

(2015) 04 BOM CK 0215

In the Bombay High Court

Case No : Criminal Writ Petition No. 1158 of 2013

Subhaschandra Balchandra Badjate

APPELLANT

Vs

The Director General

RESPONDENT

Date of Decision : 15-04-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11, 11A, 11-A(4), 11AA, 11E
Customs Act, 1962 — Section 105, 105 (1), 105(1), 110, 110(2)
Income Tax Act, 1961 — Section 226(4)

Citation : (2015) 324 ELT 307 : (2016) 53 GST 85

Hon'ble Judges : T.V. Nalawade, J;I.K. Jain, J

Bench : Division Bench

Advocate : R.R. Mantri, for the Appellant; Kalpalata Patil Bharaswadkar, Advocate and B.L. Dhus, APP, Advocates for the Respondent

Final Decision : Dismissed

Judgement

1. The petition is filed for relief of declaration that the arrest of the petitioner was illegal, the seizure of amount of Rs. 45 lakh from possession of the petitioner was illegal and the proceeding like adjudication under the Central Excise Act cannot be held against the petitioner. Relief of return of the aforesaid amount seized by the officers of the Central Excise is also claimed. Both the sides are heard.

2. The petitioner is share holder of majority shares of one private company by name "M/s. Rutuja Ispat Private Limited Company situated at Jalna, Maharashtra". Shri. Shailesh Badjate and Shri. Sushil Badjate, two sons of the present petitioner, are the Directors of the company and on the record they are conducting the business of this company. The petitioner and his two sons are living in the same premises situated in Jalna where the office of the company is also situated.

3. There was specific information to the officers of the Directorate General of Central Excise (Intelligence) Regional Unit Pune that aforesaid company was evading Central Excise Duty by not maintaining account of manufacturing of MS/

TNT Bars and it was involved in clandestine removal of this product from the factory premises without payment of Central Excise duty. There was also information that this company was purchasing unaccounted MS ingots and billets for manufacturing of the aforesaid product. There was information that though this activity was not accounted in the returns, a separate record was prepared about the unaccounted manufacture, sale etc. of the aforesaid product and that record was available in the pen-drive and in the computer of the petitioner and his sons.

4. The officers of the Directorate General of the Central Excise and also the officers of Pune and Nasik Commissionorates took action and search of the premises by name "Shreyas", Ahimsa Marg, near Jain Temple Jalna was taken. The premises was being used by the petitioner and his aforesaid two sons and all of them were living together. The officers recovered incriminating electronic data in the form of pen-drive, computer and laptop. Unaccounted amount of Rs.45 lakh was also recovered from this premises, particularly from the bedroom of the petitioner. From the factory premises situated at MIDC Jalna also incriminating material came to be recovered. The officers conducted search of the premises of few employees of this factory and from them also incriminating material came to be recovered.

5. It revealed during investigation that during the period 1-1-2009 to 7-3-2011 this company had manufacture MS/TNT bars valued more than Rs.140 crore but this company had submitted returns to the Central Excise Department of the goods manufactured worth Rs.26.16 crore. Meagre amount of Excise duty on this quantity of goods is paid. The record with regard to raw material purchased by the company, which was also unaccounted, was also found and it came to be seized.

6. As cash amount of Rs.45 lakh was found from the bed room of the petitioner, the petitioner and his two sons were asked to explain about possession of this amount. No satisfactory explanation was given by these persons. The petitioner tried to say that it was his own income and it was his income from profession as Tax Consultant. There were no income tax returns in respect of such huge amount. This amount is kept by the Excise Department in fixed deposit in a bank.

7. During investigation, the statements of employees of the factory are recorded. There is statement of person like Accountant, Prashant Jadhav and the statement shows that as per the instructions given by Sushil, he had maintained separate record of unaccounted purchase of raw material and unaccounted manufacture and sale of finished material. The statement reveals that separate electronic record was created in respect of these concealed transactions. Statement of Prashant shows that no Central Excise duty was paid in respect of this unaccounted manufacture and sale of the goods.

8. Statement of Gopal Tak, other employee of the factory, shows that he used to collect cash in respect of unaccounted sale transaction of MS/TNT Bars and this

cash he used to hand over to the aforesaid two sons of the petitioner. He had specific instructions not to create paper record in respect of those transactions and those transactions were entered only in electronic record. There are statements of employees to the effect that they used to hand over cash directly to the present petitioner also.

