
(2016) 07 DEL CK 0101

In the Delhi High Court

Case No : Writ Petition (C) No. 5939 of 2016

Worldline Tradex Pvt. Ltd.

APPELLANT

Vs

Commissioner of Customs (Import)

RESPONDENT

Date of Decision : 25-07-2016

Acts Referred:

Citation : (2016) 340 ELT 174

Hon'ble Judges : Dr. S. Muralidhar and Najmi Waziri, JJ.

Bench : Division Bench

Advocate : Mrs. Anjali J. Manish and Shri Priyadarshi Manish, Advocates, for the Petitioner; S/Shri Pramod Kumar Rai, Senior Standing Counsel and Satish Aggarwala, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

S. Muralidhar, J.—This is a petition by Worldline Tradex Private Limited seeking, inter alia, a direction to the Commissioner of Customs (Import), New Customs House, Near IGI Airport, New Delhi (Respondent No. 1), the Additional Commissioner of Customs (Import) (Respondent No. 3), the Joint Commissioner of Customs (Import) (Respondent No. 4) and the Deputy Commissioner of Customs (Import) (Respondent No. 5) (hereinafter collectively referred to as the "Customs") and the Additional Director General, Directorate of Revenue Intelligence (Respondent No. 2) ("DRI"), to provisionally release the goods imported by the petitioner under Bill of Entry (B/E) No. 5216412, dated 10th May, 2016. A further prayer is for the direction to the respondents to provide to the petitioner a copy of the panchnama dated 12/13th May, 2016 which makes reference to the above B/E.

2. The brief facts are that, the petitioner is engaged in the business of import of mobile accessories. It is stated that, in the normal course of its business, the petitioner placed an order for importing unbranded mobile accessories, parts, memory card adaptor, plastic watches, tempered glass and mobile phone LCD on its foreign supplier M/s. Micsun Import and Export Private Limited for USD

15,649.19 by way of invoice dated 11th April, 2016. According to the petitioner, the goods were dispatched through air by Airway Bill (AWB) dated 25th April, 2016. On arrival of the goods, the petitioner filed the aforementioned B/E for home consumption. The assessable value was declared as Rs. 10,61,351.54/- and the duty payable as Rs. 2,63,494/-.

3. It is stated that the petitioner filed the B/E under first check so that the Customs could itself verify the contents and indicate the duty to be paid. The petitioner states that the goods were examined on 12th May, 2016 by the DRI in the presence of two panch witnesses as well as an Inspector of Customs and two other persons besides the Customs and the Customs House Agent (CHA). The petitioner states that only Annexure C to the panchnama dated 12/13th May, 2016 and not the entire document was handed over to it.

4. The petitioner states that it kept requesting for a copy of the entire panchnama as well as for the release of the goods, but did not receive any response. A letter dated 28th June, 2016 was addressed by the counsel for the petitioner to the DRI and as well as the Customs making the same request. The petitioner also requested to the DRI that its letter dated 28th June, 2016 be treated as an application under Section 110A of the Customs Act, 1962 ("Act"), for provisional release of the goods in case the goods had been seized. Aggrieved by the continued inaction of the respondents, the present petition is filed.

5. Notice was issued in the petition to the respondents on 13th July, 2016. On behalf of Mr. Satish Aggarwala, notice was accepted for the DRI. He was asked to obtain instructions on the next date of hearing.

6. An affidavit in response to the notice was filed by Mr. S.K. Mishra, Sr. Intelligence Officer, DRI where, inter alia, he stated that a specific information was received that some Delhi based importing firms were indulging in import of high value electronics items, branded mobile phones and mobile accessories by misdeclaring the value and quantity, thus resorting to evasion of customs duties. It was stated that the DRI officials visited Air Cargo (Import) at IGI Airport on 26th April, 2016 and put on hold all imported goods containing mobile phones and mobile accessories, in respect of which an Import General Manifest had been filed. According to the DRI, a letter was addressed to the Customs by it on 27th April, 2016 stating that all consignments of mobile accessories imported by the traders (other than brand owners/manufacturers) should be examined in the presence of the officers of the DRI.

7. It is further stated in DRI's affidavit that by a letter dated 12th May, 2016 the DRI requested the Customs that in order to avoid detention and demurrage charges, the requests made by the importers for warehousing of imported consignments under Section 49 of the Act, should be considered favourably.

