

**(1985) 10 BOM CK 0057****Bombay High Court****Case No:** Criminal Writ Petition No. 639 of 1984

Mohammed Yusuf

APPELLANT

Vs

Union of India and others

RESPONDENT

**Date of Decision:** Oct. 9, 1985**Acts Referred:**

- Customs Act, 1962 - Section 11, 111, 135

**Citation:** (1986) 1 BomCR 187 : (1989) 24 ECC 23 : (1989) 24 ECR 718 : (1989) 40 ELT 14**Hon'ble Judges:** C.S. Dharmadhikari, J**Bench:** Single Bench**Judgement**

1. This petition is filed u/s 482 of the Code of Criminal Procedure and Article 227 of the Constitution of India, for quashing the investigation started by the Preventive section of the Customs Department against the petitioner for offence u/s 135 read with Section 111(o) and Section 11 of the Customs Act.

2. According to the petitioner he carries on business of export and commission agents under the name and style of M/s. Regent International, as a sole proprietor. He has export business with turn-over of more than 15 crores in last three years. He exports all kinds of Indian produce and products. He is also assessed under the Income Tax Act and is a regular Tax Prayer. According to him the Customs Authorities are trying to apprehend him under some or other provisions of the Customs Act with sole intention of harassing him. In view of this he filed an application for anticipatory bail under the provisions of the Code of Criminal Procedure and had secured the same. Therefore, today he is on bail of Rs. 2 lakhs with one surety in the like amount. According to the petitioner one Shri Noor Mohammed Yacoob Vazir, also known as Shri Noorbhoy Vazirbhoy, is the proprietor of M/s. Shah Metal Pressing Works and M/s. Shah Industrial Company, having his office at 3/4/14(2) Vokla Patia, Near Water Tank Bhuj and Opposite Mental Comp Bhuj, both in Kutch, in Gujarat State, and had necessary import and export licences for Audio Cassettes and Stainless steel hospital wares. These licences were obtained

by him from the appropriate competent authorities. Under the said licences he imported goods and also exported them in accordance with the terms and conditions of the said licences. The nephew of the petitioner one Shri Khalid Badshah, had also started a business in the name of M/s. Roosen Exports and he is dealing with the said business of imports and export on his own. However, according to the Customs Department the petitioners is the real person behind the scene and all these concern are benami. It is also the case of the Custom Department that the good imported including audio cassettes, were not exported according to the terms and conditions of the said licences and, therefore, the petitioner has committed offence under the Customs Act.

3. In support of his contentions that the whole investigation is mala fide, the petitioner has placed strong reliance upon the order passed by the Deputy Chief Controller of Imports and Exports dated 30th June 1984. It is contended by him that on the allegations made by the Custom Department itself, the Deputy Chief Controller of Imports and Exports enquired into the matter and ultimately came to the conclusion that the licences were not obtained by the said firms on the basis of misrepresentation and fraud and that the party is a genuine one and has exported entire quantity. This finding recorded by the competent authority under the Imports and Exports (Control) Act, 1947, is binding upon the Customs Department and it is not open to the Customs Department to argue otherwise. Therefore, the investigation now carried on in the same matter is not only futile but also mala fide exercise of powers. So long as the order passed by the Deputy Chief Controller of Imports and Exports holds the field, no offence could be alleged against the petitioner. In support of this contention Shri Gurusahani the learned counsel appearing for the petitioner has placed strong reliance upon the decisions of the Supreme Court in State of West Bengal and Others Vs. Swapan Kumar Guha and Others, AIR 1977 SC 1954 - Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others, S.N. Sharma Vs. Bipin Kumar Tiwari and Others, S.N. Sharma v. Bipin Kumar Tiwari and ors.

4. On the other hand it is contended by Shri Patwardhan and Shri More, the learned Counsel appearing for the Respondents that the area and field covered by the Imports and Exports (Control) Act, 1947 and Customs Act, 1962 is distinct and different. The Customs department was not party to these proceedings. Assuming that the petitioner has not committed any offence under the Imports and Exports (Control) Act, 1947, still an offence could be committed under the Customs Act. The order passed by the Deputy Chief Controller of Import and Export is not binding upon the Customs Authorities. It is an order passed in the adjudication proceeding while discharging the show cause notice issued u/s 9(1)(a) and (d) of the Imports and Exports (Control) Order, 1955. The said order is not binding upon the criminal court or the Customs department, and therefore, investigation qua an offence under the Customs Act cannot be foreclosed or prohibited. It is also contended by the learned counsel that the investigation and/or inquiry is being carried out by the Customs

Department, as it was noticed that the petitioner alongwith his co-conspirators, is involved in the offence punishable u/s 135 of the Customs Act. The investigation reveals that two firms viz. (1) M/s. Shah Metal Pressing Works and (2) M/s. Shah Industrial Company are wholly non-existent and fictitious. The alleged proprietors of these two firms are absconding and are not being traced inspite of the repeated efforts by the Investigating Authorities in Gujarat and Maharashtra. During the course of investigation it is also revealed that it is the petitioner who was dealing with the banks on behalf of the aforesaid two non-existent firms and their alleged proprietors. Further the socalled goods imported or exported have never been exported to Dubai nor they reached Dubai. The audio cassettes were sold in the local market in contravention of the provisions of the Customs Act. The third firm i.e. M/s. Roosen Exports is merely a benami firm and the petitioner is the real owner. The investigation further revealed that the licences were fraudulently obtained by the firms which never existed and it was the petitioner who had played active and significant role in that behalf. Therefore, according to the respondents the petitioner has committed offence under the provisions of the Customs Act for which investigation is being carried. It was also contended by the counsel for the respondents that it is no doubt true that in a given case even the investigation could be quashed u/s 482 of the Code, however, these powers are exercised sparingly and in a rare case. In support of this contention the learned counsel appearing for the respondents have placed reliance upon the decisions of the Supreme Court in Municipal Corporation of Delhi Vs. Purshotam Dass Jhunjunwala and Others, Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others, as well as a decision of this court in 1978 Criminal Law Journal - 809 - State of Maharashtra v. Rasiklal K. Mehta and others.

