**(2001) 12 CAL CK 0005**

**Calcutta High Court**

**Case No:** Writ Petition No. 928 of 2001

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| Rohit Kumar | | APPELLANT |
| | Vs | |
| Union of India (UOI) | | RESPONDENT |

**Date of Decision:** Dec. 21, 2001

**Acts Referred:**

- Customs Act, 1962 - Section 110(3), 75, 75(1)
- Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 - Rule 13, 16A
- Foreign Exchange Management (Export of Goods and Services) Regulations, 2000 - Regulation 3(1)

**Citation:** (2002) 82 ECC 750 : (2002) 141 ELT 27

**Hon'ble Judges:** Kalyan Jyoti Sengupta, J

**Bench:** Single Bench

**Advocate:** Pratap Chatterjee and Chowdhury and Banerjee, for the Appellant; Roychowdhury and Bhaskar Sen, Senior Advs., for the Respondent

**Judgement**

Kalyan Jyoti Sengupta, J.
This writ petition is directed against alleged inaction of the respondents for not releasing drawback to the petitioner against the shipping bills in respect of export of the goods allegedly made during the period December, 2000 and January, 2001 and also for recalling and/or cancelling and/or withdrawing direction and/or order for seizure of the bank account of the petitioner with United Bank of India, Calcutta Main Branch.

2. Briefly stated fact of the case in the writ petition amongst other is that the petitioner pursuant to the various contracts from the overseas parties exported various items of materials, viz., Auto Gaskets, Tee-Shirts, Harness Reins, Bridle, Ball Point Pen and Refills during the period between December, 2000 and January, 2001. The factum of export is evidenced by the shipping bills annexed to the writ petition being Annexure "P-1". Immediate after export as above the petitioner applied for drawback under the Drawback Scheme framed by the respondent authority. According to the petitioner he

became entitled to receive an aggregate sum of Rs. 1,19,14,858.25 from the respondents on account of drawback. The said exports were permitted to be made by the Customs authorities after they were satisfied with the particulars of the goods conforming to the description mentioned in the shipping bills. In spite of submission as above the respondent authorities, however, did not process or proceed with the application for release of drawback and the same has been illegally and wrongfully withheld from payment. Over and above without any informed reason the respondent authorities have seized the bank account of the petitioner maintained for this purpose with United Bank of India in its Calcutta Main Branch.

3. Mr. Pratap Chatterjee, learned Senior Advocate appearing with Mr. Banerjee learned Senior Advocate and Mr. Chowdhury learned Advocate for the petitioner submits that under the Customs Act, 1962 (hereinafter referred to as the said Act) the respondent authority has no power either expressly or otherwise to attach or seize the bank account. He contends that it can only be done in certain circumstances for recovery of Government dues from the defaulters under certain conditions of Customs (Attachment of Property of Defaulters for Recovery of Government Dues) Rules, 1995. He also submits that the bank account can only be attached u/s 142 of the said Act which contemplates for recovery of sums due. At present admittedly there is no dues recoverable from the petitioner. He contends that neither of the aforesaid two provisions is applicable in this case.

4. He submits that even Rule 16 of the Customs and Central Excise Duties Drawback Rules, 1995 (hereinafter referred to as the said Drawback Rules) does not empower to realize or refund without any adjudication of the drawback amount being refundable followed by demand. For this purpose recovery proceeding has to be initiated u/s 142(1)of the said Act read with Rule 16 of the said Drawback Rules. Under the provision of Rule 16A of the said Drawback Rules the amount can be recovered only when intimation from Reserve Bank of India would be received about non-receipt of export proceeds. No notice has been issued by the Customs authorities under Rule 16A(2) of the said Drawback Rules. He contends further that under the provision of the Customs Act or the Rules framed thereunder drawback cannot be withheld on the plea of non-receipt of export proceeds.

5. On the question of seizure of the bank account in relation to the subsequent consignment he relies on a decision of this Court of the learned Single Judge reported in G.R. Magnets Ltd. Vs. Dy. Dir., Directorate of Revenue Intelligence, and also another decision reported in 1999 (81) ECR 90 and submits this seizure is not permissible under law. Therefore, he submits that the order and/or direction for seizure of the bank account should be set aside and cancelled and the respondent authorities should be directed to release drawbacks which are legitimately due and payable to the petitioner.

6. In the affidavit-in-opposition it is the case of the department that the petitioner has made bogus export and there was no receipt of the export proceeds from the alleged overseas customer. In some cases during the period of December, 2000 and January,

2001 the department concerned bona fide released drawbacks on submission of the documents submitted by the petitioner and an amount of drawback approximately to the extent of Rs. 39 lacs has been transferred to the bank account of the petitioner opened for this specific purpose with United Bank of India in its Calcutta Main Branch. On subsequent attempt for export it was found that the petitioner grossly misdeclared the goods as to its value and quantity. Therefore, investigation has been started. While it being done so, it was found that there was no export at all so to say.