8. As far as the B/E in question is concerned, the DRI stated that the consignment was examined and a panchnama drawn on 12/13th May, 2016 in the presence of the two independent witnesses, a representative of CELEBI (the

custodian of goods), a representative of the CHA firm M/s. Dex Logistics Pvt. Ltd. (DLPL) and the Customs officials. It was stated that on examination of the documents submitted by the CHA, it was noted that the IGM No. 936163 had mentioned the AWB date as 28th April, 2016, whereas in the B/E the date of the AWB was 25th April, 2016. The suspicion was that the CHA was trying to mislead the DRI officials that the goods had arrived after the alert dated 26th April, 2016. It was stated that the detailed inventory was prepared and it was noticed that the consignment included high value goods such as branded wrist watches covered under Section 123 of the Act, branded Bluetooth stereo headsets, HD WIFI camera, etc., and that these had not been mentioned in the invoice presented by the importer.

9. It was further stated by the DRI that the importer had declared 4040 pieces of plastic watches (unbranded), whereas 5400 pieces of Chinese as well as branded watches were recovered. It was stated that there were discrepancies in the description as well as quantities in respect of certain other items. The value declared in the invoice or B/E appeared to be on the lower side vis-à-vis the recovered goods. It was further stated that the importer had declared 12 pieces of small Chinese CCTV cameras and during examination 12 pieces of PMP wireless NVR Kit containing 4 pieces of HD WIFI cameras and 1 piece 4 Chanel WIFI NVR were recovered. Although, it was stated that on the completion of the panchnama, the DRI handed over a copy thereof to a representative of the CHA company, this has been denied by the petitioner, who maintained that only Annexure C was handed over.

10. It appears that thereafter on 14th June, 2016, that is more than a month after the detention of the goods, summons were issued to the importer to appear before the DRI on 21st June, 2016 and to produce the relevant documents and bank statements. It is acknowledged that on 28th June, 2016 the importer made a representation for provisional release of the goods. A statement appears to have been recorded of one Mr. Siddharth Sharma on behalf of the importer under Section 108 of the Act on 5th July, 2016. He appears to have submitted a bank account statement, copies of the sales invoice running to 91 pages and import documents running to 266 pages.

11. Pursuant to the order passed by the Court, the original file was produced by Mr. Satish Agarwala, learned Counsel appearing for the DRI before the Court on 21st July, 2016. The order passed by the Court on that date noted what was found in the file as under :

"1. The original file has been produced by Mr. Satish Agarwala, learned counsel appearing for the Directorate of Revenue Intelligence (DRI). It contains the panchnama drawn on 13th May, 2016. This is in the form of joint statement by two panch witnesses, Mr. Balender Singh (Panch-I) and Mr. Jay Kumar Singh (Panch-II). The panchnama has been drawn up by Mr. Niraj Kumar Verma, Intelligence Officer, DRI (Hqrs.), New Delhi, on 13th May, 2016 and bears his signature too.

2. Mr. Agarwala states that while there is proof in the file that Annexure C to the panchnama was served on the petitioner (which in any event is not disputed by the petitioner), there is no proof in the file that the entire panchnama was served on the petitioner. He undertakes to serve on the counsel for the petitioner during the course of the day, one copy of the entire panchnama.

3. The second feature of the panchnama is that it states that "the above said goods were detained by the DRI Officers under Section 110 of the Customs Act, 1962 being relevant to the investigation being conducted by them". The above statement by the two panch witnesses cannot be, as is sought to be contended by Mr. Agarwala, taken to be an order passed by the proper officer under Section 110(1) of the Customs Act, 1962 ("Act") seizing the goods in question. In the first place, there is no such order signed by the proper officer in terms of Section 110(1) of the Act in the file. Secondly, the word used in the panchnama is "detained" and not "seized". It is, therefore, not possible to accept a statement made at the Bar by Mr. Agarwala that the Court should proceed on the basis that the goods in question have been seized by the DRI under Section 110 of the Act.

