
(2016) 04 DEL CK 0100
In the Delhi High Court
Case No : W.P. (C) 11641 of 2015.

Shiv Shakti Trading Company	Vs	APPELLANT
Commissioner of Customs (Preventive) and another		RESPONDENT

Date of Decision : 06-04-2016

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 110(2)

Citation : (2016) 9 ADDelhi 471 : (2016) 229 DLT 787 : (2016) 336 ELT 415

Hon'ble Judges : S. Muralidhar; Vibhu Bakhru, JJ.

Bench : Division Bench

Advocate : Anjali J. Manish, Advocate, for the Appellant; Rahul Kaushik, Senior Standing counsel with Bhavishya Sharma, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Dr. S. Muralidhar, J. - The prayer in this writ petition under Article 226 of the Constitution of India is for a direction to Respondent No. 2, Deputy Commissioner of Customs (Beta), to unconditionally release the goods seized from the Petitioner.

2. The grievance of the Petitioner, M/s. Shiv Shakti Trading Company is that despite the imported goods (i.e. car accessories) [imported under bill of entry ("B/E") dated 19th March 2015] being seized from it on 4th April 2015, and no show-cause notice ("SCN") having being given to it under Section 110 (2) of the Customs Act 1962 ("Act") for over six months thereafter, the seized goods have not been released to the Petitioner till date.

3. The plea of the Customs Department (Respondents herein) on the other hand, is that in the course of the investigation following the seizure of the goods in question, a statement was voluntarily made on 29th June 2015 by Mr. Ujjawal Pugalia, the Sole Proprietor of the Petitioner, inter alia that "I do not want any show cause notice and any personal hearing and matter may be decided on merit in my absence." It is therefore contended that there was no requirement to give

a SCN to the Petitioner within six months. Further, since there is no time limit prescribed for completion of the adjudication, the Petitioner cannot invoke Section 110 (2) of the Act and seek unconditional release of the seized goods.

4. The questions that arise for consideration:

(i) Whether there could be any valid waiver of the right to be given a SCN under Section 124 (a) of the Act; and

(ii) If the answer to (i) above is in the affirmative, is there a corresponding obligation on the Customs Department to pass an adjudication order within a reasonable period and what is the consequence of the Customs Department failing to do so?

5. It is submitted by Mrs. Anjali J. Manish, learned counsel for the Petitioner, that the statement recorded of the Sole Proprietor of the Petitioner during the course of the investigation under Section 108 of the Act cannot be considered to be a valid waiver of the right to be given an SCN under Section 124 (a) of the Act. According to her, even assuming that such statement had been validly made on 29th June 2015, it was only for the purpose of facilitating the immediate release of the seized goods in question under Section 110 of the Act. Relying on the decision of the Supreme Court in *Harbans Lal v. Collector of Central Excise and Customs, Chandigarh* (1993) 3 SCC 656 she submitted that Sections 110 and 124 are "independent, distinct and exclusive of each other, resulting in the survival of the proceedings under Section 124, even though the seized goods might have to be returned, or stand returned, in terms of Section 110 of the Act, after the expiry of the permissible period of seizure."

6. Mrs. Manish also referred to the decision of this Court in *Auto Creators v. Union of India* 2015 (325) ELT 49 (Del) where the Court held that the failure by the Customs Department to release the seized goods notwithstanding the expiry of the time limits under Section 110 (2) was unlawful. In the said decision, this Court referred to its earlier decision in *Jatin Ahuja v. Union of India* 2013 (287) ELT 3 (Del). Mrs. Manish also referred to the Circular Nos. 290/6/97-CX dated 20th January 1997 and 7/2013-Cus. dated 19th February 2013 issued by the Central Board of Excise and Customs ("CBEC") to underscore that the SCN could be issued under Section 124 even after an unconditional release of goods under Section 110 (2) of the Act.

7. The running theme of the above submissions was that the importer cannot be worse off for having waived the right to be given a SCN under Section 124 (a) of the Act, in anticipation of the adjudication being expedited. In the present case not only was the SCN not given to the Petitioner within six months from the date of seizure, but there was no adjudication order either passed even a year thereafter. The net result was that the seized goods were illegally detained notwithstanding the expiry of one year after their seizure with neither an SCN being issued nor an adjudication order being passed.

