

(2012) 08 BOM CK 0079

In the Bombay High Court

Case No : Writ Petition No. 6043 of 2011

Samadhan Steel Traders

APPELLANT

Vs

The Union of India, The Senior Intelligence Officer,
Directorate General of Central Excise Intelligence, The
Deputy Commissioner of Central Excise Division, Nanded,
Hingoli Naka Airport Road, Nanded Dist. Nanded and The
Assistant Director, Directorate General of Central Excise
Intelligence

RESPONDENT

Date of Decision : 14-08-2012

Acts Referred:

Customs Act, 1962 — Section 105, 105(1), 110, 123

Citation : (2012) 286 ELT 343 : (2013) 19 GSTR 17

Hon'ble Judges : Sunil P. Deshmukh, J;B.P. Dharmadhikari, J

Bench : Division Bench

Advocate : Raviraj R. Chandak, for the Appellant; Alok Sharma, ASG, for the Respondent

Judgement

B.P. Dharmadhikari, J.—Heard. Rule. Rule made returnable forthwith. Heard finally by consent of parties. The question is, whether before ordering search u/s 105 of the Customs Act, the competent authority had formed a legal opinion and was there a reason to believe that it would lead to goods liable to confiscation or any document or thing in his opinion would be useful or relevant to any proceedings under the Customs Act, 1944 ?

2. This court had issued a notice on 20th August, 2011 and on 15.6.2012 after briefly recording the question, we directed respondents to produce the original record. The reply affidavits by respondent Nos. 1 to 4 have been filed initially on 28th September, 2011 and after said order, on 13th July, 2012.

3. Shri Chandak submits that warrant for search issued u/s 105 shows satisfaction record by one D.S. Mane, Assistant Director, while the files produced does not reveal any such satisfaction reached by that Officer. He points out that

there, satisfaction is reached by two other persons, namely, Additional Director and Additional Director General. He further contends that even if the fact of receipt of some intelligence as disclosed is presumed to be true, none of the responsible officers have accepted, atleast on record, the responsibility of its receipt and there is no disclosure about the actual information gathered. He is relying upon the Apex Court judgment reported at Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das, .

3. Shri Sharma, learned ASG has assisted the court. He has invited attention to original records to show the material looked into has been correctly shown there and on the strength of that material honestly, the responsible Officers have reached a particular belief. He contends that name of the person, who gave secret information cannot be disclosed and, therefore, it has not been recorded. He further contends that additional Director Shri Ashish Chandan, has on further appreciation of material, put a remark "may be permitted under the search mode please" and authorized search. This remark dated 20.12.2010 is, thereafter accepted by still higher authority, namely, Shri Jitendra Chaturvedi, Additional Director General.

4. His contention is, in this situation, preparation of warrant by Assistant Director, by itself, is not sufficient to vitiate the exercise of search. He is also attempting to point out the material discovered after search, particularly, cash of Rs. 35 Lakhs and statement of brother of the petitioner in which said brother has accepted clandestine operations. He places reliance upon the judgment of the Apex Court reported at JT 1988(3) SC 732 (Indru Ramchand Bharvani Vs. Union of India), to urge that facts there are identical.

5. Though initially some effort was made by Advocate Chandak to show that on 11.12.2010, when the summons was issued to petitioner securing the presence on 14.1.2011, no proceedings were pending under the Act, Learned ASG has invited our attention to signature of Senior Intelligence Officer on it to show that it is actually issued on 11.1.2011 i.e. after search which was conducted on 21st December, 2010.

