(2010) 01 CAL CK 0005

Calcutta High Court

Case No: G.A. No.703 of 2009 and W.P. No. 54 of 2009

M/s. Sanghai Brothers	APPELLANT
Vs	
Union of India and Others	RESPONDENT

Date of Decision: Jan. 8, 2010

Acts Referred:

- Constitution of India, 1950 - Article 14, 19(1)(g), 226, 300A
- Customs Act, 1962 - Section 108, 11, 110, 110(1), 110(2)
- Foreign Trade (Development And Regulation) Amendment Act, 2010 - Section 3(3)

Hon'ble Judges: Soumitra Pal, J

Bench: Single Bench

Advocate: P.K. Dutta, Mr. N.K. Chowdhury and Mr. A. Chakraborty, for the Appellant; Somenath Bose and Mr. Shakeel Mohammed Akhter for Union of India, Mr. K.K. Maity for Respondent Nos. 2 to 6, for the Respondent

Final Decision: Allowed

Judgement

Soumotra Pal, J.

The petitioner a firm carrying on business of panmasala, kirana and jadibuti merchants and commission agents and distributors of kamala pasand and panmasala and also engaged in the business of betelnuts during May/June, 2008 had purchased betelnuts from M/s. Srikant Thander having as office at Ramkrishnapur, Little Andaman. The said betelnuts were transshipped from Hut Bay to the Kolkata Port. Therefrom, the goods were carried to the petitioner''s godown at Kashipur Road, Kolkata where they were lying stored in the meantime the petitioner started the process of selling the goods.

2. According to the petitioner on 17th July, 2008 some officers of the P and I Branch, Headquarters West Bengal, Kolkata, led by the Superintendent of Customs (Preventive) P and I Branch, Headquarters, West Bengal, respondent No.5 raided the said godown and found 445 bags of betelnuts. In spite of production of all relevant

documents regarding acquisition and possession of the goods, the respondent Nos. 5 and the Seizing Officer, Inspector of Customs (Preventive), Headquarters, P and I Branch, C.C.P., West Bengal, Kolkata, respondent No.6, issued a detention memo dated 17th July, 2008 u/s 110(1) of the Customs Act, 1962 (for short ''the Act''). Thereafter, summons u/s 108 of the Act was issued in the name of Raj Kumar Jain, a partner of the petitioner. In compliance thereof, the petitioner duly appeared. Statement was tendered regarding lawful purchase and procurement of the goods. Thereafter, by two written representations, dated 13th October, 2008 and 16th October, 2008, addressed to the Commissioner of Customs (Preventive) West Bengal, Kolkata and the Assistant Commissioner of Customs (Preventive and Intelligence), West Bengal, Kolkata, respondent Nos. 2 and 4 respectively, request was made for release of the goods which was not adhered to. Meanwhile on 8th December, 2008 an order was issued u/s 110 of the Act whereby the detained goods were seized by the respondent No.6. By a letter dated 10th December, 2008 a request was made to the respondent No.2 to provisionally release the goods in accordance with law. Since representations had no effect, a demand for justice dated 19th December, 2008 was sent to the Additional Commissioner of Customs, (Preventive) West Bengal, Kolkata. On 12th January, 2009 respondent No.4 issued a notice to the petitioner to show cause before respondent No.2 why the time limit for issuance of the show cause notice u/s 124 of the Act should not be extended by another sixty days u/s 110 (2) of the Act and whether the petitioner intended to be heard in person. On 13th January, 2009 the petitioner filed a reply to the said show cause notice opposing extension of time limit for issuance of show cause notice and a prayer was made for giving an opportunity of hearing on 15th January, 2009.

