedy for the petitioner is provided under the provisions of the Customs Act before the Customs Authorities. Instead of approaching the Customs Authorities, the petitioner herein cannot approach this Court for the remedy. Inasmuch as the adjudication proceedings were initiated, the petitioners should be advised to approach the Customs Authorities for whatever remedy she wants.

5. When the matter came up before us the learned Counsel appearing for the appellant submitted that the petitioner has no connection with the smuggling activities. When her husband was alive he was looking after the transport business. The trailer was hired to the exporter. The petitioner has no knowledge or connection with regard to the export of goods. It is stated that the petitioner's husband, who surrendered the trailer before the Customs Authorities, seems to have given assurance to produce the agent, driver and the cleaner for investigation. Since he died on 22-1-1997 he could not produce the above said persons. In fact, the petitioner's husband cooperated with the Department by producing the vehicle after coming to know that the Customs Authorities wanted the trailer for the investigation. Thus the husband of the petitioner cooperated with the Department in the matter of investigating the offences said to have been committed by the exporter. According to learned Counsel, no show cause notice was served upon the petitioner. u/s 110(2) of the Customs Act, where any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of Section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized. Under the proviso six months' time as stated above no sufficient cause being shown may be extended by the Collector of Customs for a period not exceeding six months. This extended period was not made by the Collector so far. Further the show cause notice said to have been sent by the Customs Authority were not served upon the petitioner and other persons. Unless the notices are actually served upon the respondents, it is not possible to say that the notices were received by the petitioner and others. Mere sending of the show cause notices is not sufficient to show that the notices were served upon the petitioner

and others. There is no question of evading notice by the petitioner. In order to support those contentions reliance was placed upon the following decisions :

Alka Watches Pvt. Ltd. & Another v. Union of India and Others [1983 (14) E.L.T. 2216 (All.); K. Rama Rao Vs. Additional Collector of

Customs, Calcutta and Another, ; K. Narasimhiah Vs. H.C. Singri Gowda, ; Sk. Aftab Vs. Collector of Customs (Preventive), ; Ambalal Morarji

Soni Vs. Union of India and Others, ; The Asstt. Collector of Customs v. Chandradas Malhotra AIR 1972 SC 699; and Manilal Bhanabhai Patel

Vs. Union of India, .

Therefore it was prayed that during the pendency of the proceedings, the vehicle may be released to the petitioner on whatever condition imposed

by this Court.

6. On the other hand, learned Standing Counsel for the Government of India submitted that unless the petitioner establishes that she has no

connection with the smuggled goods, it is not possible for her to ask for the release of the vehicle. The sandalwood attempted to be exported is

worth about Rs. 1 crore. The petitioner is not cooperating with the Department in producing the driver, cleaner and the agent. The petitioner and

others also were deliberately avoiding to receive the notice sent by the Customs Department. The petitioner has not come with clean hand and,

therefore, she is not entitled to the remedy asked for. If the vehicle is released that may be again used for other illegal purposes. The exporter as

well as the hirer of the vehicle are committing some kind of offence habitually. As per the decision of this Court rendered in W.A. No. 791 of

1995, dated 31-8-1995 (The Asstt. Director, Directorate of Enforcement, Trivandrum and Others v. A. J. Kingsley Fernandes. u/s 41 of the

Foreign Exchange Regulation Act, which is equivalent to Section 110 of the Customs Act, the Division Bench of this Court held that if the notices

are sent, it will be presumed that notices were served upon the parties. Therefore, it is not open to the petitioner to state that the show cause

notices were not served upon the petitioner and others. It was further submitted that it is always upon to the petitioner herein to approach the

Customs Authorities for suitable remedy. When the remedy is provided under the Customs Act, before the Authorities concerned, it is not possible

for the petitioner to by-pass such a procedure and approach this Court for the remedy. Even if the six months" period is lapsed as contemplated

u/s 110 of the Customs Act, it is always open to the Collector for the reasons to be recorded to extend the time for a further period of six months.

Under such circumstances it was submitted that it cannot be said that six months time of notice period has been elapsed. For these reasons it was

stated that the vehicle could not be released.

7. We have heard both the learned Counsel for the petitioner as well as learned Standing Counsel for the Government of India.

