

(2014) 03 CAL CK 0047
Calcutta High Court
Case No: W.P. No. 52 of 2014

Impex Metal

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision: March 18, 2014

Acts Referred:

- Constitution of India, 1950 - Article 226
- Customs Act, 1962 - Section 108, 113, 114, 122, 124
- General Clauses Act, 1897 - Section 13

Citation: (2014) 305 ELT 83

Hon'ble Judges: Harish Tandon, J

Bench: Single Bench

Advocate: A.K. Chowdhury and R. Bharadwaj, Advocate for the Appellant

Judgement

Harish Tandon, J.

The Court: The petitioner has come up before this Court by invoking the provisions contained in Article 226 of the Constitution of India challenging a show cause notice issued by the concerned respondents u/s 124 of the Customs Act, 1962. Mr. Chowdhury, learned advocate for the petitioner at the very outset submits that the writ petition challenging the show cause notice should not ordinarily be entertained unless the show cause notice is issued by an authority not competent to issue the same or it is issued by grossly suppressing the material fact or an abuse of the process. Bearing in mind the aforesaid proposition Mr. Chowdhury, submits that the show cause notice indicates that the adjudication is to be made by the Commissioner of Customs whereas the same is required to be done by the Assistant Commissioner of Customs or the Deputy Commissioner of Customs as provided u/s 74 of the Customs Act, 1962 and, therefore, the said notice is invalid, illegal and beyond the competence of the authority under the relevant statute. Secondly, he submits that the report prepared at the time of export is not reflected in the said show cause notice which amounts to gross suppression of material facts and on this

ground the show cause notice is liable to be quashed and declared invalid.

2. Thirdly, he submits that before the order of final assessment is passed the authorities have no power to issue show cause notice as held in the case of [A.S. Syndicate \(Warehousing\) P. Ltd. and Another Vs. Commissioner of Customs \(Port\) and Others,](#)

3. Lastly, he submits that Section 5 of sub-section (2) of the Customs Act empowers an officer of customs to exercise the powers and discharge the duties conferred or imposed under this Act on any other officer of customs who is subordinate to him. What is tried to be contended is that the expression who is subordinate to him means an officer who is in immediate lower rank to such officer and not otherwise. In support of the aforesaid contention he relies upon the judgment of the Madras High Court in the case of [The Commissioner of Customs \(Exports\) Vs. Biomed Hitech Industries Limited and Customs Excise and Service Tax Appellate Tribunal, South Zonal Bench,](#)

4. Mr. Bharadwaj, learned advocate for the respondent refute the aforesaid contention of the petitioner and says that the said notice was issued u/s 124 of the Customs Act and not u/s 28 of the said Act, which operates in a different field.

5. Secondly, he submits that the show cause notice is issued on the drawback claimed by the petitioner u/s 74 of the said Act, and the imposition of the penalties thereupon and, therefore, the contention of the petitioner that the show cause notice cannot be issued unless the order of final assessment is passed is not sustainable.

6. He further submits that the authority who issued the show cause notice is competent and the show cause notice cannot be rejected on the ground as taken by the petitioner.

7. He also submits that the authorities have disclosed all the facts in the said show cause which shall be determined after receiving the reply and other document so disclosed and, therefore, the Court should not entertain the writ petition at the show cause notice stage.

8. It is undisputed that the petitioner imported the goods and submitted the bill of entry before the competent authority. It also appears from the record that the sample was drawn for the purpose of verifying whether the goods so imported is in conformity with the goods shown in the bill of entry. It is also undisputed that the customs authority passed an order for re-export and also issued the export cargo stuffing sheet by making a counter signature thereupon. Subsequently, it was found whether the petitioner is entitled to a drawback u/s 74 or have contravened any of the provisions of the Customs Act. The show cause notice clearly suggests that a proceeding was sought to be contemplated on misdeclaring the chemical composition relating to 203 MT of High Carbon Ferro Manganese Fines exported

under cover of the shipping bill at FOB value of Rs. 86,56,146/-. For the alleged offence the authorities have contemplated for confiscation of the said goods u/s 113 of the Customs Act.

9. The authorities further indicate that the drawback as claimed by the petitioner is also liable to be disallowed which attracts the imposition of penalties under Sections 114 and 114AA of the Customs Act. So far as the point of suppression of the facts are concerned, from the length and breadth of the show cause notice, this Court finds that the authorities have spelt out the facts which may lead to the initiation of the proceedings against the petitioner. Whether the show cause notice is issued by grossly suppressing the material facts or the facts which according to the petitioner should not be reflected in the said show cause notice is a matter which should be laid to the authorities to decide. This Court is not oblivious of the proposition of law that if a material facts which are disclosed may not justify the offence alleged in the said show cause notice and may fall on the anvil of the judicial review provided, it is demonstrated without any pale of doubt that the disclosure thereof would have rendered the entire exercise undertaken by the authorities to be futile.

10. The authorities are not supposed to abuse the powers and the process at the time of issuance of the show cause notice provided their conduct clearly discernible from the material disclosed before the Court. Even if the material which according to Mr. Chowdhury was not disclosed in the said show cause notice is considered this Court does not find that the non-disclosure would have made the entire proceeding not sustainable. The show cause notice is basically on denial of the claim of the drawback u/s 74 of the said Act as well as the exportation by making a misdeclaration of the goods which is liable to be confiscated for such offence.