4. Significantly, in the counter affidavit filed by Mr. S.K. Mishra, on behalf of the DRI, there is no statement to the effect that the goods have been seized under Section 110 of the Act. What is stated in para 6 therein is that the goods "were detained under proper Panchnamas drawn on the spot". It is not possible for the Court to accept the panchnama, being a statement of the two panch witnesses, to be an order passed under Section 110(1) of the Act. Mr. Agarwala does not dispute that there is no provision in the Act that permits "detention" of goods and that too for an indefinite period. If there is no seizure of goods under Section 110(1) of the Act, there is no question of the Petitioner seeking provisional release of such goods under Section 110A of the Act.

5. The affidavit of Mr. S.K. Mishra also reveals that the goods stand warehoused under Section 49 of the Act since 8th July, 2016. The question arises as to who is responsible for paying the warehousing charges since clearly the Petitioner cannot be faulted for the unauthorised detention of the goods.

6. A further question that arises is regarding the nature of the goods in question. These are stated to be wrist watches of various makes and in terms of notification number 31/86-Customs dated 05th February, 1986 such goods have been notified to be of a perishable nature. They have to be dealt with in the manner indicated in Section 110(1A) and (1B) of the Act. The very objective of these provisions is to ensure that such perishable goods do not remain seized for a long period. The language used in Section 110(1A) is that the goods should be disposed of "as soon as may be after its seizure."

7. Ms. Anjali Manish, learned counsel for the Petitioner submits that what has been filed is a Bill of Entry (B/E) at the first check stage. She points out that the Customs authorities are yet to even inspect and assess the goods and determine the duty payable.

8. The question also arises as to the further steps that should be taken to have the B/E dated 10th May, 2016 filed by the Petitioner, assessed in the first instance by the customs authorities to enable the Petitioner to pay the requisite customs duty and get the goods cleared.

9. None has been appearing on behalf of the Department of Customs. A complete set of paper book be served on Mr. Sanjay Narula, Sr. Standing Counsel for the Department of Customs forthwith.

10. List for further hearing on 25th July, 2016"

12. Pursuant to the above order, Mr. Puneet Rai, learned counsel for the Customs appeared. Mr. Agarwala supplemented his earlier submissions by contending, on the strength of the order in the S.J. Fabrics Pvt. Ltd. v. Union of India - 2011 (268) E.L.T. 17 (Cal.), that for all practical purposes the detention of the goods should be treated as "seizure" under Section 110 of the Act. In particular, he drew attention to the following observations in para 6 of the above decision :

"6. From the aforesaid averment, it is clear that although no specific order of seizure has been issued to the writ-petitioner, it is apparent that there has been actual detention of the goods under Section 110 of the Act and time will run for giving show cause notice under Section 124(a) from at least 4th August, 2010. It further appears that already summons in terms of Section 108 of the Act has been issued to the writ-petitioner and he is being examined and thus, it necessarily follows that there has been seizure of the goods in terms of Section 110 of the Act and the writ-petitioner has been summoned in connection with the investigation"

13. Further, on the strength of the decision in R.S. Seth Gopikisan Agarwal v. R.N. Sen, Asstt. Collector of Customs and Central Excise, Raipur - 1983 (13) E.L.T. 1434 (S.C.). Mr. Agarwala sought to contend that there was no requirement for recording of reasons before making a seizure. Although, the said decision was in the context of a search under Section 105 of the Act, Mr. Agarwala contended that it would equally apply to a seizure under Section 110 of the Act.

14. Countering the above submissions, it was pointed out by Mrs. Anjali Manish, learned Counsel appearing for the petitioner, that there was no concept of "detention" of goods under Section 110 of the Act. Referring to the decisions in Mapse Tapes Pvt. Ltd. v. Union of India - 2006 (201) E.L.T. 7 (P&H), Om Udyog v. Union of India - 2010 (254) E.L.T. 547 (P&H) and Baboo Ram Hari Chand v. Union of India - 2014 (304) E.L.T. 371 (Guj.) she submitted that the recording of reasons prior to the making a seizure under Section 110(1) of the Act was a sine qua non to justify a valid seizure of imported goods.

15. Mr. Rai, appearing for the Customs, submitted that there could be certain instances where examination of goods cannot take place immediately upon their arrival and this might require the goods to be detained for "a short" or "a

temporary" period, though he was unable to specify what constituted either a short or a temporary period. According to him, there may be instances where the DRI, acting on intelligence, proceeds to intercept the goods with prior intimation to the Customs. In response to a specific query as to who would bear the demurrage or the warehouse charges in the event of such "detention", Mr. Rai said that where the detention was only for a short period and ultimately the goods were not found to be of a nature that required any seizure, then the importer could not be saddled with the resultant demurrage or warehouse charges. However, Mr. Rai was unable to inform the Court if there existed any instructions/directions issued by the Customs or the Central Board of Excise and Customs (C.B.E. and C.) regarding such "detention" of the goods, and that too without recording of reasons.