7. At the time of hearing of this application the respondent authorities could not produce any document of non-receipt of export proceeds and after hearing was over and the matter was kept pending for delivery of judgment an application has been made for adducing additional documents which purport to establish that there was no export at all. In the application filed by the respondents herein as above the bank account of the Forex Bank as well as a letter of this Bank have been annexed. The HDFC Bank is the notified Forex Bank under relevant regulation and by a letter dated 10th August, 2001 the said Bank has intimated to the Customs authority that they had not received any credit from Overseas/Foreign Bank by way of Foreign Exchange nor it had handled any export documents for the petitioner during December, 2000 to January, 2001.

8. It was found by the Court that the said documents are relevant for deciding this matter once for all. So, the application together with the documents is allowed to be filed. Accordingly an opportunity was given to the writ petitioner to file an affidavit to the said application. An affidavit in reply was also filed by the department.

9. Mr. Roychowdhury, learned Senior Advocate led by Mr. Bhaskar Sen, learned Senior Advocate while opposing the writ petition submits that fraud has been practised while filing an application claiming drawback. By means of fraudulent and bogus export a sum of Rs. 20,30,247/- has been realized from the department between December, 2000 to April, 2001. Upon enquiry it was detected that there was no export at all. Moreover, it was found that for the subsequent purported export the goods were misdeclared as to its value, quality and quantity. He submits that necessary notices and summons were issued for investigation and interrogation of the writ petitioner who could not be traced at all.

10. His further contention is that the department has got power and/or jurisdiction u/s 110(3) of the said Act to seize documents and things which in the opinion of the proper officer will be useful for or relevant to any proceeding under the Act. He submits that there cannot be any dispute that the money lying in the said bank is connected therewith will be relevant and useful for the investigation, and adjudication in respect of the said purported past export. He also submits that the word "things" has been defined in Black"s Law Dictionary in its 5th Edition which provides as follows :-

"Things - "The objects of dominion or properly as contradistinguished from person". The object of a right i.e. whatever is treated by the law as the object over which one person exercises a right, and with reference to which another person lies under a duty.

Things are distributed in three kinds : (1) Things real or immovable, comprehending lands, tenements, and hereditaments; (2) things personal or movable, comprehending goods and chattels; and (3) things mixed, partaking of the characteristics of the two former, as a title-deed, a term for years."

Therefore, according to him the said bank account comes within the word "things".

11. He contends further that the money lying in the bank is not the property of the petitioner but of the department. He contends that principle of law has been well settled to the effect that the authorities have right and jurisdiction to reopen a case where, though export apparently has been made, if it appears that the declaration made in respect of such export goods is in any way incorrect, untrue or false. In support of his contention he has relied on decisions reported in Euresian Equipments and Chemicals Ltd. and Others Vs. The Collector of Customs and Others, , South India Coir Mills, Poockakkal Vs. The Additional Collector of Customs and Central Excise and Another, and Madras Fertilizers Ltd. Vs. Assistant Collector of Central Excise, Madras V Division, Madras and Others, .

12. Mr. Roychowdhury has also relied on various orders of this Court relating to seizure of the bank account passed at the interlocutory stage.

13. Having heard the respective contention of the learned Advocates, it appears to me that two points primarily are required to be considered to decide this matter, viz., (1) whether the Customs authorities have the right to write letter or send communication to the petitioner''s Banks directing them not to allow the petitioner to operate his bank account and (2) whether the customs authorities have a right to withhold payment of drawback merely on suspicion that in the matter of separate export, the petitioner might have committed irregularity.

14. Because of additional materials being produced before this Court, the task has become relatively easier to decide the aforesaid points for academic interest at least. I shall take up the first point in order to decide this matter in the context of the facts and circumstances of this case not in general.

15. It has to be examined first under what circumstances an exporter is entitled to drawback. u/s 75 of the said Act the exporter is entitled to drawback in case of the goods which have been entered for export and in respect of which an order permitting the clearance and loading thereof for exportation has been made u/s 51 by the proper officer, or being goods entered for export by post u/s 82 and in respect of which an order permitting clearance for exportation has been made by the proper officer drawback is ordinarily allowable under the law. However, procedure for making application and allowance of drawback has been provided in the said Drawback Rules. The method for application has been provided in Rule 13 of the said Drawback Rules which is reproduced here-under :

"13. Manner and time for claiming drawback on goods exported other than by post. - (1) Triplicate copy of the Shipping Bill for export of goods under a claim for drawback shall be deemed to be a claim for drawback filed on the date on which the proper officer or Customs makes an order permitting clearance and loading of goods for exportation u/s 51 and said claim for drawback shall be retained by the proper officer making such order.