3. It has been stated that though on 15th January, 2009 the petitioner along with his learned advocate duly attended the office of the respondent No.2 in the morning for appearing at the personal hearing, however, the said respondent was not available. The petitioner was informed that as the respondent No.2 was busy with official work, on 15th January, 2009 it would not be possible to hold the hearing. It has been alleged that the petitioner''s effort to meet the respondent No.4 on 15th January, 2009 met with the same fate. Recording these facts and mentioning that the period of six months would be expiring on 16th January, 2009, a letter dated 15th January, 2009 was served on the authorities on the same day. Since neither an opportunity of hearing was granted within six months from 17th July, 2008 nor any order extending the time on the expiry of six months was passed and communicated to the petitioner, being aggrieved, on 22nd January, 2009 the writ petition was filed praying for release of the goods.

4. On 24th January, 2009 the petitioner received an envelope. Inside, the petitioner found a letter dated 16th January, 2009 issued by respondent No.5 communicating a decision referring to the show cause notice dated 12th January, 2009 that respondent No.2 had extended the time limit for issuance of the show cause notice by two months and that the final show cause notice would be issued very shortly

after completion of the investigation. It appeared that the intimation was posted on 22nd January, 2009. Since order was passed in violation of the fundamental rights guaranteed under Articles 14 and 19 (1)(g) and constitutional rights under article 300A of the Constitution of India, the petitioner filed a supplementary affidavit, affirmed on 24th January, 2009, to the writ petition incorporating the subsequent facts.

5. The writ petition was moved on 10th February, 2009 when following directions were issued:

"Let supplementary affidavit filed in Court today be kept on record.

Let affidavit-in-opposition to the writ petition as well as to the supplementary affidavit be filed by 27.2.2009. Reply, if any, be filed by 6.3.2009 Liberty to mention for hearing upon notice.

Since I find from the records produced before this Court that the customs authorities are ready to release the goods provisionally u/s 110A of the Customs Act, 1962 and since an application has already been made on 19.12.2008 for release of the goods, I direct the Additional Commissioner of Customs (Preventive) Calcutta, respondent no.3 to pass a reasoned order by 16.2.2009 which shall be communicated to the petitioner latest by 17.2.2009.

So far as release of the goods is concerned and the extension of time to show cause by two months, being Annexure P16 to the supplementary affidavit which has been contested by the petitioner, steps taken by the respondents shall abide by the result of the writ petition.

All points are kept open.

All parties concerned are to act on a signed xerox of this order on the usual undertakings."

6. Thereafter, respondent No.3 by order dated 16th February, 2009 rejected the application for provisional release of the goods on the ground that preliminary investigation was not complete. Aggrieved, appeal was filed. By an order dated 27th February, 2009 the Commissioner of Customs (Appeals) disposed of said appeal by directing the lower authority to provisionally release the goods within a period of 15 days after taking cash security with the full value of the bond. Thereafter, by letter dated 6th March, 2009 the petitioner intimated the respondent No.3 to fix the quantum of cash security in terms of the said order-in-appeal.

7. In the meantime, respondent No.4 issued a notice u/s 124 of the Act to the petitioner as to why the said goods should not be confiscated u/s 111 and why penalty should not be imposed on the firm and the partners u/s 112 of the Act. According to the petitioner though from a reading of the notice it would be evident that investigation by the Superintendent of Central Excise, Andaman & Nicobor

Islands was complete on 16th January, 2009, however, the respondents, withheld the goods wrongfully on the plea that the investigation was still pending. Since in spite of the order in appeal as the respondents were not releasing the goods provisionally and had not filed the affidavit in opposition, on 19th March, 2009 an application being G. A. No. 703 of 2009 was filed. Thereafter, the goods were released on 8th April, 2009 in terms of the order passed by the Commissioner of Customs (Appeals).