8. Countering the above submissions Mr. Rahul Kaushik, learned Senior standing counsel for the Respondents, submitted that on account of the failure by the Petitioner to cooperate with the Customs Department, an adjudication order could not be passed. According to him, after appearing once before the Customs Officer, the Sole Proprietor of the Petitioner did not turn up. Mr. Kaushik submitted that if the Court so permits, the Customs Department is prepared to pass an adjudication order in a timebound manner.

9. Referring to the decision in *S.N. Ojha v. Commissioner of Customs* 2016 (331) ELT 33 (Del), Mr. Kaushik submitted that the Petitioner would be bound by the statement made by its Sole Proprietor under Section 108 of the Act and such statement, even if subsequently retracted, could be used against him in the adjudication proceedings. He pointed out that in the present case the Petitioner did not contend that the aforesaid statement was obtained under duress or coercion. In fact, till date, the said statement has not been retracted. Mr. Kaushik also referred to the decision of the Supreme Court in *Surjeet Singh Chhabra v. Union of India* 1997 (89) ELT 646 (SC) where it was observed that the Customs Officers are not Police Officers and therefore, the statement made to them him under Section 108 of the Act, even though retracted, would be binding on the maker of the statement.

10. In order to examine the above submissions, it is necessary first to refer to the relevant provisions of the Act. The relevant portions of Sections 110 and 124 read as under:

"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) to (1C)

(2) 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:

Provided that the aforesaid period of six months may, on sufficient cause being shown, be extended by the Commissioner of Customs for a period not exceeding six months.

(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 extract therefrom in the presence of an officer of customs.

124. Issue of show cause notice before confiscation of goods, etc. - No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person -

(a) is given a notice in [writing with the prior approval of the officer of customs not below the rank of a Deputy Commissioner of Customs, informing] him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and

(c) is given a reasonable opportunity of being heard in the matter: Provided that the notice referred to in clause (a) and the representation referred to in clause (b) may at the request of the person concerned be oral."

11. It requires to be noticed at the outset that an order confiscating the illegally imported goods can be passed only after the mandatory condition of Section 124 is satisfied and an adjudication order is passed. Section 124 (a) requires a notice in writing to be given to either the owner of the goods or the person from whom they were seized, informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty. Section 124 (b) mandates that the owner of the goods or the person from whom the goods have been seized concerned should be given an opportunity of making a representation in writing within such reasonable time. Thirdly, under Section 124 (c) of the Act, such owner or person should be given a reasonable opportunity of being heard.

12. The proviso to Section 124 makes it possible for both the notices under Section 124 (a) and the representation under Section 124 (b) of the Act to be oral at the request of the person concerned. Therefore, it is possible that there might be a waiver by the owner or person of the right to be given an SCN in writing with a view to act expediting the adjudication proceedings.

13. 1 A somewhat similar question that arose in the context of Section 28 of the Act in Commissioner of Customs, Mumbai v. Virgo Steels 2002 (141) ELT 598 (SC). The facts were that the Associated Cement Company ("ACC") had floated a tender inviting supply of high standard deformed steels bars for the expansion and modernisation of its cement factory at Shahabad in Karnataka. The project was aided by the International Bank for Reconstruction and Development which would give the importer exemption from payment of import duty. However, after placing an order upon M/s. Virgo Steels ("Virgo"), the ACC decided to abandon the work of expansion, and therefore, the licence obtained by Virgo under the above Deemed Export Scheme (DES), in terms of which the import of billets and lead ingots was made on a duty free basis, became invalid. In an investigation subsequently undertaken by the Department of Customs, it was found that the

imported steel had been sold by Virgo in the market. In order to pre-empt any penal proceedings being initiated against it, Virgo wrote a letter to the Assistant Collector of Customs, Marine Preventing Wing, Mumbai admitting that the import of billets and lead ingots and their clearance duty free under the DES was illegal. Virgo also admitted to have sold the said material in the market contrary to the terms of the DES. A cheque for a sum of Rs. 50 lakhs was also enclosed to the said letter of Virgo notice as a token of their commitment. It was also stated by them that they "do not want any show cause notice and personal hearing in the matter."

13.2 The Collector of Customs nevertheless proceeded to pass an order against Virgo demanding customs duty and penalty. Virgo's appeal allowed by the Customs, Excise and Gold (Control) Appellate Tribunal holding that the non-issuance of SCN to Virgo under Section 28 of the Act had vitiated the proceedings initiated by the Collector of Customs. In the further appeal by the Customs Department, the Supreme Court observed that the requirement of issuance of notice under Section 28 of the Act is "solely for the benefit of the individual concerned, therefore, he can waive that right. In other words, this Section casts a duty on the Officer to issue notice to the person concerned of the proposed action to be taken. This is not in the nature of a public notice nor any person other than the person against whom the proceedings are initiated has any right for such a notice. Thus, this right of notice being personal to the person concerned, the same can be waived by that person."