5. For properly appreciating the controversy raised in this petition, it will be worthwhile if a reference is made to the relevant provision of the Imports and Exports (Control) Act, 1947. Sections 4K deal with the adjudication and confiscation of goods or penalty which could be imposed under the Act. It is under this section the order is passed by the Deputy Chief Controller of Imports and Exports which is subject to an appeal u/s 4-M. Admittedly such an appeal has not been filed before the higher forum. Section 4-D and 4-F provide for conferring powers upon the authorities concerned, to seize the imported goods or the material and Section 4-F lays down that the provision of the Code of Criminal Procedure related to search and seizure, shall, so far as may be, apply to every search and seizure made under the Act. Then comes Section 5 which reads as under :

"5. If any person contravenes or attempts to contravene, or abets a contravention of, any order made or deemed to have been made under this Act - or any condition of a licence granted under any such order or any authority, he shall, without prejudice to any confiscation or penalty to which he may be liable under the provisions of the Customs Act, 1962, be punishable;

Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court, such imprisonment shall not be for less than six months".

From the bare reading of Section 5, it is quite clear that the penalty contemplated u/s 5 is without prejudice to any confiscation or penalty to which the person may be liable under the provisions of the Customs Act. The relevant provisions of the Customs Act with which we are concerned in this petition are Section 111 which provide confiscation of the goods brought from a place outside India. Sub-section (o) of Section 111 reads as under :

"(o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer."

It is the case of the Respondents that the offence committed by the petitioner is covered by Section 111(o) read with section 135 of the Customs Act. If the provisions of Section 5 are read in this context, then it is quite clear that even the penalty contemplated by the Imports and Exports (Control) Act, 1947 is without prejudice to any confiscation or penalty to which he may be liable under the provision of the Customs Act. Therefore, the provisions of the Imports and Exports (Control) Act, 1947 are not given an overriding effect over and above the provisions of the Customs Act, 1962. In this context it can also be not forgotten that as observed by this Court, the orders passed in adjudication proceedings under the provisions of the Imports and Exports (Control) Act, 1947, will not be binding upon the criminal courts. While dealing with the similar contention, this is what the Division Bench has observed in *State of Maharashtra v. Rasiklal K. Mehta* :

"..... Besides, the reasons given by the learned Magistrate for staying for proceedings of the Criminal case are also not very sound. He has stated that if in the assessment proceedings ultimately it is held that document such as Form No. 16 was a genuine one, perhaps no prosecution would be launched by the enforcement wing if the prosecution has not already been launched, and if it has been launched it would be infructuous. But there is also the other possibility of the Department holding that the document is not a genuine one and in that case the prosecution would not be infructuous. Moreover, the finding given by the Department authorities in the assessment proceedings would not be binding on the Criminal Court. The Criminal Court will have to come to its own conclusion on the basis of the evidence led before it."

6. Further in this case it cannot be forgotten that the order passed by the Deputy Chief Controller of Imports and Exports dated 30th June 1984 relates to only one firm i.e. M/s. Shah Metal Pressing Works, and not concerned with other two firms i.e. M/s. Shah Industrial Company or M/s. Roosen Export qua with which also

investigation is being carried out. In the affidavits filed in reply by the Customs Department serious allegations are made against the petitioner which are under investigation. It is no doubt true that these allegations are denied by the petitioner in the affidavit in rejoinder. It will be neither fair nor proper to adjudicate upon the merits of the controversy at this stage, when the investigation itself is pending and material is being collected. In the instant case in the affidavit filed by the Department, clear averments have been made regarding the active role played by the petitioner and the extent of his liability. As to what is the role played, by him, is a matter of evidence and cannot be decided at this stage. It is well settled that for the purpose of quashing the investigation the allegations put forward, will have to be assumed as true and it will not be fair to throttle the investigation itself at that stage.

7. It is no doubt true that it is contended by Shri Gurusahani that the investigation amounts to harassment and is also mala fide. These allegations are denied by the Respondents. Even otherwise it is not possible for me to come to a definite conclusion that the investigation itself will amount to harassment or is being made in mala fide exercise of the power. As already observed assuming that the order passed by the Deputy Chief Controller of Imports and Exports is relevant for deciding the question, still it relates to only one firm and does not cover other two firms qua with which an investigation is being carried on. There are in built safeguards in the Act in this behalf; since no court can take cognizance of an offence u/s 135 of the Act except with the previous sanction of the Collector of Customs. This stage has yet to be reached. This writ petition is filed when the investigation is pending. Therefore, having regard to the peculiar facts and circumstances of the present case, in my opinion this is not a fit case for exercise of powers u/s 482 of the Code of Criminal Procedure, or Article 227 of the Constitution of India.

8. In the result, therefore, writ petition fails and Rules is discharged.