6. Perusal of the document produced before this court alongwith affidavit reveals that there was information with the Department. Note relied upon to show "reason to believe" reveals that it is a note prepared by 3 officers, who have placed signatures in same line, namely, Inspector(MKP), SIO (VMD) and then, AD (DSA). Below this signature, there is seal (D.S. Mane)AD. All these signatures are on same date. Below this, designation of Additional Director has been written and it has been struck off, by black pen and signature of said officer, disclosed to us as Ashish Chandan appears. He has stated above his signature, "May be permitted under Search Mode Please". He has not marked the file/papers thereafter to anybody else. At the bottom, there is again remark dated 12.1.2011 signed by the Inspector (SIO) and IO (IMD). This remark is obviously after search on 21.12.2010. In open space between this last remark and signature of Mr. Ashish Chandan, a signature appears and that signature is

disclosed to us to be of Jitendra Chaturvedi, Additional Director General. Thus, this document which reveals mention of Intelligence Report dated 21.12.2010, is first page in the file. It is not very clear whether Intelligence Report dated 20.12.2010 was accompanying it. The note prepared on the basis of alleged Intelligence Report shows that clandestine clearances of finished goods through 2 concerns named in it was resulting in evasion of Central Excise duty. After names of these two persons, it is proposed that their premises may be searched on 21.12.2010 to recover incriminating documents/records. The estimated approximate duty which could have been detected is valued at Rs. 50 Lakhs. The list of officials participating in the operation is given thereafter. Name of petitioner is at Sr. No. 2 in the list of 2 concerns/persons. Shri Mane has simply signed this note like two other officers.

7. Section 105 of the Customs Act, reads thus :

105. Power to search premises - (1) If the Assistant Commissioner of Customs or Deputy Commissioner of Customs, or in any area adjoining the land frontier or the coast of India an office of customs specially empowered by name in this behalf by the Board, has reason to believe that any goods liable to confiscation, or any documents or things which in his opinion will be useful for or relevant to any proceedings under this Act, are secreted in any place, he may authorize any officer of customs to search or may himself search for such goods, documents or things.

{2} The provisions of the Code of Criminal Procedure, 1898 (5 of 1898) relating to searches shall, so far as may be, apply to searches under this Section subject to the modification that Sub-section (5) of Section 165 of the said Code shall have effect as if for the word, "Magistrate", wherever it occurs, the words Commissioner of Customs were substituted.

Thus, the authority named therein, must have a reason to believe that any goods liable to confiscation or any document or things, which in his opinion, will be useful for or relevant to any proceedings under the Act are secreted in any place, & then, he can authorize the search or may himself search for such goods, documents or things.

Therefore, a "reason to believe" that the goods liable to confiscation or documents or things, are secreted in any place, must be recorded by the concerned officer. Inspector (MKD), SIO (VMD) are not the Officers who could have recorded any such satisfaction. The note which we have extracted above, does not contain any such opinion. It only recommends search without disclosing or recording reason to believe. The note also does not contain reference to material relevant for such belief. Only document referred to, is intelligence report.

That intelligence report is third document from last in the original file handed over to us. The said intelligence report contains only last paragraph which is different than the proposal for search submitted. It is mentioned that petitioner is maintaining manual records in the form of register/note books containing

details of such purchases and sales of MS TMT Bars. This material or possibility is not reflected in the note and authorities who have granted authorization also do not refer to it.

8. In fact, the first authority competent to search has not said anything and if it is presumed that Shri D.S. Mane had that authority, he has not used that power or authority but he has placed the file for perusal and approval before the higher authorities, namely, Additional Director. Additional Director also only suggests grant of permission under the search mode. The remarks put in by him and reproduced by us above, cannot be construed as an express authorization. Reliance upon said remark by the respondent is misconceived for present purposes. He, at the most, placed the matter before still higher authority namely, Shri Chaturvedi. Shri Chaturvedi has simply signed without putting any remark. It is, therefore, very difficult to find out which authority has actually applied mind and granted necessary authorization. It is also not very clear whether note styled as Intelligence Report dated 20.12.2010 was perused by Shri Mane, or Shri Chandan or then Shri Chaturvedi. Thus authority who reached the satisfaction is untrecable. Similarly there is nothing to show that any such satisfaction has been reached at all before the search was conducted or ordered.