8. The gist of the argument of the petitioner was that since notices were sent to the firm by the respondents and thus its existence is not in dispute, the respondents cannot question the status of the petitioner firm which is registered. Had the respondents raised a dispute regarding status in its affidavit in opposition, the petitioner would have dealt with it in its affidavit in reply. Regarding the release of the goods it was submitted that since the detention memo dated 17th July, 2008 was in fact a seizure memo and as no notice was issued u/s 110(2) within 16th January, 2009, the respondents were statutorily bound to release the goods. Moreover, though the petitioner had replied to the notice dated 12th January, 2009 and had prayed for hearing as proposed by the respondents, however, the authorities by an order dated 16th January, 2009 had extended the time to issue show cause notice which had neither been communicated nor had been annexed to the affidavit in opposition. Since no hearing was granted no sufficient cause had been shown for such extension. Since the right to have the betelnuts restored to him had already accrued on the expiry of 16th January, 2009, it could not be defeated by an ante dated order of extension, if any. It was submitted that it is not unknown that subsequent facts are brought on record either by amending the writ petition or by filing supplementary affidavit during the pendency of the proceedings to assist the Court to come to a logical conclusion. In such circumstances the Writ Court being a Court of Equity, must consider each and every aspect brought before it to do complete justice to the litigant instead of going into the nicety of law. In short, technicalities should not come in the way of granting relief under Article 226.

9. The argument broadly on behalf of the customs authorities was as the writ petition had been moved by a partner of an unregistered firm, the petition is not maintainable. Submission was that the trade licence annexed to the writ petition neither revealed that the petitioner was engaged in the trading of betelnuts nor the godown was used for the storage of the same. Moreover, the number of bags containing betelnuts did not tally. Since these facts struck the officer, he had reasons to believe that the goods were liable for confiscation. Now, as the goods were liable to be seized, the petitioner cannot pray for absolute release. Since on 8th December, 2008 goods were seized and the time to issue show cause notice under the Act was yet to expire, issuance of show cause notice on 8th March, 2009 was just and proper. Submission was, under the Act, detention and seizure are different and cannot be at par. Further, there is no challenge to the order passed u/s 124. Besides, factual disputes cannot be decided in the writ jurisdiction.

10. Learned Advocates for the parties had relied on several judgments in support of their submissions which shall be dealt with appropriately.

11. The questions to be considered are (i) when the seizure of the goods took place on 17th July 2008 or on 8th December, 2008 and (ii) whether the order extending the issuance of show cause notice was in terms of section 110(2) of the Act.

12. In order to answer the first issue, it is necessary to refer to the relevant provisions of section 110 of the Act which are as under:

"Section 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.

.....

(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.

(Emphasis supplied)

13. Now in the light of the provisions let the "Detention Memo" dated 17th July, 2008 and the "Inventory of The Foreign Goods Seized" dated 8th December, 2008 be examined. The relevant portion of the "Detention Memo" is as under :

" Detention Memo

Order u/s 110 of the Customs Act, 1962

Whereas I have reasons to believe that the goods specified in the schedule below, which are now lying in your godown at 95/1K, Cossipore Road, Kolkata-700 002 are liable to confiscation under the customs Act,1962 and whereas it is not practicable now to seize such specified in the schedule below, I, therefore, in exercise of the power vested in me u/s 110(1) of the Customs Act,1962, do hereby, order that you, the owner/custodian of the said goods, shall not remove, part with or otherwise deal with the said goods without the prior permission of the appropriate Customs Authority.

Given under my hand and seal this 17th day of July, 2008.

Seal:

Dated : 17.7.08

Full Signature

Superintendent

Customs (Prev)

Schedule

SI. No.	Details of goods	Quantity	Value	Remarks
1.	Betel-nuts	445 Bags (35600Kg.)	Rs.1,78,0000/-	

(Emphasis supplied)

The relevant portion of the "Inventory of the Foreign Goods Seized" dated 8th December, 2008 is extracted hereunder:

"Inventory of the Foreign Goods Seized/Detained u/s 110 of the Customs Act, 1962

.....	Dtd: 08.12.2008
1. Name & Addressed of the owner:	M/s. SanghaiB orthers, 29, Mullick Street, Kolkata-7.
2. Date & Time of the Detention:	17.07.2008 at 16.00 hrs.
3. Place of the Seizure:	Godown 95/1 K, Cossipore Road, Kolkata
4. Place of Recovery:	Godown 95/1K, Cossipore Road, Kolkata

5. The owner in possession/control/custody of the foreign goods so seized failed to produce relevant document(s) in support of his illicit acquisition/carrying of the goods recovered.