8. The fact remains that the trailer as stated above originally belonged to the husband of the petitioner. On 16-1-1997 the trailer was seized by the

Customs Department. The show cause notice was sent to the petitioner and others on 7-7-1997. A perusal of the returned cover would go to

show that the notices were returned since the addressees were not found. According to the petitioner, her husband was murdered on 22-1-1997

and, therefore, the legal representatives of her husband were managing the business. According to the petitioner, it is only through the trailer she is

eking out her livelihood. Therefore, if the vehicle is kept in an open place without protection it would become useless at the time when it will be

returned after the proceedings were over. In the present case the proceedings were not commenced. According to the petitioner, the six months"

time has elapsed between the date of seizure and the date of filing of the writ petition. According to the petitioner, since the show cause notice

dated 7-7-1997 was not served upon the petitioner and others personally, it cannot be said that the service of notices was completed. Therefore,

under the provisions of Section 110(2) if the proceedings were not commenced within six months from the date of seizure the goods shall be

returned to the person from whom it was seized. On the other hand, according to learned Standing Counsel for the Government of India, the show

cause notices were sent on 7-7-1997 because of the deliberate attitude on the part of the petitioner and others not to receive notices, the notices

could not be served upon them personally. When the notices are sent, it will be presumed that the notices were received by the petitioner and

others as per the decision of this Court rendered in W.A. No. 791/1995, dated 31-8-1995, cited supra. Even otherwise it was stated that the

Collector would have the power to extend the period for another six months as notice period. But, in the present case, this was not done by the Commissioner of Customs till now.

9. Therefore, the point for consideration is, whether the proceedings were commenced within six months after the seizure of the container and the vehicle on 16-1-1997. According to the facts arising in this case, even though the show cause notices were sent on 7-7-1997 the notices have not reached the petitioner and others. They were returned with the endorsement "addressee was not found". In *Ambalal Morarji Soni Vs. Union of India and Others*, the Gujarat High Court, while considering the provisions of Section 79 of the Gold Control Act and Section 124 of the Customs Act, held as under :

The whole object of giving notice is to inform the person concerned of the grounds on which it is proposed to confiscate the goods or to impose a penalty and to give him an opportunity to make a representation in writing within such reasonable time as may be specified in the notice and he must be given reasonable opportunity of being heard in the matter.

Giving of the notice contemplated by Section 124 of the Customs Act and Section 79 of the Gold Control Act means that the notice must have been received. The giving of the notice is not complete unless and until it reaches the person concerned or its actual tender to him. Merely despatching of the notice to the address of the person does not complete the giving of the notice.

In *K. Narasimhiah Vs. H.C. Singri Gowda*, , the Supreme Court, while considering the provisions of the Mysore Town Municipalities Act, 1951, held that the giving of the notice is not complete unless and until it reaches the person concerned or its actual tender to him. Merely despatch of the notice to the address of the person does not complete the giving of the notice. In *Ambalal Morarji Soni Vs. Union of India and Others*, , it was further held that it is clear apart from the Authority that the notices must be given in the sense that the notice must reach the person concerned before the expiry of six months. If that is not done, it cannot be said that the notice has been given to him. Further, it may be pointed out that under the provisions of Section 153 of the Customs Act and Section 113 of the Gold Control Act, it is open to the authorities concerned to tender the

notice to the person concerned without necessarily sending it by registered post in each and every case. The consequences of not accepting the

notice when tendered by the postal authorities are very serious because then u/s 153 of the Customs Act and Section 113 of the Gold Control

Act, it would be open to the authorities to serve the notice by merely pasting it on their own notice board and it is not likely that every citizen would

refuse to accept the notices tendered by the postal authorities without the consequence of not accepting would be to have the notices pasted on the

notice board and the goods were confiscated and the penalty imposed on him ordinarily without his knowing as to what is the ground of

confiscation or imposition of penalty or without his getting an opportunity of showing cause against such grounds.

In the Assistant Collector of Customs Vs. Charan Das Malhotra, the Supreme Court held that if the notice is not given within the period of six

months from the date of seizure as contemplated by Section 110(2) of the Customs Act and Section 79 of the Gold Control Act the person

concerned is entitled to have the goods returned to him. In Mrs. Payal Ashok Kumar Jindal Vs. Captain Ashok Kumar Jindal, the Supreme Court

considered the provisions of Section 153 of the Customs Act, 1962 and Section 37(c) of the Central Excises and Salt Act, 1944. In Alka

Watches Pvt. Ltd. and Another Vs. Union of India (UOI) and Others, the Allahabad High Court while considering the provisions of Section

110(2) and Section 124(a) of the Customs Act, 1962 held as under :

The object of the giving of the notice u/s 124(1) of the Customs Act is to afford an opportunity to the party concerned to show cause against the

seizure and the proposed confiscation of the goods or the imposition of penalty and requires to mention the grounds on the basis of which it is

proposed to confiscate the goods or to impose a penalty, so that the party may be aware of the grounds against which he may effectively show

causes. Therefore, it is imperative for the authorities under the Act not only to pass an order for the issue of show cause notice but also to cause

the notice to be served on the party concerned.

