(1999) 10 AHC CK 0082

In the Allahabad High Court

Case No : C.M.W.P. No. 379 of 1999

Yash Export Industries and others — APPELLANT

Vs

Union of India and others — RESPONDENT

Date of Decision : 14-10-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 132
Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 108, 108(4), 11, 11(2), 111
Foreign Exchange Regulation Act, 1947 — Section 12
Foreign Exchange Regulation Act, 1973 — Section 13, 18(1), 18(A), 19(1), 67
Penal Code, 1860 (IPC) — Section 193, 228

Citation : (2000) 1 AWC 30

Hon'ble Judges : N.K. Mitra, C.J;S.R. Singh, J

Bench : Division Bench

Advocate : Atul Mehra and G.C. Rawal, for the Appellant; S.N. Srivastava, S.S.C. and Sanjay Kumar Singh, Addl. S.C., for the Respondent

Final Decision : Dismissed

Judgement

S.R. Singh, J.—Summons dated 9.4.1999 issued u/s 108 of the Customs Act. 1962 (in short the ''Act'') being Annexures-3 and 4 are sought to be quashed by issuance of writ of certiorari. Further relief claimed herein Is that the respondent No. 5 be directed to clear the shipping bills of petitioner No. 1. a proprietorship firm of which Shri Sudhir Malik claims himself to be the sole proprietor having export activities at S-25/265. K-4A. Vrindavan Colony. Sarsoli, District Varanasi. It is alleged in the petition that M/s. Sokasi International General Trading (LLG). Post Box No. 2215 A. I. Naumaiah. Ajman. UZAE. a foreign buyer, agreed to purchase goods viz, P.V.C. soles-One set of goods which the foreign buyer aforestated agreed to purchase was 25,000 pair P.V.C. soles @ $ 10.10 per pair and the other part of the consignment was of 32,000 pairs of P.V.C. soles @ $9.60 per pair. The contract price of the entire goods came to $ 5,59.700 and pursuant to the said contract, the petitioner got the goods prepared and packed in full container of 40 ft. and all necessary shipping documents along with the goods were deposited in the office of respondent No. 5 on 25.3.1999. It is further alleged that the goods are freely exportable and are placed under Open General Licence, i.e.. no export duty was payable on the goods which do not fall In the category of "prohibited goods". It is alleged in the writ petition that the petitioner No. 1 has been approaching and requesting the fifth respondent to clear the goods but it appears that the goods were detained by the respondent Nos. 2 and 3 and. therefore, could not be cleared. It is on these allegations that the present writ petition has been filed for the reliefs stated herein above.

2. The case of the respondents, as set out in the counter-affidavit, is that the petitioner No. 1 has attempted to export a consignment of P.V.C. soles and the credit rate of which is 20% of the f.o.b. value and in support of the consignment certain invoices submitted in proof of purchase of goods sought to be exported were found to be forged during the investigation by the Directorate and the export consignment is under investigation by the Directorate regarding ''over valuation''. The bank account of petitioner No. 1 in State Bank of India, Hari Nagar, New Delhi, it has been stated in the counter-affidavit, does not contain the photograph of Sudhir Malik. the proprietor of the alleged firm M/s. Yash Export Industries and the own account of the person who introduced the opening of the account Ashok Malik who does not contain any photograph and the address given therein has been found to be fictitious and this person was introduced in the bank by the petitioner No. 3 ; investigation with the Broker who had sold the DEPB scripts of M/s. Yash Exports Inc. indicated that petitioner No. 2 is In close contact with the petitioner No. 1 and to investigate the complete chain, petitioner Nos. 1, 2 and 3 have been summoned u/s 108 of the Act. It has been further alleged In the counter-affidavit that Varanasi address of the firm M/s. Yash Exports Inc. is a residential premises of Shri Mangesh Malik, who in his statement u/s 108 of the Act has stated that there is no office of M/s. Yash Exports Inc. at the given address and the landlord of the said premises has also given similar statement ; the Delhi address of the firm is also a residential premises owned by one Shri V. P. Garg, who in his statement dated 12.4.1999 u/s 108 of the Act has revealed that he rented the above premises to .Shri Vipin Chaudhary and Shri Sudhir Malik and that he never gave them permission to run office from the said premises and that there exists no office of M/s. Yash Exports Inc. at the above address. Shri Vipin Chaudhary too in his statement is said to have stated that no such office exists at the so called Delhi address ; the proprietorship concern namely M/s. Yash Exports Inc. (petitioner No. 1) is a bogus concern ab-initio ; assessment in respect of the consignment in question has been done by an officer junior to Assistant Commissioner which being impermissible in law. the Directorate Revenue Intelligence is examining the role of the officers In doing the irregular assessment and their statement u/s 108 of the Act has also been recorded. "Prohibited goods" according to the counter-affidavit are not only those goods which are restricted under the licensing policy and goods prohibited under various other Acts may also come within the purview

