

(2012) 09 CAL CK 0023

Calcutta High Court

Case No: W. P. No. 641 of 2012

Shahid Ali

APPELLANT

Vs

Commissioner of Customs,
Airport and Administration and
Others

RESPONDENT

Date of Decision: Sept. 25, 2012

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 102, 104, 165, 439
- Customs Act, 1962 - Section 10, 104, 113, 113(h), 114
- Income Tax Act, 1961 - Section 131, 131(3)
- Passports Act, 1967 - Section 10

Citation: (2013) 19 GSTR 511

Hon'ble Judges: Indira Banerjee, J

Bench: Single Bench

Advocate: Arijit Chakraborti, for the Appellant; Shampa Sarkar, for the Respondent

Judgement

Indira Banerjee, J.

This writ application is directed against the alleged action of the respondent-customs authorities in withholding of passport No. H4493554 belonging to the petitioner. According to the petitioner, on December 31, 2009 when the petitioner was traveling to Dhaka from Kolkata by Air India Flight No. IX-912 through the Netaji Subhas Chandra Bose International Airport, Kolkata, he came across one, Shri Debnath, resident of Habra, 24 Parganas (North), who was also traveling to Dhaka and was known to the petitioner by face.

2. It is alleged that the said Shri Debnath requested the petitioner to allow him to use the free baggage weight limit available to the petitioner under the Rules of the airlines, by carrying baggage on his behalf.

3. The petitioner stuck his neck out to oblige a person whom, as per his own statement he knew only by face. Be that as it may, the petitioner was informed by the airlines security staff that his baggage had not properly been screened. On further screening, it was found that there were small bottles containing vaccines and injections in the baggage carried by the petitioner.

4. The briefcase which was admittedly being carried by the petitioner was sealed and detained by the customs officers of the Air Intelligence Unit, Netaji Subhas Chandra Bose International Airport, Kolkata, under DR Memo No. 195/09 AIU, dated December 31, 2009. A statement of the petitioner was recorded on January 1, 2010. On the same day, that is on January 1, 2010, the goods in the detained briefcase were inventoried and valued at Rs. 7,00,692.30.

5. The petitioner was arrested u/s 104 of the Customs Act, 1962 on the allegation that the seized goods were liable for confiscation u/s 113 of the Customs Act, 1962 and the petitioner was liable for prosecution under the provisions of the said Act.

6. On January 2, 2010, the petitioner was produced before the learned Chief Judicial Magistrate, 24 Parganas (North). The petitioner was remanded to jail custody u/s 104 of the Customs Act, 1962. On January 16, 2010 also, the prayer of the petitioner for bail was rejected by the said learned Chief Judicial Magistrate.

7. The petitioner again applied for bail before the learned sessions judge, 24 Parganas (North), Barasat, u/s 439 of the Criminal Procedure Code and was enlarged on bail on the terms and conditions specified in the order of the learned sessions judge.

8. On June 29, 2010 a show-cause notice being F. No. S1[VII]-18/19/AIU was issued alleging that the seized goods were liable for confiscation u/s 113(h) of the Customs Act, 1962 and the petitioner was liable to penalty u/s 114. According to the petitioner, the petitioner replied to the said show-cause notice by a letter dated August 3, 2010. However, the proceedings against the petitioner are yet to be concluded.

9. On August 31, 2010, the petitioner made a prayer for release of his passport which, according to the petitioner, has been withheld by the respondent-customs authorities. It appears that in spite of repeated requests and reminders, the passport has not been returned to the petitioner.

10. There is no provision under the Customs Act, 1962 under which customs authorities can withhold a passport. Passports are governed by the Passports Act, 1967. Under the provisions of the Passports Act, 1967, the passport authorities might impound a passport or cause a passport to be impounded or revoked, if proceedings in respect of an offence alleged to have been committed by the holder of the passport are pending before a criminal court of India. It, however, appears that the passport authorities have not yet initiated any action for impounding or

revocation of the passport of the petitioner.

11. In [Suresh Nanda Vs. C.B.I.](#), cited by Mr. Chakraborti, the Supreme Court held as follows:

7. Sub-section (3)(e) of section 10 of the Act provides for impounding of a passport if proceedings in respect of an offence alleged to have been committed by the holder of the passport or travel document are pending before a criminal court in India. Thus, the passport authority has the power to impound the passport under the Act. Section 102 of the Criminal Procedure Code gives powers to the police officer to seize any property which may be alleged or suspected to have been stolen or which may be found under circumstances which create suspicion of the commission of any offence.