16. The Court finds that there is no provision in the Act which justifies the detention simpliciter of goods by the authorities whether it is the Customs or the DRI, and that too without recording of reasons.

17. Mr. Agarwala drew the attention of the Court to the proviso to Section 110(1) of the Act which envisages a situation where it is not practical to seize imported goods. The proviso states that in such instance "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".

18. In the present case, as already noted, no order was served on the owner of the goods in terms of proviso to Section 110(1) of the Act. What the panchnama talks of is the custodian being told by the DRI not to remove, part with or otherwise deal with the goods. Clearly, therefore, no action was proposed and, in fact, taken in terms of the proviso to Section 110(1) of the Act, which is the only exception to not immediately seizing the goods. It appears to be imperative that if the proper officer decides to seize the goods, then he must record first reasons to believe that such goods are liable to be confiscation under the Act.

19. In R.S. Seth Gopikisan Agarwal (*supra*) the Supreme Court discussed Section 105 of the Act dealing with search and not Section 110 of the Act which deals with seizure. In any event, even the Supreme Court did not suggest that no reasons at all are required to be given for a search undertaken under Section 105 of the Act. In Para 7 the Supreme Court observed that the Customs Officer "doubtless" has to indicate "broadly the nature of the documents and the goods in regard to which the officer authorised by him should make a search, for without that his mandate cannot be obeyed". While the Supreme Court observed that the specific particulars need not be mentioned, it did not dispense with the recording of reasons for the action taken under Section 105 of the Act.

20. Even the decision in S.J. Fabrics Pvt. Ltd. v. Union of India (*supra*) does not suggest that the proceedings under Section 110(1) of the Act is not to be followed. The above observations in para 6 of the decision are relevant in the context of the computation of the period of limitation for the purposes of

issuance of the show cause notice under Section 124(a) of the Act. The said decision does not suggest that for effecting a seizure under Section 110(1) of the Act, no order is required to be passed by the proper officer.

21. None of the above decisions is an authority for the proposition sought to be advanced by Mr. Agarwala that detention and seizure is one and the same thing. On the contrary, the decisions of the Punjab and Haryana High Court referred to by learned counsel for the petitioner hold to the contrary. Both in *Mapse Tapes Pvt. Ltd. v. Union of India* (supra) and *Om Udyog v. Union of India* (supra) the High Court was concerned with the similar situation of detention of the goods without recording reasons to believe that seizure of the goods was warranted under Section 110(1) of the Act. The following discussion in *Mapse Tapes Pvt. Ltd. v. Union of India* (supra) supports the case of the petitioner that, for there to be a valid seizure of the goods it is incumbent on the proper officer to record reasons to believe, under Section 110(1) of the Act, that the goods are liable to be confiscated :

"23. The case in hand, in our opinion, will fall within the four corners of Section 105 of the Act as in the present case the seizure of the goods was preceded by search. It is even evident from panchnama dated 8-2-2005 (Annexure P. 3) attached with the writ petition.

24. In the present case, what to talk of respondents themselves producing the records to show recording of reasons, even in spite of specific query by the court, nothing has been produced before us to show as to whether reasons were recorded or not before the search was authorised or the seizure took place. All what has been relied upon is the report of Directorate of Revenue Intelligence, Delhi Zonal Unit (DRI) which is much prior to the date of seizure and important aspect of the matter is that the goods were cleared under Section 47 of the Act after the above report was available with DRI. Further, undisputed allegations of the petitioners are that even after the clearance of the consignment, seizure of which is in question, in the present petition a number of consignments were cleared by the respondents under Section 47 of the Act under similar circumstances.

25. We are of the view that while existence power of seizure may be justified but its exercise will be liable to be struck down unless "reasons to believe" were duly recorded before action of search and seizure is taken, which has not been done in the present case because the respondents have not been able to satisfy the court that due process of law was followed while taking drastic step of search and seizure in the case of the petitioner. On this ground alone, we are of the view that action of search and seizure is liable to be quashed and accordingly we answer the second issue in favour of the petitioner and against the revenue.