9. In this situation, grant of authorization by Shri Mane cannot be said to be legal and valid. Warrant issued is under signature of Shri D.S. Mane and in it, he has stated that there are reasons to believe that excisable goods liable to confiscation and documents and things, which in his opinion would be useful for and relevant to proceedings under the Central Excise Act, 1944 and Customs Act, 1962, are secreted in places mentioned in it, He (D.S. Mane) authorized and required the persons named therein to search. Thus, this court is concerned with the material looked into by Shri Mane, while authorizing such search. The discussion above, clearly shows that Shri D.S. Mane has not authorized any such search and for reasons best known to him, he placed the alleged material before his superior, namely, Shri Chandan and that officer, in turn, placed the matter before still higher authority, namely, Shri Chaturvedi.

10. The intelligence report dated 20.12.2010 does not show who has received alleged information. We are not concerned with the person outside department who has furnished that information to the department. The Officer or employee in the department who got that information is not specified. Whether it was Inspector, or then, Senior Intelligence Officer, or then, any other Senior Intelligence Officer, who signed that report, got that information; or then, it was somebody else, is not disclosed. The authority granting permission as contemplated u/s 105 has also not considered the authenticity of the alleged material, in this background.

11. We, therefore, find that there was no material before the Department, as required u/s 105(1) of the Customs Act, which could have supported "reason to believe" which is cardinal. The judgment of the Apex Court in *Indru Ramchand Bharvani Vs. Union of India* (supra) considers the provisions of Section 123 of

the Customs Act, which deals with proof and it's sub-section(1) stipulates that where goods to which section 123 applies are seized under the said Act, in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods is on the person from whose possession same are seized.. Paragraph 2 of the judgment shows that secret information that smuggled diamonds have been kept by petitioner Nos. 1 and 2 in a particular premises was received and, thereafter, after obtaining the necessary search warrant, the Customs Officer searched the business premises on 16.11.1979. The following two questions were referred to this High Court :

(1)Whether, in the facts and circumstances of the case the tribunal was justified in holding that the seizing Customs Officer had adequate material to form the reasonable belief as contemplated in Section 110 read with Section 123 of the Act, that the diamonds found in the business premises of M/s. Gems Impex Corporation were smuggled goods ?

(2) Assuming that Section 123 applied and burden of proof was on the appellants, whether the tribunal should have held that the appellants had discharged this burden by tendering affidavits of persons claiming ownership of the seized diamonds.

The proceedings were then transferred to Delhi High Court. In para.12, the Honourable Apex Court has accepted the finding of high court that there was evidence to presume that goods in question were smuggled. Para.13 shows that the stock found in possession of the petitioner was much more than the stock reflected in the stock book. It is in this background that the Honourable Apex Court has appreciated the controversy.

12. We find that the issue is squarely covered by Division Bench judgment of this court in M/s. Spacewood Furnishers Pvt. Ltd. and Shri Vivek Deshpande, Director of M/s. Spacewood Furnishers Pvt. Ltd. Vs. The Director General of Income Tax (Investigation), Pune, The Director of Income Tax (Investigation), Nagpur, Saraf Chamber, Mount Road, Sadar, Nagpur, Tah. and Dist. Nagpur, State of Maharashtra, Assistant Director of Income Tax (Investigation), (HQR), Nagpur and Dy. Commissioner of Income Tax, Central Circle 2(3), Nagpur, Aaykar Bhawan, Civil Lines, Nagpur, Tah. and Dist. Nagpur, State of Maharashtra, to which one of us (B.P. Dharmadhikari,J) is party. The law as laid down by Honourable Apex Court in "Income Tax Officer Vs. Lakhmani Mewal Das" (supra) has been used in it. Here, we have already found that the authority which had issued warrant which was ultimately executed had not applied its mind to form "reasonable belief" and the material on record does not support any such satisfaction. The Search carried on 21.12.2010, therefore, cannot be said to be in accordance with law. The same is accordingly quashed and set aside.

Rule made absolute accordingly. No costs.