(2) The said claim for drawback should be accompanied by the following documents, namely :-

(i) copy of export contract or letter of credit, as the case may be,

(ii) copy of Packing list,

(iii) copy of AR-4 Form, wherever applicable,

(iv) insurance certificate, wherever necessary, and

(v) copy of communication regarding rate of drawback where the drawback claim is for a rate determined by the Central Government under Rule 6 or Rule 7 of these rules.

(3) (a) If the said claim for drawback is incomplete in any material particulars or is without the documents specified in Sub-rule (2), shall be returned to the claimant with a deficiency memo in the form prescribed by the Commissioner of Customs within 10 days and shall be deemed not to have been filed for the purpose of Section 75A.

(b) where the exporter re-submits the claim for drawback after complying with the requirements specified in the deficiency memo, the same will be treated as a claim filed under Sub-rule (1) for the purpose of Section 75A.

(4) For computing the period of two months prescribed u/s 75A for payment of drawback to the claimant, the time taken in testing of the export goods, not more than one month, shall be excluded."

16. It will appear from the aforesaid Rule 13 of the said Drawback Rules that there, are various relevant documents which are required to be filed with such application for drawback and the same are required to be examined by the proper officer of the Customs. In the writ petition I do not find any document excepting shipping bills. No copy of the Letter of Credit nor export contract has been annexed, though admittedly in some cases drawbacks have been allowed. It is not known to me as to how the drawback was allowed. However, it was for the department to scrutinize the same.

17. Under Regulation 3(1) of the Foreign Exchange Management (Export of Goods and Services) Regulation, 2000 a declaration is mandatory on part of the exporter of the Forex Bank through whom export proceeds in foreign currency is to be realized. The writ petitioner declared HDFC Bank Limited having its office at Hindustan Times House, 18-20

K.G. Marg, New Delhi is the notified Forex Bank. The department had also issued necessary Import-Export Code Certificate to the petitioner. It appears from the letter dated 10th August, 2001 that the aforesaid notified Bank has unequivocally stated that it has not handled any export document nor has realized any export proceeds in respect of the petitioner''s Code. Therefore, admitted position is that the export proceeds have not been realized by the petitioner as yet. Under these circumstances, in my view, though the petitioner has been able to collect drawback in respect of the certain alleged export and the same has been kept in the aforesaid bank account but the said amount cannot be said to be belonged to the petitioner and this position under the law will be clear from the second proviso of Sub-section (1) of Section 75 of the said Act which provides as follows :-

''. . . . .

. . . . .Provided further that where any drawback has been allowed on any goods under this sub-section and the sale proceeds in respect of such goods are not received by or on behalf of the exporter in India within the time allowed under the Foreign Exchange Regulation Act, 1973 (46 of 1973), such drawback shall be deemed never to have been allowed and the Central Government may, by rules made under Sub-section (2), specify the procedure for the recovery or adjustment of the amount of such drawback.''

18. Under the Foreign Exchange Regulation Act, 1973 the time is ordinarily granted for a period of six months to recover sale proceeds, of course the same may be extended on application of the concerned Forex Bank. Nothing has been produced before me that any extension has been granted. So, it is unlikely that the export proceeds can be received in respect of the alleged export for which drawback has already been allowed. In fact, in the affidavit-in-opposition of the writ petitioner filed against subsequent application it has been admitted that sale proceeds have not been received. Therefore, under the friction of law drawback has never been allowed, in other words, the drawback should not have been allowed. Therefore, the money which has been received earlier by the writ petitioner is now found to have been paid by the department by mistake as if the same ought not to have been paid at all. The said amount, in my view, belongs to the department concerned. The writ petitioner has no proprietary interest in the money which is lying in the said bank account. But then this money has to be realized and/or recovered from the petitioner in accordance with the rules if not paid by the writ petitioner of its own and such procedural method is explicitly provided in Rule 16A of the said Drawback Rules which provides as follows :-

''16A. Recovery of amount of Drawback where export proceeds not realized. - (1) Where an amount of drawback has been paid to an exporter or a person authorized by him (hereinafter referred to as the claimant) but the sale proceeds in respect of such export goods have not been realized by or on behalf of the exporter in India within the period allowed under the Foreign Exchange Regulation Act, 1973 (46 of 1973), including any extension of such period, such drawback shall be recovered in the manner specified

below.

(2) On receipt of relevant information from the Reserve Bank of India, the Assistant Commissioner of Customs or Deputy Commissioner of Customs shall cause notice to be issued to the exporter for production of evidence of realization of export proceeds within a period of thirty days from the date of receipt of such notice and where the exporter does not produce such evidence within the said period of thirty days, the Assistant Commissioner or Customs or Deputy Commissioner of Customs shall pass an order to recover the amount of drawback paid to the claimant and the exporter shall repay the amount so demanded within sixty days of the receipt of the said order :

Provided that where a part of the sale proceeds has been realised, the amount of drawback to be recovered shall be the amount equal to that portion of the amount of drawback paid which bears the same proportion as the portion of the sale proceeds not realized bears to the total amount of sale proceeds.