26. Before parting with the judgment, we make it clear that we are not going into question of alleged liability for undervaluation or mis-description or any other consequence or the liability of the petitioners as a result of pending show

cause notice issued to the petitioners...."

22. In *Om Udyog v. Union of India* (supra), in similar circumstances, the Court directed immediate release of the goods since "the Department had not shown prima facie case for exercise of powers of confiscation and has only relied upon existence of power". The Gujarat High Court in *Baboo Ram Hari Chand v. Union of India* (supra) negated the plea of the Department that seizure and confiscation were one and same thing. In that case the panchnama was projected as the seizure order. The Court observed that "such composite order is unheard of". It further observed :

"27. Technically, asking the party to submit fresh PD Bonds for a period of six months on one hand and proceeding to seize the goods on the other hand may not perhaps be faulted with, however, burden lies on the authority to explain rationale to rush into seizure/confiscation of the goods in such circumstances, the reason is the "proper officer" cannot proceed to seize the goods under Section 110 of the Act unless he has reason to believe. The authority would exercise drastic powers to seize the goods only in case wherein it has reason to believe that the goods is liable to be confiscated. The powers to seize and the powers to confiscate are quite drastic powers. Little elaboration would show apparent inconsistency in the conduct of the respondent, from which it can be said that formation of belief for seizure by the respondent is vitiated???"

23. The power of seizure under Section 110 of the Act has to obviously be exercised for valid reasons. The proper officer has to record his reasons to believe that the goods that he proposes to seize are liable to confiscation. The said reasons for exercise of the power have to be recorded prior to the seizure. In the present case, as already noticed, apart from the panchnama, there is no separate order passed under Section 110(1) of the Act by the proper officer recording the reasons to believe that the goods are liable for confiscation. Since till date no other order exists and no such order has been communicated to the Petitioner, it is not possible to accept the plea of Mr. Agarwala, learned counsel for the DRI, that the "detention" of the goods by the DRI was with the authority of law and in any event should be treated as a seizure in terms of Section 110(1) of the Act.

24. The net result is that the detention by the DRI of the goods imported by the petitioner under the aforementioned B/E from 13th May, 2016 onwards is entirely without the authority of law.

25. The question that next arises is, what should be the consequential direction that has to be issued in the matter? As already pointed out by the learned counsel for the petitioner, the B/E has been presented as a first check B/E. The Customs has not even examined the goods and assessed the B/E. Therefore, it is imperative that the Customs should now proceed with further steps in the matter.

26. At this stage, it is pointed out by Mr. Rai, learned Counsel for the Customs, that unless the DRI issues a No Objection Certificate (NOC) for the release of the

goods, they cannot take further steps in the matter.

27. Since the Court has already held that the detention of the goods by the DRI in the customs warehouse is entirely without the authority of law, the Customs will now proceed with the further steps in the matter on the basis that there is a No Objection Certificate granted by the DRI. The Customs will proceed to inspect the goods and assess the B/E. In other words, the grant of NOC by the DRI to the further course of action to be taken by the Customs has to be presumed. At the time of assessing the B/E, however, the concerns expressed by the DRI, as set out in Paras 13, 14 and 15 of the affidavit of Mr. S.K. Mishra, will be kept in view by the Customs. Once the B/E is assessed and the duty, as assessed is paid by the petitioner, the goods will be released to it subject to whatever conditions the Customs might want to impose for such release.

28. The entire exercise of inspecting the goods and the consequential assessment of the B/E be completed by the Customs within a period of two weeks from today. It is made clear that the petitioner cannot be saddled with the warehouse charges as it has happened entirely due to the illegal action of the DRI. In other words, the petitioner cannot be asked to bear the warehousing expenses. It will be for the DRI to bear the responsibility in this regard.

29. For appropriate coordination in such circumstances in future between the DRI and the Customs Department, and to ensure that there is no such indefinite detention of the goods without the authority of law, a detailed set of instructions needs to be issued by the Customs in consultation with the C.B.E. and C.

30. With the aforesaid observations, the writ petition is disposed of but, in the circumstances, with no orders of costs.

31. Order dasti under the signature of the court master.