

**(2016) 12 AP CK 0063**

**In the Andhra Pradesh High Court**

**Case No : Writ Petition Nos.30792 and 30793 of 2016**

Syed Irfan Mohammed

APPELLANT

Vs

Union of India

RESPONDENT

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**Date of Decision : 13-12-2016**

**Acts Referred:**

**Citation : (2017) 2 AndhLD 726**

**Hon'ble Judges : Sri V. Ramasubramanian and Sri G. Shyam Prasad, JJ.**

**Bench : Division Bench**

**Advocate : Sri S. Ravi Senior Advocate and Sri V. Gopalakrishna Gokhale, Advocates, for the Petitioner; Sri B. Narasimha Sarma, Senior Standing Counsel, for the Respondent**

**Final Decision : Disposed Off**

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## **Judgement**

Sri V. Ramasubramanian, J.&mdash;The petitioners have come up with the above writ petitions challenging an Order-in-Original passed by the 2nd respondent under various provisions of the Customs Act, 1962 and the Customs Tariff Act, 1975.

2. We have heard Mr. S. Ravi, learned senior counsel and Mr. V. Gopalakrishna Gokhale, learned counsel appearing for the petitioners and Mr. B. Narasimha Sarma, learned senior standing counsel for the respondents.

3. The case of the petitioners is that both of them were taken to the office of the Directorate of Revenue Intelligence on two different dates and that on the basis of the statements allegedly given by them, show cause notices dated 24-04-2015 were issued to them. Under the show cause notices, issued not only to the petitioners herein but also to two other partnership firms by name M/s. Star Impex and M/s. VRPL Overseas, all of them were called upon to show cause as to why a certain quantity of cigarettes imported under different bills of entry and available in 2 live containers should not be confiscated and duty, interest and penalty should not be levied not only against the live containers but also against

the imports made in the past. These show cause notices were issued under Section 28 (4) of the Customs Act, 1962.

4. The petitioners sent replies, almost on identical lines on 27.04.2016, claiming that they did not import any material including baby diapers and cigarettes. Thereafter, the petitioners were called upon to attend a personal hearing. The petitioners appeared through counsel and reiterated their contentions.

5. But, the 2nd respondent in these writ petitions passed Orders-in-Original dated 25-05-2016 directing (1) the confiscation of the cargo in 2 live containers and (2) the imposition of duty, interest and demand, in respect of the cargo available in the live containers as well as the cargo cleared in the past from 13 containers. Aggrieved by these Orders-in-Original, the petitioners are before us.

6. At the outset, it should be pointed out that the petitioners herein have an effective statutory alternative remedy of appeal as against the impugned orders, to the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) under Section 129A (1) of the Customs Act, 1962. But the petitioners have bypassed the alternative remedy of appeal, on the short ground that they were not the importers of the goods and that the impugned orders have been passed only on the basis of statements allegedly recorded by the investigating officer under duress and coercion. Since these statements relied upon by the 2nd respondent in the Orders-in-Original have already been retracted and they are also contested in judicial proceedings, the petitioners claim that the alternative remedy is not an efficacious remedy but an oppressive one.

7. Normally, the aforesaid argument, which any importer takes for bypassing the alternative remedy of appeal, does not appeal to us. Every person aggrieved by an Order-in-Original, wants to invoke the writ jurisdiction of this Court, so as to avoid the requirement of having to make a pre-deposit of 7.5% of the duty.

8. But in extraordinary cases where the principles of natural justice have been completely thrown to the winds or where there is total lack of jurisdiction on the part of the adjudicating authority, this Court would not hesitate to interfere in exercise of the power conferred under Article 226 of the Constitution of India. Therefore, let us examine whether the case falls under any of these two categories.

9. In our considered view, the case may not fall under the category of violation of natural justice. A show cause notice was issued to which the petitioners submitted a reply. The petitioners were granted an opportunity to appear through counsel at the time of personal hearing. Therefore, the petitioners cannot complain of violation of natural justice.

10. The question of lack of jurisdiction is raised on the ground that what were seized by the Department of Revenue Intelligence were two containers bearing Nos.TLXU 5401360 and BSIU 9156563. Therefore, at the most the entire adjudication could only be in respect of cargo de stuffed from both these

containers. But the 2nd respondent came to the conclusion that the goods cleared by M/s. Star Impex from 11 containers in the past and the goods cleared by M/s. VRPL Overseas under two containers in the past, could have also contained cigarettes concealed in baby diapers and that therefore customs duty, interest and penalty are also liable to be VRS, J. & GSP, J. wps\_30792&30793\_2016 imposed, in respect of those 13 containers. It is this action of the 2nd respondent which is assailed by the petitioners to be completely without jurisdiction.