9. Shailesh, aforesaid Director contended that Sushil was maintaining record. He showed readiness to pay Excise Duty if there was short payment. The company was formed in the year 2004 and Shailesh was Director of this company right from beginning. Sushil became Director from 2005-06.

10. The officers drew panchanama in presence of panch witnesses and the aforesaid material came to be seized. This panchanama is signed by Sushil as it was prepared in his presence. It was confirmed that the aforesaid transactions recorded in the computer and the pen drive were not shown in the returns submitted to the Excise Department.

11. It is the case of the officers of the Department that these two brothers did not cooperate during investigation and as they are not cooperating the statements of the employees of the factory were again recorded. The statements of persons from whom raw material was collected are recorded and the statements of the persons, concerns to whom the unaccounted finished material was sold are also recorded. They are compared with the aforesaid electronic data. These statements and record seized is in conformity with the case of the Department that there were unaccounted transactions.

12. The statements of the employees of the factory and the record collected by the Department show that benami accounts were opened in banks by the petitioner and his sons in the names of their employees. Statement of Manoj Joshi, Accountant shows that his monthly salary was Rs.4000/- and he had no other source of income. Account was opened in his name in a bank and the account statement of this account shows that an amount of Rs.28.55 lakh was deposited in the account of Manoj Joshi and Manoj had given blank cheques of this account to Sushil. This amount was deposited between 13-2-2010 and 5-8-2011.

13. Similarly, in the account of Clerk, Chelmeti, amount of Rs.46.42 lakh was deposited and the pass book and the cheque book of this account were kept with Sushil or with the present petitioner. Similarly, in the name of another employee, Jadhav, amount of Rs.33.99 lakh was deposited in the bank. His statement shows that he had withdrawn amounts from the bank and he used to hand over the amounts to the present petitioner. Thus amount of more than one crore rupees was deposited by the petitioner and his sons in the accounts of their employees and Benami record was created but this amount was utilized by the petitioner and his sons.

14. Sushil and present petitioner came to be arrested at Jalna on 16-8-2011 for contravention of provisions of the Central Excise Act and they were produced

before the Chief Judicial Magistrate, Pune on 17-8-2011. On the same day, on the ground of old age bail was granted to the petitioner. Shailesh was arrested in Pune and he was produced before the Chief Judicial Magistrate on 17-8-2011. Bail was refused to Shailesh and Sushil by the Chief Judicial Magistrate. Even the Sessions Court refused the bail to them. This Court at Principal Seat granted bail to Sushil and Shailesh subject to following conditions :-

(a) that they shall not transfer the property of the factory viz Gat No. 199/3 of Jalna until adjudication proceeding is completed and liability towards duty and penalty is discharged;

(b) They are to give undertaking and security by producing title deed in respect of payment of the duty. Similar undertaking is obtained from the petitioner.

15. The show cause notice issued by the Department against the petitioner and his sons, the purchasers of the finished material, persons who had sold the raw material without maintaining the account of raw material etc. show that the aforesaid material and other relevant material is mentioned in the show cause notice. There are allegations that this illegal activity was going on from 1-1-2009 to 7-3-2011. In the initial inquiry the value of the manufactured goods was shown as Rs.132.71 crores but after making further inquiry it was ascertained that the value of manufactures goods was Rs.143 crores and most of the goods were cleared without making payment of Duty. There is allegation that the Duty of more than Rs.15.75 crore is not paid. In respect of shortage of the goods there will be charge of Excise Duty of more than Rs. 11 lakh, there will be penalty which can be recovered under Rules 25 and 26. In the show cause notice it is mentioned that amount of Rs.45 lakh is liable for confiscation under sections 121 and 124 of the Customs Act.

16. The record shows that search was made on 3- 6-2011. As per the record, on 6-8-2011 summons was served on the petitioner and he was asked to appear before the Assistant Director office of the DGCEI on 16-8- 2011 at 11.00 hours. The petitioner avoided to appear but he sent a letter/reply dated 15-8-2011 and requested to exempt him from personal appearance. As he avoided to appear, arrest memo was served on 16-8-2011 and he came to be taken in custody at 1.30 hours at Jalna.