6. It is a violation of section 3(3) of the Foreign Trade (Development and Regulation) Act, 1992 as amended, read with section 11 of the Customs Act, 1962 and hence seized the under mentioned foreign goods u/s 110 of the Customs Act, 1962 on the reasonable belief that the same has been smuggled and illicitly imported into India and are liable to confiscation u/s 110 (b) & 111(d) of the Customs Act, 1962.

.....

(Seizing Officer)

Inspector of Customs (Preventive)

Hdgrs.P&I Branch, C.C.(P) W.B. Kolkata."

(Emphasis supplied)

14. It is evident from the "Detention memo" dated 17th July, 2008 that as under the Act the goods were liable for confiscation and as it was not practicable to seize the goods, in exercise of the power vested u/s 110(1) , order of detention was issued. Thereafter, the "Inventory" dated 8th December, 2008 was furnished. In the said "Inventory" though in paragraph 2 it has been mentioned that the goods were detained on 17th July, 2008, that the goods were already seized is evident from the words "so seized" occurring in paragraph 5 of the said inventory. Besides the "Detention memo" dated 17th July, 2008 leaves no manner of doubt that the goods were indeed seized on the said date as power was exercised u/s 110(1) which postulates, that if the proper officer has "reason to believe" he "may seize such goods". Moreover, It is clear from the tenor of the "Detention order" that the proviso to the said sub-section was invoked as the petitioner was directed "not" to "remove, part with or otherwise deal with the said goods". In my view, since it was not practicable to seize the goods the said detention order was issued under proviso to section 110(1) in lieu of seizure, as correctly contended by the petitioner. Hence, it is clear from a combined reading of the "Detention Memo" and the "Inventory" or the "Detention Memo" itself that the seizure of the goods took place on 17th July, 2008 and not on 8th December, 2008 as contended by the respondents.

15. So far as the second issue is concerned it is evident that the notice to issue show cause dated 12th January, 2009 for extension of time limit for issuance of show cause notice u/s 124 of the Act was issued u/s 110(2) of the Act. The petitioner was called upon to show cause within three days and request was made as to whether he intended to be heard in person before the Commissioner on or before 15th January, 2009. In the said notice it was categorically mentioned that if no cause was shown or if the petitioner failed to appear on the appointed day, order would be passed ex parte. The petitioner by letter dated 13th January, 2009 replied in writing

and request was made for personal hearing on 15th January, 2009 before any order was passed. I find from letter dated 15th January, 2009 that the petitioner appeared and tried to meet the Commissioner who was not available in the office. He then tried to meet the show cause issuance authority but as the officer was also not available, hearing could not be done. Thereafter, the petitioner was issued with the intimation dated 16th January, 2009 which is as under:

"To 16.1.09

M/s Sanghai Brothers,

25, Mullick Street,

Kolkata-07

Sir,

Sub : Extension of time limit for issuance of Show Cause Notice, Cor-Reg:

Please refer to this office letter of even number 73 dated 12.01.09 on the subject matter. The Commissioner of Customs, C.C.(P), W.B., Kolkata is pleased to extend the time limit for issuance of SCN for next two months. The final Show Cause Notice will be issued very shortly, after completion of the follow-up investigation, pending at Superintendent of C. Excise, Andaman & Nicobar Division end.

This is for your kind information.

Yours faithfully,

.....

