

(2015) 02 DEL CK 0049
In the Delhi High Court
Case No : WP (C) 66/2012

Sajjan Kumar and Others

APPELLANT

Vs

UOI and Others

RESPONDENT

Date of Decision : 11-02-2015

Acts Referred:

Customs Act, 1962 — Section 108, 110, 110(3), 124, 127B

Citation : (2015) 221 DLT 99

Hon'ble Judges : Rajiv Shakdher, J.

Bench : Single Bench

Advocate : Rajesh Yadav, Chandrani Prasad, Ruchika V. Arora and Mitali, for the Appellant; Arun Bhardwaj, CGSC, Rishi Kapoor, Apurva Varma, Gauraan Bhardwaj and Gunjan Bansal, Advocates for the Respondent

Judgement

Rajiv Shakdher, J.—This is a writ petition in which several reliefs have been sought by the petitioners. A perusal of the record would show that vide order dated 11.05.2012 the two reliefs, which the petitioners had pressed for, and which are set out in prayer clause (b) and (e), have already been granted vide order dated 11.05.2012, passed by my predecessor. The petitioners" have pressed before me, for the moment, only for grant of relief prayed for in prayer clause (d).

1.1 The reason for the same is that, the respondents, according to the petitioners, have delayed the matter far too long, firstly, by spending enormous amount of time in investigating the petitioners, and thereafter, in concluding the adjudication.

2. By way of reliefs sought, in prayer clause (d), the petitioners seek return of title documents pertaining to properties, the details of which are set out in paragraph 36 of the writ petition. Though the order dated 11.05.2012 stated that this relief would be pressed by the counsel for the petitioners at the stage of final hearing, counsels for both sides agree that arguments could be heard qua the said relief. Accordingly, I heard learned counsels for the parties for and against

the proposition as to whether the title documents of the properties in issue ought to be released.

3. In order to deal with the said prayer, the following brief facts are required to be noticed.

3.1 It appears that the respondents received intelligence that certain entities were involved in fraudulently claiming export incentives, such as, duty draw back, DEPB and Focus Product Licenses, under a scheme framed for that purpose, by over-invoicing their exports.

3.2 Accordingly, on 24.08.2011, a search was conducted at the premises of these entities and persons who were said to be connected with them.

3.3 In so far as the respondents are concerned, the lynchpin, in respect of the said illegal activities carried out by the entities concerned is, petitioner no.1. Petitioner no. 2 to 6, according to the respondents, are the entities via which the alleged fraud was perpetrated. Petitioner no.7 is an HUF, of which, petitioner no.1 is a member. Petitioner no.1 is also a director in petitioner no.2 and petitioner no.5. In so far as petitioner no.3 is concerned, which is a partnership firm, petitioner no.1 is one of the partners. Petitioner no.4, though, is a proprietorship concern. Petitioner no.8, is the wife of petitioner no.1.

3.4 Notably, four (4) out of the five (5) properties, whose title documents have been seized by the respondents, are owned by petitioner no.8. The fifth (5th) property is owned by petitioner no.1.

3.5 The charge levelled by the respondents is that petitioner no.1, along with his associates, had procured goods from various places in the country, and exported the same through the aforementioned entities, which as indicated above, includes, a firm, companies and a proprietorship concern, by over-invoicing the value of the goods exported. The investigation, apparently, according to the respondents, revealed that petitioner no.1 had exported over-invoiced goods of a value of more than Rs. 500 crores, and thus, obtained, illegally, undue benefit in the form of duty draw back and/or DEPB amounting to approximately Rs. 25 crores, and Focus Product Licenses, worth approximately, Rs. 15 crores.