17. This Court is considering the contentions made with regard to various reliefs claimed one by one. Petitioner has claimed declaration that he is not liable to aforesaid activities of the private company as he was simply a share holder. It is his case that amount of Rs.45 lakh taken over from him is not liable to confiscation as it is not the amount of the factory. It is his contention that the aforesaid show cause notice was not given to him within six months from the date of seizure and so he is entitled to get back the amount in view of provisions of Section 110(2) of the Customs Act, 1962.

18. In view of the aforesaid record, provisions which can be used in such a case need to be considered first. Learned counsel for the petitioner submitted that the

Department has produced copy of Notification No. 68/63-C.E. of the Central Excise as amended up to 2- 9-1997. The Notification shows that as provided under section 12 of the Central Excise Act, Central Government has declared that provisions of Sections 105 (1), 110, 115 (excluding clauses (a) and (e) of sub-section (1)), clause (a) of section 118, sections 119, 120, 121 and 124, clause (b) and sub clause (ii) of clause (c) of sub-section (1) of section 142 and section 150 of the Customs Act shall apply to the matters specified therein for like matters provided under the Central Excise Act. Those provisions are to apply subject to following modification and alterations :-

(1) The reference to "smuggled goods" shall be deemed to be the reference to "excisable goods which have been removed in contravention of any of the provisions of the Central Excise Rules 1944".

(2) In section 115, in sub section (2) reference to "smuggled goods" shall be taken to be reference to "excisable goods removed without payment of Excise Duty"; and

(3) reference to "goods which are sought to be smuggled" shall be read as goods sought to be removed for evasion of Excise Duty.

19. In view of aforesaid notification and the sections of Excise Act, one needs to keep in mind the provisions of the Customs Act mentioned in the Notification. Provision of section 105(1) of the Customs Act is with regard to the powers of search given to the officers specially empowered. This provision shows that the officer who is authorized and who has reason to believe that any goods, are liable to confiscation, due to contravention of the provisions of the Act (in the present case Central Excise Act) or any document or thing which in the opinion of such officer is relevant and can be used in any proceeding under the Act, he can search any place where such goods or things can be found. Provision of Section 110 gives power of seizure to the authorized officers or the officers mentioned in the section and those powers relate to the case of aforesaid nature and the documents and things of the nature mentioned in section 105.

20. The provision of section 110(2) of the Customs Act shows that when the goods are seized under sub section (1) of section 110 and notice in respect of such goods is not given, under clause (a) of section 124 of Customs Act within six months from the date of seizure, the goods shall be returned to the person from whose possession they were seized. This period can be extended by six more months after following procedure laid down for that purpose. Provision of section 110(3) of the Customs Act shows that there is power to seize any document or thing which in the opinion of such officer will be useful for or which is relevant to any proceeding under this Act. There is no need to discuss the record with regard to authorization as there is no dispute over this point.

21. The provision of Section 115 of the Customs Act mentioned in the aforesaid Notification is with regard to the power to confiscate conveyance. This also provides for burden which is cast on the owner to prove that he had no

knowledge that his conveyance was being used for carrying the goods in respect of which the offence under the Act is committed. There are provisions with regard to confiscation of package in which goods were found and also confiscate other goods which were used for concealing such goods etc but they need no consideration in the present matter.

22. Provision of Section 121 of the Customs Act, 1962 reads as under:

"121. Confiscation of sale-proceeds of smuggled goods.-- Where any smuggled goods are sold by a person having knowledge or reason to believe that the goods are smuggled goods, the sale proceed thereof shall be liable to confiscation."

23. Section 124 of the Customs Act shows that no order of confiscation or imposing penalty can be made unless the owner is given notice in writing of the proposed confiscation or imposition of penalty. The provision also shows that opportunity needs to be given to such person to make representation in writing against the proposed confiscation and imposition of penalty. Reasonable opportunity of hearing is also expected in such a proceeding. However if the person concerned requests, oral representation can also be accepted.

24. The provision of Section 142(b), clause (ii) of clause (c) of the Customs Act shows that there is power to the officers to distraint goods until amount payable is paid.

25. The aforesaid provisions are made applicable for implementation of the provisions of the Central Excise Act. There are more provisions in the Central Excise Act also with regard to the powers of the officers which are being mentioned afterwards.

26. The learned counsel for the petitioner took this Court through the definition of "goods" given in section 2(22) of the Customs Act. the definition is as under :-

"(22) "goods" includes -

- (a) vessels, aircraft and vehicles;
- (b) stores;
- (c) baggage;
- (d) currency and negotiable instruments; and
- (e) any other kind of movable property.