Superintendent of Customs

Hqr. P&I Br.,CC(P),WB, Kolkata"

16. It is evident from the records that the envelope containing the intimation was posted on 22nd January, 2009 and according to the petitioner, it was received on 24th January, 2009. It is clear that though section 110(2) proviso postulates that on "sufficient cause" being shown the period of six months for issuance of show cause notice may be extended by the Commissioner for a period not exceeding six months, however, in the instant case no sufficient cause has been shown to warrant such extension since neither any order showing cause was appended to the intimation dated 16th January, 2009 nor any order has been annexed to the affidavit filed by the respondents. The intimation dated 16th January, 2009 demonstrates that extension was granted in a routine and mechanical manner and there is absolute lack of sufficient cause since there was no determination on the materials before him. Therefore, the logical conclusion would be such extension is bereft of sufficient cause and no order is in existence at all. It is strange that though the petitioner had given a written reply to the notice dated 12th January, 2009 neither it

finds mention in the intimation dated 16th January, 2009, nor is there any answer why hearing could not be granted. The entire action speaks of the arbitrary, highhanded, illegal act on the part of Superintendent of Customs (Prev), the respondent No.6. During hearing an argument was sought to be advanced on behalf of the respondent that since the goods were seized on 8th December, 2008 and not on 17th July, 2008 the time limit had not expired. Though the said issue has been addressed in the preceding paragraph, it cannot be lost sight of that as the period of six months was expiring on 16th January, 2009, the respondents had issued the letter dated 12th January, 2009 keeping in mind that the seizure took place on 17th July, 2008. The law in this regard is well settled in Assistant Collector of Customs and Superintendent, Preventive Service Customs, Calcutta and others v. Charan Das Malhotra reported in 1983 E.L.T. 1477(S.C.) wherein the Supreme Court, while considering the proviso to sections 110(2) and 124 of the Act in a matter where admittedly extension orders were passed ex parte and without any opportunity being heard, held as under:

.....The power of seizure founded on a mere reasonable belief being obviously an extraordinary power, the second sub-section envisages completion of the enquiry within a period of six months from the date of seizure. But it provides that if such an enquiry is not completed within that period and a notice u/s 124(a) is, therefore, not given, the person from whom the goods are seized becomes entitled to their restoration. However, on the supposition that in some cases such an investigation may not be completed owing to some difficulties, the legislature gave under the proviso power to the Collector an officer superior in rank and also an appellate authority u/s 128, to extend the time on two conditions, namely, (1) it does not exceed one year, and (2) on sufficient cause being shown (Paragraph 11). It was further held that "There can be no doubt that the proviso to the second sub-section of section 110 contemplates some sort of inquiry. The Collector, obviously, is expected not to pass extension orders mechanically or as a matter of routine but only on being satisfied that there exist facts which indicate that the investigation could not be completed for bona fide reasons within the time laid down in section 110(2) , and that therefore, extension of that period has become necessary." (paragraph 12)

17. The judgment in Assistant Collector of Customs v. Charan Das Malhotra (supra) came up for consideration in I.J. Rao, Asstt. Collector of Customs and Another Vs. Bibhuti Bhushan Bagh and Another, wherein it has been held "If the notice is not issued in the confiscation proceedings within six months from the date of seizure the person from whose possession the goods have been seized becomes immediately entitled to the return of goods." (paragraph 13) Both the judgments of the Supreme Court were considered in Harbans Lal Vs. Collector or Central Excise and Customs, Chandigarh, . Therefore, the law is well settled that notice is to be issued within six months from the date of seizure and the person from whom the goods were seized is entitled to be heard failing which he is entitled to the return of

the goods. The judgment in Lokenath Tolaram, etc. Vs. B.N. Rangwani and Others, relied on by the respondents is not applicable to the facts of the instant case since it is evident from paragraphs 9 and 10 of the said judgement that there was a "special agreement between the appellant and the excise authorities during the pendency of the writ petition in the High Court" and "the appellants took out several notices of motion and obtained various interlocutory orders by consent of parties". The principles of law in Gian Chand & Ors. v. State of Punjab, reported in 1983 ELT 1365(SC) relied on behalf of the respondents are not applicable to the facts of the case as Supreme Court had considered "seizure" u/s 178 of the Sea Customs Act, 1978 and not detention. Therefore, with respect I disagree with the judgment in Pro Musicals Vs. The Joint Commissioner of Customs (Preventive), Marine and Preventive Wing, The Commissioner of Customs, (Marine - Preventive) and The Commissioner of Customs (Air), which while considering Gian Chand (supra) had made a distinction between detention and seizure.

