

Gawar Construction Ltd. Vs. Union of India (Uoi) and ors.

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Court : Mumbai

Decided On : Sep-29-2009

Reported in : 2009(111)BomLR4038; 2009(170)LC5(Bombay);
2009(243)ELT484(Bom)

Judge : Ferdino I. Rebello and ;D.G. Karnik, JJ.

Acts : [Customs Act, 1962](#) - Sections 110, 110(2), 111 and 124

Appeal No. : Writ Petition No. 7577 of 2009

Appellant : Gawar Construction Ltd.

Respondent : Union of India (Uoi) and ors.

Advocate for Def. : P.S. Jetly and ;R.B. Pardeshi, Advs.

Advocate for Pet/Ap. : L.S. Shetty, ;A.M. Sethna and ;Sachitra Shetty, Advs., i/b.,
L.S. Shetty and Associates

Judgement :

D.G. Karnik, J.

1. Rule, by consent heard forthwith. The respondent No. 3 has not put any appearance though served.

2. By this petition, the petitioner seeks a mandamus or a direction or order directing the Union of India and the customs authorities to forthwith release the Hot Mix Paver Machine seized by them from the premises of the petitioner under the seizure memo dated 14th November 2008.

3. The respondent No. 3 imported Hot Mix Paver Machine bearing model No. M/CS1800, SI No. 06681674 (for short 'the machine') through WIRTGEN India Pvt. Ltd., Bangalore in the month of October 2005 without payment of customs duty as an actual user in view of an exemption allowed to actual users. The machine was insured by it with ICICI Lombard General Insurance Co. for a sum of Rs. 9,29,89,400/-. The machine met with an accident in or about January 2007. The respondent No. 3 reported the accident to the insurance company. After the inspection, the insurance company was of the view that the machine could not be repaired and brought back to its original condition and was required to be discarded. The insurance company settled the claim of the respondent No. 3 on a total loss basis and paid the settled amount to the respondent No. 3 after deducting its scrap/residual value with permission to respondent No. 3 to sell. The respondent No. 3 accordingly sold to the petitioner the machine for Rs. 24,00,000/-. According to the respondent Nos. 1 and 2, the machine was allowed to be imported without payment of duty on condition that the importer respondent No. 3 would use it for its own use for a period of 5 years. Since the machine, though met with an accident, was sold within a period of 5 years of the import, the condition for a duty free import was breached and was liable for confiscation under Section 111(o) of the [Customs Act, 1962](#) (for short 'the Act'). The respondent No. 2 accordingly seized the machine from the premises of the petitioner on 14th November 2008 under a seizure panchanama. The petitioner has now approached this Court for release of the machine.

4. According to the petitioner, no notice was issued to it prior to the seizure or even after the seizure till date and, in any event, the respondents were required to give notice to the petitioner under Section 110(2) read with Sub-section (a) of Section 124 of the Act within 6 months (which could be extended by a further period of 6 months). Since no notice has been issued to the petitioner within 6 months or even after the expiry of one year, the continued seizure and detention of

the machine by the respondents is bad in law. In support, learned Counsel for the petitioner refers to and relies upon a decision of the Supreme Court in *Assistant Collector of Customs v. Charandas Malhotra* : 1971 (3) SCR 802 and two decisions of this Court in *P. Kishanchand Textiles Pvt. Ltd. v. Union of India*, (Writ Petition No. 574 of 2009 decided on 10th June 2009 -) and *Jayant Hansraj Shah v. Union of India* (Writ Petition No. 316 of 2008 decided on 29th February 2008 -).