27. On the basis of the aforesaid definition, the learned counsel for the petitioner submitted that, period of six months given in section 110(2) of the Customs Act is applicable to the sale proceed of excisable goods in respect of which there is evasion of estate duty. He submitted that in view of this definition and provisions of Section 121 of the Customs Act read with sections 110 and 124 of the Customs Act, it was necessary for the Department to give notice within prescribed period of intention of confiscation if the Department has formed

opinion that the cash amount can be confiscated as provided in the aforesaid provisions. He drew attention of this Court to relevant portion of the show cause notice which is already quoted. This proposition needs to be accepted for many reasons as under :-

(i) "goods" includes currency, vessels etc. and even other movable property under the definition of "goods" given in Customs Act. When section 110 of the Customs Act is made applicable, it needs to be presumed that the definition of "goods" given in the Customs Act needs to be read into the words "any goods" given in provisions of sections 110 and 124 of the Customs Act. These words further need to be read with following words like "liable to confiscation under this Act". Thus, all those goods which are liable to confiscation under the Act are covered in section 110(2) of the Customs Act. It can be said that in section 2(22) of the Customs Act the things which need to be treated as goods under the Act are mentioned.

(ii) In Chapter XIV of the Customs Act various categories of goods which are liable to confiscation are mentioned. In the Notification issued under section 12 of the Central Excise Act it is mentioned that subject to modification given in the Notification the aforesaid provisions of the Customs Act are to apply to the action taken under Central Excise Act. At the cost of repetition it needs to be mentioned that in place of "smuggled goods" the words "excisable goods" which have been removed or sought to be removed in contravention of any of the provisions of the Central Excise Act and the Rules" are to be read.

(iii) Provisions of Sections 118, 119 and 120 of the Customs Act are made applicable. They show that packages and other goods used for evasion of customs duty on the goods involved are also liable to confiscation. Particularly when the provision of Section 121 shows that the sale proceeds of the excisable goods in respect of which there has been contravention can be confiscated, it needs to be presumed that condition given in section 110(2) and the procedure given in section 121 of the Customs Act to the property mentioned in section 121 is applicable. Thus the scheme of the Act shows that it was necessary to issue notice within six months from the date of seizure in the present case also."

The learned counsel for the petitioner has placed reliance on following reported cases :-

- (1) 1983 (14) E.L.T. 1715 (Del.) (Shantilal Mehta v. Union of India;
- (2) Dhirajlal Amritlal Mehta Vs. Union of India, (1982) 10 ELT 273 ;
- (3) D. Sengupta Vs. Collector of Customs and Others, (1987) 13 ECC 175 : (1987) 13 ECR 165 : (1987) 31 ELT 30 ; and,
- (4) Krishna Gopal Chander Khalifa and Sons Vs. Union of India (UOI), (1996) 81 ELT 483 .

28. Though the aforesaid position of law is in favour of the petitioner, the other

circumstances of the present case cannot be ignored. The relevant material is already discussed and it shows that present petitioner was involved in running of the business and he was collecting sale proceeds. Thus, the proceeding can go on against him. There is no plausible explanation with the petitioner and there is nothing with him to show that he got such income from which he could have accumulated cash amount of Rs.45 lakh. He is a Tax Consultant. He has given undertaking to the High Court not to dispose of the property and this undertaking was given to see that his sons get bail. Liability of payment of duty, penalty and also interest is to be fixed. There are more provisions in the Central Excise Act like provisions of sections 110 and 110A. While considering the claim of the petitioner in such a case these provisions need to be kept in mind. Circumstance of fraud mentioned in section 11-A(4) of the Central Excise Act is prima facie made out in the present matter. There is prima facie case for evasion of estate duty and also non payment of income tax on the income made by utilizing aforesaid modus operandi. Thus not only the duty payable is to be ascertained under the present Act but the Income Tax authorities need to take action in present case. The provisions of sections 11, 11A, 11AA, 11E etc. are independent of the provisions giving power of confiscation. Provision of Section 226(4) and (5) of the Income Tax Act need to be kept in mind by officers of the Central Excise and it is their duty to see that in such cases information is given to the Income Tax Department also. When such matter comes before Court it is also duty of the Court to see that the Income Tax Department is heard in such a case and intimation of the incident is given to the Income Tax Department also. In view of these circumstances, this Court holds that the amount cannot be returned to the petitioner. Returning of the amount will amount to virtually disposing of the property which can also be attached under the aforesaid provisions. This Court has no hesitation to hold that the amount cannot be returned to the present petitioner and so he is not entitled to such a relief. Learned counsel for the Department has placed reliance on a case reported as Pooran Mal Vs. The Director of Inspection (Investigation), New Delhi and Others, AIR 1974 SC 348 : (1974) 93 ITR 505 : (1974) 1 SCC 345 : (1974) 2 SCR 704 .