3.6 Evidently, pursuant to the search, summons were served on petitioner no.1 under Section 108 of the Customs Act, 1962 (in short the Customs Act), to present himself in the office of the Directorate of Revenue Intelligence (in short DRI), on 24.08.2011. Petitioner no.1, it appears, presented himself before the concerned officers of the DRI both, on 24.08.2011, as well as, on 25.08.2011 and, had his statement recorded. Apparently, in the statement recorded, the petitioner no.1 has admitted that he had wrongly availed benefit of export incentives schemes in the form of duty draw back, DEPB and Focus Product Licenses by employing the methodology of over-invoicing. The statement of petitioner no.1, apparently, also alludes to the fact that the goods exported were sourced from Surat, Delhi and other places and, were thereafter exported via

ICD, Tughlakabad, Patparganj and Faridabad. The statements of petitioner no.1, according to the respondents, were also corroborated by those made by the members of his staff, as well.

3.7 It is also the case of the respondents that petitioner no.1 had voluntarily submitted demand drafts worth Rs. 1.42 crores, principally, for the reason that he accepted the fact that export incentives were wrongly claimed.

3.8 Pertinently, it appears that petitioner no.1 vide a communication dated 26.08.2011 retracted the statement made on 24.08.2011 and 25.08.2011 on the ground that he was coerced and threatened into making statements before the concerned officer. By another letter dated 29.08.2011, petitioner no.1 also made allegations to the effect that he was humiliated, abused and subjected to physical violence by the DRI officers.

3.9 It may also be relevant to note that the petitioners had evidently filed a writ petition in the Supreme Court bearing no. 186/2011, whereupon the petitioner no.1's arrest was stayed vide order dated 15.09.2011. The said writ petition was finally dismissed vide order dated 17.10.2014, with liberty to "approach the appropriate forum for appropriate relief." Similarly, petitioner no.1 had also filed a writ petition in this court bearing no. 7185/2011, seeking mandamus for refund of Rs. 1.42 crores, which according to him, had been obtained under threat and/or coercion. This writ petition was, however, dismissed vide order dated 28.09.2011. The court while dismissing the writ petition, is said to have observed that allegations of coercion could not be examined in the writ petition, and that if, in the assessment proceedings it was found that moneys were not due, the said amount will be refunded, with interest, to the petitioners.

3.10 Apparently, the matter was carried in appeal to the Division Bench. The said appeal was numbered as LPA 954/2011. The Division Bench disposed of the appeal vide order dated 07.12.2011, with liberty to petitioner no.1 to approach the Single Judge by way of a review. The review petition (No.7185/2011) was, however, dismissed by the Single Judge vide order dated 06.01.2012. This apart, there are two other writ petitions filed in this court; these are: WP(C) No. 498/2012 and 642/2012. By way of WP(C) 498/2012, the petitioners therein has sought for release of the remaining amount of duty draw back, which according to them are receivable by them, while in WP(C) 642/2012, the reliefs sought are, broadly, pertaining to : release of consignments and issuance of directions to quash certain communication, seizure memos and panchnama, etc.

4. I may only note that when the instant writ petition was moved by the petitioners on 05.01.2012, investigations were still on. The first show cause notice was issued on 23.08.2012 followed by a corrigendum issued in that behalf on 04.01.2013. The second show cause notice was issued on 14.08.2013.

5. In so far as the relief sought in prayer clause (d) is concerned, the following broad submissions have been advanced by Mr. Rajesh Yadav, learned counsel for the petitioners.

(i) That four (4) out of the five (5) properties are owned by petitioner no. 8, who has not been issued a show cause notice by the respondents.

(ii) The seizure of title documents amounts to virtually a provisional attachment of the properties in issue. The title documents, otherwise, have no usefulness or relevance qua the matter at hand. The properties in issue were bought prior to the period for which investigations are being carried out by the respondents.