14. Although Mrs. Manish sought to distinguish the above decision on the ground that the statement made in the instant case was under Section 108 of the Act, the Court finds that the latter statement, even if retracted, can be acted upon by the Customs Department, although in the present case there is no such retraction. In *K.I. Pavunny v. Assistant Collector (HQ), Central Excise Collectorate, Cochin* (1997) 3 SCC 721, the Supreme Court clarified that the Customs Officers are not the Police Officers, and therefore, a confessional statement made to them under Section 108 of the Act could be relied upon as long as it was made voluntarily and not obtained under threat, inducement or promise. Earlier, in *Surjeet Singh Chhabra v. Union of India* (supra) the Supreme Court clarified that the statement could be relied upon even if it was subsequently retracted.

15. Circular 290/6/97- CX dated 20th January 1997 issued by the CBEC emphasised that where prima facie offences of serious nature or high stakes and/or legal questions are involved, the SCN must not be permitted to be waived. However, where a party requires expeditious adjudication for any reasons, they may file their replies and request for their case to be heard expeditiously. In the subsequent Circular No. 7/2013-CUs dated 19th February 2013, reference was made to the decision of this Court in *Jatin Ahuja v. DRI* (supra) which held that even though the seized goods may have been released provisionally under Section 110A, if no SCN was issued under Section 110 (2) of the Act within the

initial period of six months or the extended period if any of a further six months, the goods shall be released unconditionally to the person from whom they were seized.

16. The above circulars acknowledge that although there is no time limit provided under Section 124 (a) of the Act for the issuance of an SCN, the release of goods for non-compliance of provisions of Section 110 (2) of the Act "is bound to create complications like difficulties in realisation of duty leviable on goods under reference and of fine and penalty amounts." Therefore, it is stated that SCN is to be issued to the owner of the goods or such person under Section 124 (a) of the Act within six months from the date of seizure or within the extended period in terms of the proviso to Section 110 (2) of the Act.

17. The net result of the above discussion is that except where offences of serious nature or high stakes and/or legal questions are involved, it is permissible for the Customs Department to act upon the statement made under Section 108 of the Act waiving the right to be given a SCN under Section 124 (a) and have the adjudication proceedings expedited. Question (i) is answered accordingly.

18. Question (ii) is whether there is any corresponding obligation on the Customs Department to pass an adjudication order within a reasonable period and what is the consequence of the Customs Department failing to do so? This Court in *Jatin Ahuja v. Union of India* (supra) held that the effect of non-compliance with the provisions of Section 110 (2) of the Act would be that the seized goods would be released unconditionally to the person from whose possession the goods were taken. The Bombay High Court, in *Jayant Hansraj Shah v. Union of India* 2008 (229) ELT 339 (Bom) held that it was only where no order is passed for the provisional release of the seized goods under Section 110A of the Act, and if no SCN is issued under Section 124 (a), that Section 110 (2) would apply. The mandatory nature of Section 110 has been emphasised in *J.K. Bardolia Mills v. Deputy Collector* 1994 (72) ELT 813 (SC).

19. Recently, this Court in *Auto Creators v. Union of India* (supra) reiterated the above legal position. It was held that the time taken for adjudication of any issue cannot be excluded while reckoning the six months period mandated by Section 110 (2) of the Act. The conclusion was that the time limit under Section 110 (2) for giving a SCN to the person from whose goods was seized, is mandatory in nature. There are two time limits: an initial period of six months and, an extension by a further period of six months on sufficient cause being shown. For such extension of time the provision requires application of mind by the Customs Department to the facts of the case and being satisfied that for bona fide reasons the investigation cannot be completed within the first six months after the seizure. In other words, as explained in *Assistant Collector of Customs v. Charan Das Malhotra* (1971) 1 SCC 697 the extension of time is not to be granted mechanically or as a matter of routine.