11. So far as the competence of the authority to issue a show cause notice is concerned this Court does not find that the same could be thrown at the nascent stage of its issuance. The heading of the show cause notice clearly depicts that the same has been issued by invoking the provisions contained u/s 124 of the Customs Act, 1962. Section 124 postulates that no order confiscating the goods or imposing any penalty or person shall be made unless the owner of the goods or such person is given a notice in writing with the prior approval of the officer of the customs not below the rank of the Assistant Commissioner of Customs informing him on the grounds on which it is proposed to confiscate the goods or imposed a penalty. Though, the other portions of the said section relates to an opportunity of hearing to be given to the person and also making a representation by the importer or the exporter as the case may be. The show cause notice is admittedly issued by the Assistant Commissioner of Customs (Port), Calcutta.

12. According to Mr. Chowdhury, the show cause notice contains that the hearing is to be made before the Commissioner of Customs who is a higher authority than the Assistant Commissioner of Customs or the Deputy Commissioner of Customs u/s 74 of the said Act. By drawing an inspiration from a judgment rendered by this Court in

the case of A.S. Syndicate (Warehousing) P. Ltd. (supra), Mr. Chowdhury would contend that the Assistant Commissioner being an officer not on immediate lower rank, the Commissioner cannot assume jurisdiction in view of the provisions contained u/s 5(2) of the said Act. He draws emphasis on the expression "who is subordinate to him" to mean that the officer must be immediately in the lower rank of the Commissioner and not in the line of descent.

13. The reliance is heavily made on the judgment of the Madras High Court in the case of Biomed Hightech Industries Ltd., (supra) for the aforesaid proposition that when the expression is used in singular it has to be interpreted as such. If one look at the issue before the Madras High Court from the very first glimpse, it appears that the question poised before the Court was as to whether the order passed by the Chief Commissioner of Customs as an adjudicating authority is appealable u/s 129A of the Customs Act, 1962 or not. The hierarchy of the officer is provided u/s 3 of the Customs Act which put the Chief Commissioner of Customs at a higher pedestal than the Commissioner of Customs. Section 5(2) bestows the power on the officer of the customs to exercise and discharge the duties imposed on any other officer of the customs who is subordinate to him. However, restriction is imposed under sub-section (3) thereof where the Commissioner (Appeals) shall not exercise the power and discharge the duties conferred or imposed on an officer of the customs other than the specified in Chapter XV and Section 108 thereof.

14. Chapter XV relates to an appeal and revision where different authorities have been entrusted the powers and the duties to be discharged. Section 129A of the said Act provides an appeal to an Appellate Tribunal against the order or the decision passed by the Commissioner of the customs as an adjudicating authority. The point arose whether the Chief Commissioner of Customs as an adjudicating authority discharges the powers and the duties of the Commissioner of Customs the appeal would lie to the Appellate Tribunal or not. The answer to the said issue can be aptly found from Paragraphs 23 and 24 of the said judgment which reads thus:-

23. Section 122 of the Act speaks about the adjudication of Confiscations and Penalties. Under the said Section only the Commissioner of Customs has been made as an adjudicating authority. As against the order passed by him an appeal, would lie u/s 129-A of the Act. Therefore, the mere fact that u/s 129-A does not mention about the Chief Commissioner of Customs itself is a clear indicative of the fact that the order is passed by him only as an Commissioner (Adjudication) and not as a Chief Commissioner of Customs.

24. It is no doubt true that an appeal is a creation of the statute. Therefore, a right to file an appeal is a statutory right. In other words when there is no appeal that is provided in an enactment then such an appeal if filed cannot be decided by the appellate forum. A Tribunal constituted under the statute will have to perform its functions as defined therein. It cannot assume jurisdiction which is not otherwise available with it. However in the present case on hand in view of the provisions

provided under the Act and reading them along with Section 129-A it is very clear that an appeal is provided when an order is passed by a Chief Commissioner of Customs while exercising the power of Commissioner (Adjudication).

15. The point which is tried to be canvassed by Mr. Chowdhury that when the expression is used in singular the powers and the duties can be discharged by a higher authority and the authority who is immediately in lower rank to him is not acceptable for the simple reason that Section 13 of the General Clauses Act, 1897 clearly provides that the words in singular shall include the plural and the vice versa. Had it been an intention of the Legislature that the expression who is subordinate to him means an officer immediate in the lower rank of the officer, discharge and assumes power there has been a clear indication. The narrow and the pedantic meaning to an expression would not only frustrate the legislative intent but it would render the provisions otiose and unworkable.

16. In totality this Court does not find that any case is made out which made warrant the invocation the power of judicial review at the show cause stage. The petitioner can take all the plea available to him in the reply to a said show cause notice before the authority and it is expected that the authority would consider the same and shall decide the proceedings in accordance with law. The petitioner is permitted to file reply to the said show cause notice within four weeks from date.

17. It is once again made clear that this judgment shall not be construed to have any impact on the merit of the said proceeding initiated on the basis of the show cause notice and the authorities are free to decide the same independently and without influenced any observation made herein. The writ petition is disposed of without any order as to costs.