11. The main grievance of the petitioners is that the cargo cleared in the past, after following the procedure prescribed by law cannot be the subject matter of the adjudication proceedings, merely on account of the fact that the two live containers contained contraband goods. According to the petitioners, the conclusion reached by the 2nd respondent was only presumptuous. Even the statements made by the concerned officers in respect of the past containers showed that all the procedure prescribed by law were followed before those 13 containers were cleared in the past. Therefore, to subject those past containers to adjudication, on the presumption that the persons, who attempted to smuggle goods under two live containers, should have also done the same in respect of the past containers, has no basis in law.

12. It is seen from the Orders-in-Original that the discussion relating to the past containers, start from paragraph 116. The allegation that cigarettes were concealed behind baby diapers and the smuggled in 12 containers in the past, was apparently made based upon the statements allegedly made by the petitioners herein and also corroborated by a person, who facilitated their clearance as well as the employees of a transport company.

13. But oral statements allegedly made by the petitioners, which they have retracted immediately, cannot form the sole basis for coming to the conclusion that a wrong doer of the present could have been a wrong doer in the past also. It will be a different matter, when it comes to live containers. In so far as the live containers are concerned, the cargo is seized and is available as primary evidence to show that what was imported in those live containers as baby diapers, actually contained cigarettes. But in respect of past containers already cleared and disappeared into the market, the primary evidence is lost. Therefore, merely on the basis of confession statements recorded from the petitioners and the alleged corroborative statements made by the person, who cleared the cargo and who transported the same, a presumption of this nature cannot be drawn.

14. Mr. B. Narasimha Sarma, learned senior standing counsel contended that the 2nd respondent did not proceed merely on the basis of oral statements, but also examined the issue on a scientific basis, by assessing the weight of the cargo as declared in the past and the weight that ordinary baby diapers of such a volume would have had.

15. But unfortunately, the 2nd respondent did not come to the conclusion that he

did, on the basis of the weight of the cargo declared in the past. On the contrary, the 2nd respondent dealt with a contention raised by the petitioners on the weight factor, in paragraph 113 of the impugned orders. Paragraph 113 of the impugned order reads as follows:

"?. Regarding the weight, Sri Azmathullah argued that the total weight of container should be around 17000 kgs, as 400 cartons of cigarettes weight 12000 kgs and 425 cartons of Diapers weigh 5000 kgs. However the freight paid weight was around 6 tonnes. It is a fact that the Cargo Weight of each of all the containers was declared as 6225 kgs. Even if assuming that all the cartons are of Diapers only, considering the weight of 425 cartons of Baby Diapers to be 5000 kgs as argued by Sri Azmathulla, the total weight of the goods consisting of 825 cartons of Diapers should be around 10000 kgs. However the declared weight was around 6 tons only. Even in respect of the two containers which consisted of more than 600 cartons of Cigarettes the Cargo Weight was declared as 6225 kgs only. Further, out of the two containers that were examined one container consisted of 610 cartons of cigarettes and the other container consisted of 709 cartons of Cigarettes. However, the declared weight is exactly 6225 kgs in respect of both the containers. Thus, it is clear that there is gross mis-declaration of the weight in respect of all the containers. Thus the "weight factor" cannot be basis to argue that the past containers consisted only Diapers?.."

16. If the 2nd respondent had come to the conclusion that the past containers could have also contained the cigarettes, on the basis of the weight of a particular quantity of cigarettes and the weight of a particular quantity of baby diapers, the 2nd respondent could have at least been credited with some arithmetical logic. But the 2nd respondent rejected the issue of weight factor as though it had nothing to do with the material imported.

17. No one can find out as to what was smuggled in a container, once a container is cleared after all the statutory formalities are carried out and the cargo disappears into the market. At least if the clearance of goods, in the past containers had taken place without following any of the procedures, there could be some logic to contend that the smuggled goods escaped the clutches of law. But today there are no allegations that the procedure prescribed by law was not followed while clearing the past containers.

18. Even as per the Orders-in-Original, the goods in the past containers were cleared under Section 47, after carrying out examination of random cargo. The 2nd respondent has extracted in paragraph 135 of the impugned order, the examination order and the examination report. Paragraph 135 reads as follows:

"??I have perused the examination orders and examination reports relating to the past containers. The examination order in general is as under.