(3) Where the exporter fails to repay the amount under Sub-rule (2) within said period of sixty days referred to in Sub-rule (2), it shall be recovered in the manner laid down in Rule 16.

(4) Where the sale proceeds are realized by the exporter after the amount of drawback has been recovered from him under Sub-rule (2) or Sub-rule (3) and the exporter produces evidence about such realization within one year from the date of such recovery of the amount of drawback, the amount of drawback so recovered shall be repaid by the Assistant Commissioner of Customs or Deputy Commissioner of Customs to the claimant."

19. I accept the argument of Mr. Chatterjee that ordinarily the bank account and the credit balance in respect thereof admittedly belongs to the account holder cannot be attached and/or seized without due process of law. I also accept the argument of Mr. Chatterjee that such seizure and/or attachment can only be levied after the department will come to the findings that certain amount is recoverable from a particular person or persons as provided under the Customs (Attachment of Property of Defaulters for Recovery of Government Dues) Rules, 1995. If it is done the same tantamount to an act of without jurisdiction. But in this case I cannot apply the aforesaid principle of law or the argument of Mr. Chatterjee for the simple reason that the money lying in the said account does not belong to the writ petitioner. So, question of attachment of his money does not and cannot arise. It is a lawful Act on part of the department concerned to protect its own property and/or money which is discovered to have been handed over to and collected by the petitioner wrongfully and the same is required to be recovered in accordance with law.

20. Therefore, I accept the argument of Mr. Roychowdhury and Mr. Sen that the meaning and connotation of the word "things" as defined in Black"s Law Dictionary in its 5th Edition includes the money which is lying in the aforesaid bank account. The power of

seizure of documents and things has been provided in Section 110(3) of the said Act. In the event the aforesaid amount which is lying in the said bank account is not refunded then the same has to be realized under the provision of Rule 16A of the said Drawback Rules read with second proviso of Sub-section (1) of Section 75 of the said Act. The power of seizure u/s 110 of the said Act has been provided in respect of any proceeding under this Act. Sub-section (3) of Section 110 of the Customs Act is clear on this aspect which I reproduce here-under :

"110(3). The proper officer may seize any documents or things which, in his opinion, will be useful for, or relevant to, any proceeding under this Act."

21. In order to draw up a proceeding under second proviso of Subsection (1) of Section 75of the said Act and Rule 16A of the said Drawback Rules a recovery proceeding has to be drawn up for the aforesaid amount in the event the said amount is not refunded. Therefore, it has to be established by the department concerned amongst other that (i) the drawback has been allowed, (ii) the amount has been disbursed and transferred in the account of the petitioner and (iii) the sale proceeds have not been received by the petitioner and/or any person on its behalf from the overseas customers within six months and/or within the extended time. Therefore, the aforesaid money shall be deemed to be "things" which is tangible one. So, I do not find any illegality and invalidity for seizure of the aforesaid bank account to the extent of the amount of the drawback already realized and sale proceeds in respect thereof has not been collected.

22. The decisions cited by Mr. Roychowdhury on the point of reopening of the exports already made may not be relevant for this issue and it may be relevant for some other issues viz., whether the exports have been really made or not. I refrain from making any comment or accepting the principle laid down by the decisions cited by Mr. Roychowdhury for this matter. Therefore, I answer the first point as formulated by me in the affirmative.

23. As far as the second point is concerned, I am of the view that the Customs authorities have no right to sit on the application for payment of the drawback. If the petitioner fulfils all conditions while making an application in accordance with the procedure laid down in the said Drawback Rules the respondent authority is bound to consider and dispose of such application. Each and every transaction has to be dealt with on its own merit in the case of drawback, separately. u/s 75 of the said Act read with the said Drawback Rules there is no power and/or jurisdiction to withhold the payment of drawback on any circumstances if all the conditions are fulfilled laid down under law. However, while processing the application it would be open for the department to make any enquiry as to whether there was any real export or not and in appropriate situation it would be further open for the department too to refuse release any drawback, if it is found there is no export in such sense. The authority concerned shall be vigilant that no fraud is allowed to be perpetrated as against beneficial statutory provision. In this case I find that there are materials and grounds for which investigation and enquiry are to be undertaken.

Therefore, I direct the department concerned to finalize this matter in respect of the petitioner''s claim for drawback and to pass appropriate order in accordance with law. The same shall be done within a period of 12 weeks from the date of communication of this order.

24. There will be no order as to costs.