(iii) The power to provisionally attach property vests in the respondents under the provisions of Section 28BA of the Customs Act, which requires service of notice on the concerned person under Section 28(1) read with Rules framed under Section 142 of the Customs Act. Furthermore, for exercising the power of provisional attachment, approval of the Commissioner of Customs is required to be taken in writing, as per the provisions of Section 28BA of the Customs Act. In any event, provisional attachment dissolves after the expiry of period of six (6) months, unless extension of time is sought in the manner prescribed under Section 28BA of the Customs Act, and such extension, under no circumstances, can exceed a period of two (2) years. In the present case, the respondents have committed an infraction of the safeguards provided in Section 28BA, which required issuance of notice and the lifting of provisional attachment after expiry of the period of six (6) months. In the instant case, the maximum period of two (2) years has also expired.

(iv) The allegation that the petitioners have indulged in over-invoicing of exports, and thus, taken undue benefits, in the form of DEPB and/or duty draw back or Focus Product Licenses, is incorrect, as the entire export proceeds were realized and bank realization certificates, issued in that behalf, were provided to the respondents. There has been, thus, no violation of either the provisions of the Customs Act or, that of the provisions of the Foreign Exchange Management Act, 1999 (in short FEMA). The respondents, in paragraph 36 of their counter affidavits have accepted the fact that they have resumed the title documents for investigation, and that, after issuance of a show cause notice, they could embark upon the process for triggering the power vested in them under Section 28BA of the Customs Act, in order to safeguard the interest of the Revenue. It is thus clear that the respondents have exercised their power of resumption of title documents of the properties in issue, under the provisions of Section 28BA of the Customs Act.

(v) The fact that show cause notices have been issued under Section 124 of the Customs Act, after the institution of the writ petition, would not defeat the rights of the petitioners to seek release of the title documents. Reliance in this behalf is placed on a judgement of the Division Bench of Punjab and Haryana High Court, dated 14.02.2013 passed in CWP 14552/2013, titled: Rama Overseas vs UOI.

6. Mr. Dubey, who appeared on behalf of the respondents, submitted, in line with the stand taken in the counter affidavit (which has been broadly indicated above), as follows:

(i) The petitioners have illegally availed of export incentives by over-invoicing the value of its exports. Illegal benefits, as indicated above, in the form of DEPB and/or duty draw back in the sum of Rs. 25 crores were availed of, in addition to, illegal receipt of Focus Product Licenses valued at Rs. 15 crores.

(ii) Petitioner no.1 in his statement made under Section 108 of the Customs Act has accepted the factum of wrongful availment of export incentives.

(iii) Petitioner no.1 has not fully cooperated with the respondents during the phase of investigations.

(iv) The export incentives already availed of by the petitioners by employing the device of over-invoicing have been debited in the concerned account, and that, title deeds have been retained to secure the interest of the Revenue.

(v) The respondents have exercised the power of seizure not under Section 28BA, as contended by the counsel for the petitioners, but under Section 110(3) of the Customs Act, and therefore, the procedure prescribed under Section 28BA would have no applicability.

(vi) Petitioner no.8, though not referred to as one of the persons to whom show cause notice dated 14.08.2013 was addressed, her name finds mention in the body of the said show cause notice. Reliance in this behalf is placed on paragraphs 28 and 28.1 of the show cause notice dated 14.08.2013. Therefore the submissions made on behalf of the petitioners that no show cause notice was issued to petitioner no.8 was not correct.

(vii) The expression "useful for" or "relevant to any proceedings under this Act", found in sub-Section (3) of Section 110, which empowers a proper officer to seize any document or thing have a wide scope and amplitude. In other words, as long as, in the opinion of the proper officer the seized documents, in this case the title documents, are useful for or relevant to any proceedings undertaken, the petitioners cannot ask for their release. In this particular case, the title documents have been seized to protect the interest of the Revenue.

7. Having heard the learned counsels for the parties, and perused the record, what emerges is as follow:

(i) Though the charges levelled against the petitioners are serious, the investigation carried out by the respondents continued for nearly nine months. The search was conducted in the premises of petitioner no.1 on 24.08.2011. The first show cause notice was issued only on 23.08.2012, followed by a corrigendum dated 04.01.2013.