8. Sub-section (5) of section 165 of the Criminal Procedure Code provides that the copies of record made under sub-section (1) or subsection (3) shall forthwith be sent to the nearest magistrate empowered to take cognisance of the offence whereas section 104 of the Criminal Procedure Code authorises the court to impound any document or thing produced before it under the Code. Section 165 of the Criminal Procedure Code does not speak about the passport which has been searched and seized as in the present case. It does not speak about the documents found in search, but copies of the records prepared under sub-section (1) and sub-section (3).

9. "Impound" means to keep in custody of the law. There must be some distinct action which will show that documents or things have been impounded. According to Oxford Dictionary "impound" means to take legal or formal possession. In the present case, the passport of the appellant is in possession of CBI right from the date it has been seized by the CBI. When we read section 104 of the Criminal Procedure Code and section 10 of the Act together, under the Criminal Procedure Code, the court is empowered to impound any document or thing produced before it whereas the Act speaks specifically of impounding of the passport.

10. Thus, the Act is a special Act relating to a matter of passport, whereas section 104 of the Criminal Procedure Code authorises the court to impound document or thing produced before it. Where there is a special Act dealing with specific subject, resort should be had to that Act instead of general Act providing for the matter connected with the specific Act. As the Passports Act is a special Act, the rule that "general provision should yield to the specific provision" is to be applied. See [Damji Valji Shah and Another Vs. Life Insurance Corporation of India and Others](#), [Gobind Sugar Mills Ltd. Vs. State of Bihar and Others](#), and [The Belsund Sugar Co. Ltd. Vs. The State of Bihar and Others Etc.](#),

11. The Act being a specific Act whereas section 104 of the Criminal Procedure Code is a general provision for impounding any document or thing, it shall prevail over that section in the Criminal Procedure Code as regards the passport. Thus, by necessary implication, the power of court to impound any document or thing

produced before it would exclude passport.

12. The Supreme Court, in effect, held that the Central Bureau of Investigation could not retain possession of a passport. The Supreme Court further opined even the court could not impound a passport u/s 104 of the Criminal Procedure Code. In the aforesaid case, the Supreme Court directed the respondents to hand over the passport to the appellant, Suresh Nanda, but at the same time directed that it would be open to the respondents to approach the passport authorities u/s 10 of the Passports Act, 1967 for impounding the passport of the appellant in accordance with law. In [Avinash Bhosale Vs. Union of India \(UOI\) Directorate of Revenue Intelligence, Mumbai Zonal Unit-13, Enforcement Directorate and State of Maharashtra](#), a Division Bench of the Bombay High Court held the following (page 388 of 322 ITR):

In [Suresh Nanda Vs. C.B.I.](#), while interpreting section 104 of the Criminal Procedure Code, which expressly deals with power to impound documents by the court, the apex court has held that the phrase "impound any document or thing" does not include a passport. After considering the relevant provisions in relation to search and seizure, the apex court has recorded a clear finding that the term "document" would not include a passport. What is to be borne in mind is that the apex court was dealing with power of a court to impound a document and, in that context, held that "document" does not include a passport. Section 131 of the income tax Act vests power in regard to search and seizure in the authorities under the income tax Act. The authority has been vested with power to seize documents. While interpreting section 104 of the Criminal Procedure Code, which categorically deals with power of the court to impound documents, it is held that document does not include a passport. If by an interpretative process the apex court has held that even a court cannot impound a passport, then, it would be highly inappropriate to interpret the term "documents" used in section 131(3) of the income tax Act, so as to enable the executive authorities to impound the passport. It is also to be borne in mind that power to seize cannot be equated with power to impound. Impounding tantamounts the retention over a period of time after seizure is made. Thus, it is, not possible to hold that power of seizure u/s 131(3) of the income tax Act could be extended to validate impounding of passport.

In view of the clear pronouncement by the Supreme Court holding the Passports Act to be a complete code in dealing with impounding of the passport we have no iota of doubt that the respondent's act of impounding of the petitioner's passport is without authority of law. In the result we cannot accept the submission made on behalf of the learned Solicitor General that impounding of the passport could be made by having recourse to general provision under the income tax Act, regulating the seizure of documents. The writ petition, therefore, must succeed. In view of the clear pronouncement by the Supreme Court in the case of Suresh Nanda (2008) 2 SCC (Cri) 121, we do not propose to deal with the High Court judgments, relied upon

by the learned Solicitor General.

13. This court has no option but to hold that the customs authorities have no power, authority and/or jurisdiction to retain the passport of the petitioner. The passport of the petitioner shall be returned within 30 days from the date of communication of this order. It will, however, be open to the customs authorities to approach the passport authorities for necessary action u/s 10 of the Passports Act, 1967, in accordance with law, if it so deems fit and proper.

14. There can be no doubt that the petitioner will have to comply with the conditions in which bail has been granted including the condition, if any, not to leave the local area or not to leave the country without leave of the court.

15. The writ application is disposed of. Urgent certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.