18. During hearing, a point was raised by the petitioner whether the respondents could urge issues raised in the petition which have gone uncontroverted in the affidavit in opposition filed by the respondents. The law as laid down by the Supreme Court in Smt. Naseem Bano Vs. State of U.P. and others, is that if the averments are not controverted, as has happened in this case, High Court should proceed on the basis of said averments which are admitted by the respondents.

19. Before I proceed further a mention must be made about the affidavit-in-opposition filed by the respondents. Though at the outset it has been stated therein "Affidavit-in-opposition on behalf of the respondent Nos. 2 to 6", it is evident from paragraph 1 of the said opposition it is an affidavit "on behalf of the respondent no.2". Therefore, there is no affidavit on behalf of the respondent Nos. 1 and 3 to 6 though opportunity was granted to all the respondents for filing the same. Perusing the affidavit-in-opposition I find that the writ petition as well as the supplementary affidavit has been dealt with in a manner which leaves much to be desired as I find the respondents are not very serious in dealing with the matter as the issue has been dealt with casually. That the issue has been dealt perfunctorily is evident from the fact that though the goods were released pursuant to the order in appeal passed by the customs authorities, in paragraph 3 sub-paragraph (iv) an impression has been given that it was released pursuant to the observations of the High Court in its order dated 10th February, 2009.

20. Now so far as the maintainability of the writ petition is concerned since I find that notices were issued to M/s. Sanghai Brothers, the petitioner firm and the respondents in their affidavit have not questioned regarding its status, the authorities are estopped from raising the point of maintainability. I accept the submission of the petitioner that had the status of the firm been questioned in the affidavit-in-opposition, the respondents would have demonstrated in reply that it was indeed registered. It is to be noted, that a registered firm itself is competent to

move a writ petition in view of the judgment in Chunilal Damani v. Collector of Customs and Central Excise, West Bengal, reported in 2000 (126) E.L.T. 357 (Cal.).

21. With regard to the question whether facts subsequent to the filing of writ petition can be considered, in view of the judgment in Ghisulal Tailor Vs. Union of India (UOI) and Others, , in my view, since Writ Court is a Court of Equity it should consider the entire aspect for the ends of justice. In this regard it is appropriate to refer to the judgment of the Apex Court in Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others, wherein it has been held "The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied." (paragraph 19) "The Supreme Court further held "Mandamus is a very wide remedy which must be easily available `to reach injustice wherever it is found'' technicalities should not come in the way of granting that relief under Article 226" (paragraph 21). Hence, as there was utter failure on the part of the respondent No.5 in carrying out the duty cast on him u/s 110(2), relief cannot be denied. Therefore, since neither sufficient cause has been shown for further detention of goods, nor is there valid order extending the time for issuing the show cause notice, the seizure of goods effected on 17th July, 2008 cannot be sustained and is, thus, set aside and quashed. Since goods have been returned pursuant to the order in appeal after the petitioner had furnished the bank guarantee and bond and as I have held that the extension was de hors the provisions of law, the respondents including the respondent Nos. 2 to 5 are directed to return the bank guarantee as well as the bond within a fortnight from the date of presenting the certified copy of this order. The writ petition is, thus, allowed. However, I make it clear that this order shall not prevent the customs authorities from proceeding with the adjudication in any manner whatsoever.

22. No order as to costs.

Urgent photostat certified copy of this judgment and order, if applied for, be given to the appearing parties on priority basis.