(ii) The respondents concede that neither in the first show cause notice, nor in the corrigendum, petitioner no.8 is mentioned. In so far as the second show cause notice is concerned, which was issued on 14.08.2013, there is no mention of petition no.8 in the list of 16 persons/entities, to whom, the said show cause notice, has been addressed. I may only note that petitioner no.1, amongst

others, is named as an addressee.

(iii) As regards petitioner no.8, in paragraph 28 and 28.1, there is a reference to her, along with petitioner no.1, in her capacity as a director of petitioner no.2 company.

(iv). Four (4) of the five (5) properties in issue, belong to petitioner no.8.

(v) Concededly, all five (5) properties, which include a property of petitioner no.1, have been purchased, prior to the period which is subject matter of adjudication. As per the averments made in paragraph 10 of the respondents' affidavit dated 22.03.2012, the period of export, qua petitioner no. 2 to 7 (which were entities purportedly used to over-invoice the value of goods exported), spans between 31.07.2010 to 10.08.2011. There is, however, a passing reference of the fact that some exports were carried out by petitioner no.2 between February and March, 2008 and September to October, 2008; though no details with respect to value of exports are given for the said periods, in contradistinction to the period referred to above by me, i.e., between July, 2010 to August, 2011.

8. In the background of these facts, the question which arises is: can the respondents continue to retain the title documents of the properties in issue? Undeniably, investigations in the matter have come to an end in view of the fact that show cause notices have been issued. The respondents have taken the stand that they have not exercised powers under Section 28BA of the Customs Act. The case of the respondents, is that, they have exercised their power of seizure of the title documents of the properties in issue under Section 110(3) of the Customs Act. Therefore, for the sake of convenience, the relevant provisions of Section 110 and 28BA are extracted hereinbelow:

"....SECTION 110. Seizure of goods, documents and things. -

(1) If the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods: Provided that where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer.

1A xxxx

1B xxxx

1C. xxxx

(3)The proper officer may seize any documents or things which, in his opinion, will be useful for, or relevant to, any proceeding under this Act...

(4)The person from whose custody any documents are seized under sub-section (3) shall be entitled to make copies thereof or take extracts there from in the presence of an officer of customs...."

"....SECTION 28BA. Provisional attachment to protect revenue in certain cases. - (1) Where, during the pendency of any proceeding under section 28 or section 28B, the proper officer is of the opinion that for the purpose of protecting the interests of revenue, it is necessary so to do, he may, with the previous approval of the Commissioner of Customs, by order in writing, attach provisionally any property belonging to the person on whom notice is served under sub-section (1) of section 28 or sub-section (2) of section 28B, as the case may be, in accordance with the rules made in this behalf under section 142. (2) Every such provisional attachment shall cease to have effect after the expiry of a period of six months from the date of the order made under sub-section (1):

Provided that the Chief Commissioner of Customs may, for reasons to be recorded in writing, extend the aforesaid period by such further period or periods as he thinks fit, so, however, that the total period of extension shall not in any case exceed two years :

Provided further that where an application for settlement of case under section 127B is made to the Settlement Commission, the period commencing from the date on which such application is made and ending with the date on which an order under sub-section (1) of section 127C is made shall be excluded from the period specified in the preceding proviso...."

9. A bare reading of the provisions of Section 110 shows that it confers power of seizure on the proper officer qua goods, documents and things. Sub-Section (1) of Section 110 confers power qua seizure of goods on the proper officer, where he has reason to believe that the said goods are liable for confiscation under the Customs Act. Though this power of seizure of goods under Sub-Section (1) is peremptory, a notice is required to be issued qua the seizure under clause (a) of Section 124 within six (6) months of seizure, failing which the goods in issue are required to be returned to the person concerned, unless time is extended by the Commissioner of Customs on sufficient cause being shown, albeit for a period, not exceeding six (6) months. This aspect comes through upon reading of sub-section (2) of Section 110 along with the proviso adverted to therein.