of "prohibited goods". In order to support the value indicated In the shipping bill in question, the exporter is said to have submitted three invoices of M/s. Star Trading Company, Delhi which has been found to be a non-existent company and these facts according to the respondents, lead to an Inference that the Invoices are bogus. The shipping bills in question were filed by the Customs House Agent of M/s. Yash Exports Inc. but the statement of Customs House Agent recorded u/s 108 of the Act has revealed that he filed shipping bills without proper authorisation of the exporter and that he had not met the exporter at all. It is in these and other surrounding circumstances that the Directorate of Revenue Intelligence is looking into the over valuation i.e., declaring a highly exaggerated value of the goods under detention.

3. We have heard Shri G. C. Rawal assisted by Sri Atul Mehra for the petitioners and Shri S. N. Srivastava, senior standing counsel assisted by Shri Sanjay Kumar Singh. Additional Standing Counsel for the respondents.

4. Learned counsel appearing for the petitioners submitted that enquiry u/s 108 of the Act was impermissible in view of the fact that the goods sought to be exported were not liable to confiscation and the enquiry pursuant to the impugned summons cannot be said to be an enquiry ''in connection with smuggling of any goods''. It has been the submission of the learned counsel and that the goods were not ''dutiable goods'' nor they fall within the category of ''prohibited goods'' and since the shipping bills in relation to the goods in question had not been filed to the benefit of the ''drawback'' Section 113 of the Act would not at all be attracted so as to Justify an enquiry u/s 108 of the Act. In opposition the learned senior standing counsel appearing for the respondents submits, inter alia, that the exporter has declared a highly exaggerated value of the goods under detention of the goods went over" valued are liable for confiscation ; the goods fall within the category of "prohibited goods" in that according to clause 3 (3) of the Custom Control Order, 1988, if the value of the goods has been incorrectly declared by the exporter then the export of such goods is prohibited : and that the writ petition Is not maintainable at this stage.

5. Section 108 of the Act under which the summons have been issued being relevant for the purpose of discussion is quoted below :

"108. Power to summon persons to give evidence and produce documents.--(1) Any Gazetted Officer of customs shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making in connection with the smuggling of any goods.

(2) A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned.

(3) All persons so summoned shall be bound to attend either in person or by an

authorised agent, as such officer may direct, and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such documents and other things as may be required :

Provided that the exemption u/s 132 of the Code of the Civil Procedure. 1908 (5 of 1908), shall be applicable to any requisition for attendance under this section.

(4) Every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of Section 193 and Section 228 of the Indian Penal Code (45 of 1860)."

6. It would be eloquent from sub-section (4) that the enquiry u/s 108 of the Act is deemed to be a "judicial proceeding" for certain purposes and the officer empowered to hold enquiry is clothed with the power to summon any person whose attendance he considers necessary either to give evidence or to produce documents or any other thing tn enquiry which such officer is making in connection with "smuggling" of any goods. "Smuggling", in relation to any goods, means any act or omission which will render such goods liable to confiscation u/s 111 or Section 113. We are not concerned with Section 111 which provides for confiscation of improperly imported goods. It being a case of export the relevant provision is Section 113 which provides for confiscation of goods attempted to be improperly exported. Section 113 in so far it Is relevant to the controversy involved herein is quoted as under :

"Section 113. Confiscation of improperly imported goods, etc. --The following export goods shall be liable to confiscation :

(a) .....

(b) .....

(c) .....

(d) any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force.

(e) .....

(f) .....

(g) .....

(h) .....

(i) .....