Open and inspect 5% of cargo or more packgs. Verify desc wrt org import documents/bank attested documents verify the brand verify rsp declaration"

The examination report in general is as under

"opened and inspected selected pkgs. Verified desc wrt org import documents and found in order, verified the brand "good baby" verified rsp declaration dated 7-1-2014 placed in file??"

19. After having extracted the examination order and the examination report, the 2nd respondent has concluded towards the end of paragraph 135 that there was no evidence to show that the examining officer de stuffed and examined the cargo. The conclusions drawn in paragraph 135 are extracted as follows:

"?.From the examination order, examination report and also from the procedure prescribed in the Appraising manual, it is clear that the cargo need not be de stuffed to examine the goods. Further the examining officer has not mentioned that he has de stuffed and examined the cargo. The examination order specifies to open and inspect 2% packages which work out to some 17 packages. In the container having some 425 packages of Baby Diapers there is every possibility that the 17 packages selected at random, to contain Baby Diapers. Further, the cigarettes were concealed behind baby diapers packages. There were 425 packages of diapers. That means to approach a cigarette package more than half of the container should be de stuffed. In the realm of self assessment, where more reliance is placed on the importer's self declaration, it is not feasible to de-stuff half of every container. Such action would be resorted only when there is some doubt regarding the cargo. In the impugned case, the notices have conspired in such a way that there is no scope for suspecting that the container consisted of cigarettes. Such a deep rooted conspiracy cannot be detected in a routine examination of goods. Even for a specialised Investigating Agency like DRI, it took such a considerable time to unearth the conspiracy. Thus just because no cigarettes could be detected during the course of examination of the goods, it cannot be concluded that the containers consisted of only Diapers."

20. But the conclusion drawn by the 2nd respondent, which we have extracted above, is in the realm of speculation. The same cannot be permitted in view of the fact that different officers had examined the past containers at different points of time. Therefore, the theory of conspiracy floated by the 2nd respondent, unless it takes into account the role played by the examining officers of the department also, cannot hold water.

21. It is seen from paragraphs 136 to 138 of the Orders-in-Original that the 2nd respondent has come to the conclusion that the past containers should have also contained cigarettes, solely on the basis of the statements of the person who transported material. Though none of the witnesses stated that they transported cigarettes, the 2nd respondent has drawn an inference on the ground that if those containers contained only Baby Diapers, there was no need to transport those goods to safe places and that there was no need to engage a 3rd person to get the goods cleared. These presumptions are also completely unknown to law.

22. As contended rightly by the learned counsel for the petitioners, Section 47 of

the Customs Act, 1962 prescribes the procedure for clearance of goods for home consumption. Two conditions are to be satisfied for the Proper Officer to pass an order under Section 47(1) permitting clearance of the goods for home consumption. They are: (1) that the goods are not prohibited goods and (2) that the importer has paid import duty assessed thereon along with any charges payable in respect of the same. Therefore, once goods are cleared under Section 47, there is a presumption in law that the procedure prescribed under Section 47 has been followed.

23. In case the duty payable on the goods had been short levied or not levied, on account of any collusion, wilful misstatement or suppression of facts, it is open to the Proper Officer to initiate proceedings under Section 28(4). This could be done within 5 years.

24. But the power under Section 28(4) cannot be invoked in cases where a claim is made that what was imported was completely different from what was indicated in the Bills of Entry. In a case where the Bills of Entry declared the goods to be Baby Diapers and the Proper Officer also cleared the goods for home consumption under Section 47(1), it may not be possible for the Department later on to contend that cigarettes concealed in Baby Diapers could have been imported and taken into the market. In other words, what could be found out from the records alone could be the subject matter of proceedings under Section 28(4). What cannot be established merely by the records cannot form the basis of the proceedings under Section 28(4).

25. Today if the different Proper Officers who cleared the 13 containers in the past were summoned and examined, even they will not support the case of the Department, for the fear of disciplinary proceedings being initiated against them. Therefore, we do not think that the 2nd respondent could have invoked the jurisdiction under Section 28(4) in respect of the past containers. If this is permitted, it would become a matter of surmises for any officer to claim that some goods could have been smuggled into the country by concealing them behind the goods that were declared to be the goods of import in the Bills of Entry. Hence, the Orders-in-Original impugned in these writ petitions are liable to be set aside only insofar as they impose a duty, interest and penalty in respect of the past 13 containers.

26. Accordingly, both the writ petitions are allowed to the limited extent of setting aside paragraph 186.II(2) and 186.III(2). Insofar as all other matters are concerned, the petitioners will have to avail the alternative remedies available to them in law. The miscellaneous petitions, if any, pending in these writ petitions shall stand closed. No costs.