29. The relief of quashing the adjudication proceeding started against the present petitioner also cannot be given to the petitioner in view of the material already discussed. The material is sufficient to make out a prima facie case that he was involved in running of the business and he was collecting money, sale proceeds in respect of the excisable goods. He was actively involved in evasion of the excise duty. Thus the proceeding of confiscation and imposition of penalty can go on against him. The learned counsel for the Department has placed reliance on the following cases reported as (1) 1997 (96) E.L.T. 21 (S.C.) (Union of India v. Polar Marmo Agglomerates Ltd.); and, (2) Commissioner of Customs and Central Excise and Others Vs. Charminar Nonwovens Ltd., (2004) 93 ECC 585 : (2004) 114 ECR 501 : (2004) 167 ELT 372 : (2004) 5 SCALE 368 : (2004) 5 SCC 125 : (2004) 2 SCR 222 Supp : (2004) 136 STC 356 .

30. The submission for the present petitioner that his arrest was illegal and the

offence is bailable is also not acceptable. The material collected shows that false record was created for evasion of excise duty. Thus, it is a case of forgery and fraud also. There has been evasion of excise duty in respect of goods worth more than Rs.140 crore. Provisions of sections 9, 9A and 9-AA of the Central Excise Act show that this offence is cognizable and non bailable. The duty evaded apparently exceeded Rs.50 lakh (for old provision Rs. 30 lakh) and there is such specific allegation of the Department. When a case is filed in Criminal Court, the Court has also power to forfeit such amount and that can be seen in the provisions of the Code of Criminal Procedure and also section 110 of the Central Excise Act. The learned counsel for the Department has placed reliance on a case of Harvest Gold Food (India) Private Limited and Others Vs. Union of India (UOI) and Others, (2006) 202 CTR 231 : (2006) 282 ITR 83 : (2005) 3 RLW 1898 : (2005) 4 WLC 21 .

31. The provision of Section 13 of the Central Excise Act shows that there is a power to Excise Officer not below the rank of Inspector to arrest the person like present petitioner involved in such offence if he has authorization as provided in section 13 of the Act. The provision of section 14 of the Act shows that there is power to the empowered officer to issue summons to a person like present petitioner and call him to the office. Section 14(2) of the Act shows that persons so summoned is bound to comply with the summons and the conditions of the summons. Provision of Section 18 gives procedure for such an arrest. Provision of Section 19 of this Act runs as under :-

"19. Disposal of persons arrested.-- Every person arrested under this Act shall be forwarded without delay to the nearest Central Excise Officer empowered to send persons so arrested to a Magistrate, or, if there is no such Central Excise Officer within a reasonable distance, to the officer-in-charge of the nearest police station."

32. In the present case summons was served on the petitioner and he was called to Pune to appear before the empowered officer. He failed to comply with this summons. Authorization of arrest was then given. It is submitted for the Department that Excise Officer empowered to arrest person like the petitioner was at Pune and so the petitioner was taken to Pune. Admittedly the petitioner was produced before the Magistrate from Pune by such empowered officer and within the prescribed period. It is non bailable offence and the Magistrate refused bail to the two sons of the present petitioner. Even the Sessions Court refused bail and the High Court granted bail subject to aforesaid conditions to the sons of the petitioner. Only due to the circumstance like petitioner's old age, the Magistrate granted him bail. Therefore the submissions that the petitioner ought to have been taken to the nearest police station and he should have been produced before the Magistrate at Jalna cannot be given much weight and these circumstances cannot be used against the Department. The competent officer at Pune has the power under section 21 of the Act which is similar to the power of the officer in charge of a police station. Such officer produced the petitioner

before the Magistrate of Pune and within the prescribed period. There is provision in the Act like section 22 taking care of search, seizure etc. Thus no relief as claimed by the petitioner can be given in the present case.

33. In the result, the writ petition stands dismissed.

34. A copy of this order is to be sent to the Income Tax Office Jalna by the Registrar (Judicial).