9.1 The power of the proper officer to seize documents or things, is vested in him under Sub-Section (3) of Section 110. The limitation on the power to seize any documents or things is circumscribed by the use of the expression "useful for" or "relevant to any proceedings under the Customs Act". In other words a proper officer cannot seize any documents or things, unless he forms an opinion that the said documents are useful for or relevant to any proceedings under the Act.

10. In the facts of the present case, there is no question of power being exercised under Sub-Section (1) as the adjudication presently underway is in relation to alleged wrongful availment of export incentives qua goods, which have already been exported, albeit by having them over-valued. The question then arises is, whether the proper officer has formed an opinion as to whether the title documents of the properties in issue are useful for or relevant to any

proceedings under the Customs Act. Apart from the argument raised before me that the seizure of title documents has been carried out to protect the interest of revenue, there is no attempt whatsoever made to demonstrate as to how the said title documents would be useful for or relevant to the proceedings initiated under the Act. As the facts set out above reveal, the properties in issue were bought much prior to the period, qua which adjudication is on. If that be so, surely, it cannot be the case of the respondents that the export incentives availed of by the petitioners were funneled into or used to purchase the said immovable properties. I could have understood the argument of the respondents that they needed to provide for security, for recovery of its dues, if adjudication by them were to reveal that export incentives were wrongfully availed by the petitioners, and hence, the need to provisionally attach the properties in issue. But that is not the stand taken before me by the respondents. While they argue that the seizure of documents has taken place to secure the interest of the Revenue, the power vested in that behalf under Section 28BA, has not been availed of. In view of a specific power having been conferred by the legislature, for the said purpose, the arguments sought to be advanced on behalf of the respondents, that the same purpose could be achieved by them, by exercising a power of like nature under sub-section (3) of Section 110, is a submission, that I am not willing to accept.

11. Section 28BA confers the power of provisional attachment on the proper officer, if he is of the opinion that exercise of such power is necessary, for the purpose of protecting the interest of the Revenue. The exercise of that power has been circumscribed by the legislature, with necessary safeguards, which includes the right of the person whose property is sought to be provisionally attached, to be served with a notice under Sub-Section (1) of Section 28 in accordance with the Rules framed in that behalf, under Section 142 of the Customs Act. The proper officer cannot exercise the power of provisional attachment except with the previous approval of the Commissioner of Customs, by an order in writing. A provisional attachment effected, albeit after due approval, ceases to have effect after the expiry of period of six (6) months from the date of the order made under Sub-Section (1) of Section 28BA. The Chief Commissioner of Customs, can extend the said period by such further period or periods as he may deem fit, up to a maximum of two (2) years for reasons to be recorded in writing.

11.1 Admittedly, in the present case, none of the prerequisites, referred to in Section 28BA, have been adhered to by the respondents. As a matter of fact, as noted hereinabove, when faced with this situation, the respondents at the Bar sought to defend their actions by alluding to the provisions of Section 110(3) of the Customs Act. In the counter affidavit, the respondents have not traced the source of their power to the provisions of Section 110(3) of the Customs Act. On the other hand, in paragraph 36 of the counter affidavit, the respondents seem to indicate that at some point in time, in future, they would take recourse to the provisions of Section 28BA of the Customs Act.

12. Dehors, the failure of the respondents to advert to the provisions of Section 110(3) of the Customs Act, what is noticeable, clearly, is the absence of any material which would show that the proper officer had formed an opinion that seizure of title documents would be useful for or relevant to the proceedings under the Act.

13. I may only indicate, that an argument was raised before me by the counsel for the petitioners, that petitioner no.8 is not even a noticee, in the two show cause notices served by the respondents - this argument need not detain me, in view of the conclusion I have arrived at hereinabove.

14. Therefore, having regard to the foregoing discussion, I am of the view that the respondents should release the title documents of the properties referred to in paragraph 36 of the writ petition, to petitioner no. 1 and 8. It is ordered accordingly.

15. List on 07.05.2015.