(j) .....

(k) ....."

7. It would be evident from clause (d) Section 113 of the Act that any goods attempted to be exported or brought within the limits of any customs area for the purposes of being exported, contrary to any prohibition imposed by or under this Act or "any other law for the time being in force" shall be liable to confiscation. Section 11 of the Act empowers the Central Government to prohibit by notification in the Official Gazette or subject to such conditions to be fulfilled before or after, as may be specified in the notification the import or export of goods of any specified description if it is satisfied that It is necessary so to do for any of the purposes specified in sub-section (2) of Section 11 even if the Central Government has not issued any notification u/s 11 of the Act in respect of the goods in question the same may still be held to have been prohibited "under any other law for the time being in force". Section 18(1)(a) of the Foreign Exchange Regulations Act, 1973, also empowers the Central Government to prohibit the taking or sending out by land, sea or air of all goods or of any goods or class of goods specified In the notification from directly or indirectly to any place so specified unless the exporter furnishes to the prescribed authority a declaration in the prescribed form supported by any Such evidence as may be prescribed or so specified and true in all material particulars which, among others, shall include the amount representing--(i) the full export value of the goods ; or (ii) if the full export value of the goods is not ascertalnable at the time of export, the value which the exporter, having regard to the prevailing market conditions, expects to receive on the sale of the goods in the overseas market ; and affirms in the said declaration that the full export value of the goods (whether ascertainable at the time of export or not) has been, or well within the prescribed period be. paid in the prescribed manner. Section 67 of the Foreign Exchange Regulations Act. 1973. specifically provides that restrictions imposed by or u/s 13. clause fa) of subsection (1) of Section 18. Section 18A and clause (a) of sub-section (1) of Section 19 shall be deemed to have been imposed u/s 11 of the Customs Act. 1962 and all the provisions of that Act shall have effect accordingly. Restriction imposed by Section 13, Section 18A and clause (a) of sub-section (1) of Section 19 are not applicable to the facts of the present case but a restriction comprehended by Section 18(1) faj may be treated to be prohibition imposed under the Customs Act thereby attracting the provision regarding confiscation of improperly Imported goods as visualized by Section 113. The view we are taking finds support from the decision of the Supreme Court in M/s. South India Coir Mills v. Additional Collector of Customs and Central Excise and another. AIR 1976 SC 1527, which was a case on Section 12 of the Foreign Exchange Regulation Act. 1947. which was in pari materia with Section 18 of the Foreign Exchange Regulation Act, 1973.

8. The expression "In connection with" occurring in Section 108 of the Act means "with reference to" or "in respect of. The expression ''in connection with smuggling of goods'' occurring in Section 108 of the Act does not mean that the officer of customs holding enquiry must necessarily form an opinion, as a condition precedent to holding of enquiry u/s 108 of the Act, that the goods in

question are smuggled goods. A reasonable suspicion in respect of ''smuggling'' may in a given case Justify enquiry u/s 108 of the Act and if the enquiry has been enunciated in good faith and it does not suffer from vice of malafide, the Court should be loath to interfere with the initiation of enquiry so long as there is some reasonable connection or nexus with the enquiry and smuggling. Jurisdiction of the Court under Article 226 of the Constitution of India is no doubt unlimited and plenary in nature but the Court in a matter like the one In hand must act with restraint and caution. In the fact situation of this case. Interference with the summons would not be in the furtherance of law and administration of justice. Interference at the threshold of issuance of summon may in appropriate cases be. called for if the officer initiating enquiry has no jurisdiction to enquire into the matter and not in a case where the authority is acting in good faith in discharge of its statutory duty. In the fact situation of the case stated earlier in this judgment, we are of the considered view that the present is not a case of enquiry being vitiated by malafide or by reason of lack of jurisdiction and sans any reasonable basis. The respondents cannot be prohibited from holding enquiry with a view to take steps In the matter u/s 113 read with Section 114 of the Act nor can they be directed to clear the bills and release the detained goods without completing the enquiry. Under the circumstances it would not be apt and proper to throttle the enquiry initiated u/s 108 of the Customs Act, 1962, at the very threshold of the issuance of summons. The petition is misconceived and is liable to be dismissed.

9. In the result the petition fails and is dismissed.