20. In *Harbans Lal v. Collector of Central Excise and Customs, Chandigarh* (supra) the Appellant therein was arrested on 4th March 1970 and a huge quantity of gold, currency notes and other articles were recovered from his possession. These were immediately seized. Just prior to the expiry of six months from the date of seizure, i.e, on 27th August 1970, the Collector, Central Excise and Customs, on his own, passed an ex parte order extending the seizure period by a further period of six months, i.e, upto 19th March 1971. On 4th March 1971, an SCN was issued to the Appellant under Section 124 (a) of the Act. Negativating the challenge by the Appellant to the above order dated 27th August 1970, the High Court held that the proceedings under Section 124 were independent of those under Section 110 of the Act. Dismissing the further appeal by the Appellant, the Supreme Court, referring to the decision in *Collector of Customs v. Charan Das Malhotra* (supra), observed that the period laid down in Section 110 (2) affects only the seizure of the goods and not the validity of the notice under Section 124 (a) of the Act. It was, in this context, it was held that the two Sections viz., 110 and 124 "are independent, distinct and exclusive of each other, resulting in the survival of the proceedings under Section 124, even though the seized goods might have to be returned, or stand returned, in terms of Section 110 of the Act, after the expiry of the permissible period of seizure."

21. In the instant case, the stage of issuing the SCN has not been crossed. Even if it were to be taken that the Petitioner validly waived the right to be given an SCN, an adjudication order had to be passed within a reasonable time after the seizure. Here, not only has the initial period of six months after the date of seizure lapsed, but the next six months also has without any order having being passed in respect of extension of the period of six months for the reasons indicated in Section 110 (2) of the Act. Merely because there was a waiver by the Petitioner of the right to be given an SCN, it did not mean that the Respondents could indefinitely postpone the adjudication order without which the Respondents could not have, in terms of Section 124 (a) proceeded to confiscate the seized goods.

22. The waiver by the Petitioner of the right to be given an SCN was in the expectation of expeditious adjudication. At this juncture it requires to be noticed that the Petitioner imported three consignments under three different B/Es. In respect of all the three B/Es, the Petitioner waived the right to be given an SCN. In respect of two of the B/Es an adjudication order was passed, and the Petitioner paid the demand without demur. It is only in respect of the third B/E, which forms the subject matter of the present writ petition, that the Respondents neither issued an SCN nor passed any adjudication order for a year after the seizure of the goods. The explanation offered by the Respondents for not passing the adjudication order is not at all convincing. Even assuming that the Sole Proprietor of the Petitioner did not continue to appear before the Officer concerned, there was no justification for not completing the proceedings and passing an adjudication order within a reasonable time. The Petitioner is right in contending that it cannot be worse off for having waived the right to be given an

SCN under Section 124 (a) of the Act. That waiver was plainly in the expectation of expeditious adjudication. However, as a result of the inaction of the Respondents, the Petitioner has been denied the release of the seized goods indefinitely.

23. Considering that the time limits for issuance of an SCN in terms of Section 110 (2) are sacrosanct, if at the time of seizure of the goods there is waiver by the person from whom the goods were seized, or the owner of the right to be given an SCN, in the expectation of an expedited adjudication, then the reasonable time within which the adjudication should be completed should be six months from the date of such seizure. If, despite the waiver of the right to be given an SCN, no adjudication order is passed within the period of six months from the date of seizure, the person waiving the right to be given an SCN can no longer be held bound by such waiver. The consequence would be the same as is envisaged by Section 110 (2) of the Act i.e., the immediate unconditional release of the goods in favour of the person from whom the goods have been seized. Notwithstanding such unconditional release, it will still be open to the Department to proceed under Section 124 and complete the adjudication for which there is no specified time limit.

24. Another possible scenario is where, despite the waiver, no adjudication order is passed within a period of six months of the seizure. In such event, it may still be open to the Department to issue an SCN before the expiry of six months, or within the extended period as envisaged in Section 110 (2) of the Act. In such event, it will be open to the Petitioner to avail the procedure under Section 110A of the Act to seek provisional release of the goods.

25. In the present case, despite the waiver by the Petitioner of the right to be given an SCN in terms of Section 110 (2) of the Act, no adjudication order was passed for a period of one year after the seizure. The Petitioner could, therefore, not be bound by such waiver after the expiry of the time limit under Section 110 (2) of the Act. In the circumstances explained herein above, there was no justification for the Respondents to continue to detain the goods seized.

26. The Court accordingly directs that the goods seized be forthwith released unconditionally to the Petitioner. This will, however, not preclude the Respondents from proceeding under Section 124 of the Act and passing an adjudication order in accordance with law.

27. The petition is allowed in the above terms but, in the facts and circumstances of the case, with no orders as to costs.