In K. Rama Rao Vs. Additional Collector of Customs, Calcutta and Another, , the Madras High Court while considering the provisions of Section

153(b) and 134(c) and Section 110(2) of the Customs Act, 1962 held that if the

petitioner has denied the service of show cause notice which is alleged to have been sent by registered post to him and the Department has failed to produce any acknowledgment due or postal receipt, it cannot be said that service of notice as required u/s 110(2) of the Customs Act, has been made. If the provisions of Section 153(b) of the Customs Act are restored to it is necessary to show the particulars of display and mere showing of office note in official file is not sufficient.

10. Learned Standing Counsel for the Government of India relied on a decision of the Division Bench of this Court rendered in W.A. No. 791 of

1995 (cited supra). According to the facts arising in that case, the subject matter of the writ petition relates to the seizure of certain documents

from the office premises of the writ petitioner and also production of certain documents of the petitioner on 11-2-1994 and the seizure of the same

by the Authorities. According to the respondents, these documents are required in connection with the proceedings under the provisions of the

Foreign Exchange Regulation Act, 1973. Learned Counsel for the petitioner submitted that (1) as the proceedings have not commenced within a

period of one year from the date of seizure as required by Section 41 of the Act, the respondents have no authority to retain the documents any

more, (2) that more issuance of show cause notice cannot be considered as the commencement of the proceedings within the meaning of Section

41 of the Act, and (3) that the direction issued by the learned single Judge for the return of the documents, however, in conformity with the

decision of this Court in *Nagoor Mehra v. U.O.I.* 1991 L.N. (Crl.) 457. In support of these contentions the writ petitioner placed reliance on the

decision in *R. Sivarajan v. The Deputy Director, Enforcement Directorate, Madras* 63 Comp cas 34; *Anjuman Chettiar v. Enforcement Officer*

1977 II MLJ 5; *K. Narasimhiah Vs. H.C. Singri Gowda*, ; *Bachhittar Singh Vs. The State of Punjab*, ; *Ambalal Morarji Soni Vs. Union of India*

and Others, and *Sri Durga Thakurani Bije Nijigarh and Others Vs. Chintamoni Swain and Others*, . The Division Bench as of the view that in the

above cited decisions the meaning of the expression "commencement of the proceedings" was not considered. Relying upon the decision of a

Division Bench of this Court in W.A. No. 65 of 1976, dated 16-9-1976 in the case of *Deputy Director v. K. Abdul Kadir* and Another decision

in Deputy Director, Enforcement Directorate, Madras and another Vs. Naina Maricair, the Division Bench held that were issuance of the show

cause notice can be considered as the commencement of the proceedings within the meaning of Section 41 of the Act. It is significant to note that

the decisions of the Supreme Court cited before us were also brought to the notice of the Division Bench while rendering its decision in the above

mentioned case. However, the Division Bench preferred to follow the earlier Division Bench decisions of this Court cited supra in order to come to

its conclusion.

11. We have carefully gone through the facts arising in this case wherein it is stated that the trailer was seized on 16-1-1997 and the show cause

notices were sent on 7-7-1997, but, they were returned unserved. Considering the judicial pronouncement to cited supra we are of the opinion

that when the notices were not actually served upon the petitioner and others and after the return of the notices no further steps were taken to

complete the service of the notices by the Customs Department. We are of the opinion that no proceedings were commenced in the present case

within six months after the seizure. Therefore, we hold that even though the appellant herein is entitled to the return of the trailer we are not

prepared to return the same unconditionally when the confiscation proceedings are pending before the Authorities. The prayer of the petitioner is

limited to the extent of releasing the trailer pending disposal of the confiscation proceedings on conditions imposed by this Court. Considering the

facts arising in this case and the law on this aspect, we direct the respondents to release the trailer bearing registration No. TMT 5637 to the

petitioner subject to the following conditions :

(1) The petitioner shall establish his title, possession and entitlement for the trailer by producing necessary permit, licence and registration

certificate.

(2) The petitioner shall undertake that he shall not alternate or encounter or part with the possession of the said trailer.

(3) The petitioner shall undertake that he will not use the trailer for any illegal purpose or for transportation of any contraband articles.

(4) The petitioner shall deposit a sum of Rs. 50,000/- in cash to the credit of the writ petition in this Court within four weeks from the date of this

order.

(5) The petitioner shall also furnish immovable property security for a sum of Rs. 1,00,000/- (Rupees one lakh only) within four weeks from the

date of this order to the satisfaction of the Commissioner of Customs, Madras.

(6) Failing to comply with any one of the above said conditions would render the above said order inoperative. Accordingly, the writ appeal is

allowed, but, without costs. Consequently, C.M.P. No. 10119 of 1997 is dismissed.