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**(2003) 12 CAL CK 0042**

**Calcutta High Court**

**Case No:** Writ Petition No. 2316 of 2003

Genesis International

APPELLANT

Vs

Commissioner of Customs

RESPONDENT

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**Date of Decision:** Dec. 22, 2003

**Acts Referred:**

- Customs Act, 1962 - Section 76A, 76N

**Citation:** (2004) 173 ELT 235

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

**Bench:** Single Bench

**Advocate:** P.K. Mullick, for the Appellant; Shibdas Banerjee and Biswanath Sammadar, for the Respondent

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### **Judgement**

@JUDGMENTTAG-ORDER

Kalyan Jyoti Sengupta, J.

By this application the petitioners have substantially challenged the enquiry in relation to the drawback received and/or receivable by the petitioner No. 1 for supplies made at Special Economic Zone under summons being Annexure P-3 to the petition and also proceeding thereunder, and further search and seizure. The petitioner No. 1 claims to be one of the partners thereof. It is stated in the petition, the first petitioner has been carrying on business of manufacturing leather goods meant for marketing and selling in indigenous market as well as for supply to the exporters, who are also carrying on business within Special Economic Zone. The petitioners are not the exporters, but by virtue of their supplies of the finished leather goods to the exporters within the Special Economic Zone, they are entitled to get the facility of duty draw-back, treating their sale as aforesaid to be deemed export. Such duty draw-back facility is allowable under the provisions of Foreign Trade (Development and Regulation) Act. The petitioners of course have received, and may be receiving in future draw-backs in connection with supply of their goods

to the aforesaid exporters. Therefore, according to the petitioners they are answerable and/or liable under the provisions of the Foreign Trade (Development and Regulation) Act. They cannot be subjected to under any search, seizure under the provisions of the Customs Act 1962, which is applicable in case of physical export of the goods, nor the deemed export. Physical export taken place known as transporting and/or carrying the goods after sale are transported or carried beyond the Indian Territorial sea water. This kind of activities are never undertaken by the petitioners, as such, any proceeding under the Customs Act cannot be initiated against the petitioner. Moreover, the amended provisions of the Customs Act being Chapter X(A) dealing with special provisions relating to export in the Special Economic Zone has not been enforced by the proper notification. Initially the aforesaid Chapter was sought to be enforced in July 2003, thereafter it has been deferred till January 2004.

2. The petitioners have supplied its product, to one M/s. S.G. International Pvt. Ltd. and they are not aware as to whether S.G. International Pvt. Ltd. have made any export or not.

3. Mr. P.K. Mullick, learned Senior Counsel appearing in support of the application contends that search and seizure under the provisions of Customs Act of the writ petitioner are wholly unauthorised and illegal. The search and seizure might have been undertaken had the amended provisions of the aforesaid Chapter XA of the Customs Act been enforced by a notification. Besides, the petitioners are treated to be deemed exporters under the different Act and the officers appointed under the said Act are controlled by the Ministry of Commerce and they can make an enquiry into the draw-back duty payable to the petitioners under the aforesaid Act. The officials of the Customs authority have no jurisdiction to do so, as such, he submits, that the summons, search and seizure and enquiry into the draw-back received or receivable by the petitioners from its suppliers at Special Economic Zone under the provisions of the aforesaid Act shall be stayed.

4. He contends that the said Company to which supply have been effected by the petitioners at Special Economic Zone at Falta is different and separate entity, as the petitioner No. 1 is a partnership firm and the petitioner No. 2 is partner thereof.

5. Mr. Shibdas Banerjee, learned Senior Counsel appearing with Mr. Biswanath Sammadar, learned Advocate for the Customs Authorities submits that the petitioner No. 2 is not only a partner of petitioner No. 1 but also one of the Directors of a Company M/s. S.G. International Pvt. Ltd. which is a family Company set up for the purpose of fictitious exports. Having detected fictitious exports at the port area, the Customs Preventive Department have started enquiry and investigation into this matter. He has produced in support of his submission few documents which apparently show that the petitioner No. 2 is one of the Directors of the said Company, who is the exporter.

6. He has also produced a voluntary statement made by the petitioner No. 2, wherein he has acknowledged and admitted that he is one of the Directors of the said Pvt. Ltd. Company and also one of the partners of the petitioner No. 1. He also disclosed the other facts that his younger brother is one of the Directors of the said Company, as well as partner of the petitioner No. 1 and his wife is also one of the partners.

7. Therefore, the petitioner No. 1 is nothing but an alter ego of the said Ltd. Company, against whom the serious charges are there. According to him there is no illegality and infirmity in the action of the respondents for search and seizure and also enquiry. He contends that interrogation, search and seizure should not be halted as this is absolutely a beginning of this proceeding. It is an admitted position that the writ petitioners are alleged to have supplied their products to the said Ltd. Company, which is in reality same organization, as the directors therein are also the partners of the petitioner No. 1.

8. Having heard the respective contention of the learned Counsel for the parties and having considered the materials produced by the respondents I thought at the first blush the argument of Mr. Mullick is quite convincing. It is true the Pvt. Ltd. Company is a separate and distinct legal entity, but the Court in certain circumstances will certainly lift the corporate veil to understand who are the real men behind the show. The documents produced before me show, prima facie, the petitioner No. 2 is one of the Directors of the Pvt. Ltd. Company and his wife and brother are also the Directors. Both these Directors are also the partners along with the wife of the petitioner No. 2 in the firm. It is a Pvt. Ltd. Company. Therefore, there is no doubt that the control and management of both the establishments are resting with the same persons. It is true under the amended provision of the Customs Act being Chapter XA, that in case of deemed export, the provisions of the Customs Act will not be applicable until Chapter X(A) consisting of Sections 76(A) and 76(N) are notified for enforcement. Admittedly this has been deferred till January 2004. I also accept the legal argument of Mr. Mullick that at present deemed exporters are answerable or liable under the provisions of the first mentioned Act, which relates to trade, commerce and industry of the country. It is controlled and managed by the different Ministries.

9. But, here, factually, I find, prima facie the situation is different from ordinary course of events. I appreciate at this stage, the submission of Mr. Banerjee that the Directors of the said exporter Company are required to be interrogated, if necessary the case is to be investigated. Therefore, I, prima facie hold that there is no illegality and infirmity in the search and seizure and enquiries, as being conducted by the respondents, because the partnership firm and the Pvt. Ltd. Company are same organization under two different names controlled by the same human agency and it is difficult to discern functional identity differently from each other. Having prima facie satisfied, I refuse to grant any interim relief as prayed for.

10. Let there be direction for filing affidavit-in-Opposition within three weeks after Christmas Vacation. Affidavit-in-Reply thereto, is to be filed within two weeks thereafter. Matter will appear six weeks after the Vacation under the heading "For hearing".

11. However, if any proceeding is to be drawn up, the same be done, but the final order which might be passed in relation to the proceeding will not be implemented without leave of the Court.

12. All parties are to act on a xerox signed copy of this dictated order on the usual undertaking.