5. Section 111 of the Act lays down that the goods mentioned in Clauses (a) to (p) thereof bought from a place outside India shall be liable to confiscation. Clause (o) of Section 111 of the Act is material and says that any goods, exempted subject to any condition, from duty or any prohibition in respect of the import thereof under the Act or under any other law for the time being in force, in respect of which the condition is not observed, unless the nonobservance of the condition was sanctioned by the proper officer, shall be liable for confiscation. Section 110(1) of the Act says that where a proper officer has reason to believe that any goods are liable to confiscation under the Act, he may seize such goods. Sub-section (2) of Section 110 says that where any goods are seized under Sub-section (1) and no notice in respect thereof is given under Clause (a) of Section 124 within 6 months from the seizure of the goods, the goods shall be returned to the person from whose possession they were seized. Proviso to Sub-section (2) of Section 110 of the Act empowers the Commissioner of Customs, on sufficient cause being shown, to extend the period within which the notice is to be given by a further period not exceeding 6 months. In *P. Kishanchand Pvt. Ltd.* (supra), a Division Bench of this Court, to which one of us (Rebello, J.) was a party, has held that the notice under Section 110(2) of the Act is required to be given within 6 months with a power to the Commissioner for sufficient cause to further extend the period of 6 months from the date of seizure. There is however no provision to extend the period beyond 6 months and notice under Section 110(2) must be given in any event within 12 months from the date of seizure. The notice mentioned under Section 110(2) is a show cause notice to be issued in pursuance of Section 124(a) of the Act. Section 124 says that no order confiscating any goods or imposing any penalty on any person shall be made under this chapter unless the owner of the goods or such person is given a notice in writing of the grounds on which it is proposed to confiscate the goods and impose the penalty and is given an

opportunity of making a representation and is given a reasonable opportunity of being heard in the matter.

6. Mr. Jetly, learned Counsel appearing for the respondent, submitted that though notice in the present case was not given to the petitioner, it was given to the respondent No. 3 who was the owner importer of the machine within 6 months of the seizure. He submitted that issuance of a notice to the respondent No. 3 was sufficient compliance of Section 110(2) read with Section 124 of the Act and it was not necessary to issue a notice to the petitioner from whose custody the goods were seized. He submitted that under the condition of exemption, the respondent No. 3 who was the importer of the goods, was prohibited from transferring the goods for a period of 5 years from the date of import. The respondent No. 3 could not have transferred the goods in view of the prohibition. The transfer was bad in law and, therefore, the respondent No. 3 continued to be the owner of the goods in law. The notice was therefore required to be given only to the respondent No. 3 who continued to be the owner of the machine and not to the petitioner from whose possession the goods were seized.

7. Per contra, learned Counsel for the petitioner submitted that the petitioner having purchased the goods was the owner of the goods. On true interpretation of Section 124 of the Act, notice is required to be given to the owner of the goods as well as to the person from whose custody the goods are seized. As the goods were seized from the custody of the petitioner, notice was required to be given to it within 6 months. Since the notice was not given to the petitioner, the goods were liable to be returned to the petitioner in view of the provisions of Section 110(2) of the Act.

8. In order to appreciate the rival contentions of the parties, it would be necessary to set out the provisions of Sections 110 and 124 of the Act, which read as follows:

110. Seizure of goods documents and things. (1) If the proper has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods.

Provided that where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer.(2) Where any goods are seized under Sub-section (1) and no notice in respect thereof is given under Clause (a) of Section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized.

Provided that the aforesaid period of six months may, on sufficient cause being shown, be extended by the [Commissioner of Customs] for a period not exceeding six months.[Other subsections, being not relevant, are not quoted.]

124. Issue of show cause notice before confiscation of goods, etc. No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person

(a) is given a notice in writing informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and

(c) is given a reasonable opportunity of being heard in the matter.

Though it is the contention of the petitioner that on purchase of the machine by payment of Rs. 24 lakhs it became the owner thereof and it is the contention of the respondents that the petitioner is not the owner of the machine as there was prohibition for sale under the exemption notification and the sale in contravention of the said prohibition did not confer any title on the goods, we do not consider it necessary to decide upon the said controversy as in our view even otherwise the petitioner was entitled to a notice.

9. In view of the admitted position that the machine was transferred by the respondent No. 3 to the petitioner in breach of the condition against transfer for a period of 5 years from the date of import, undoubtedly it was liable for confiscation

under Section 111(o) of the Act. Under Section 110 of the Act, the respondents had the power to seize the machine as they had reason to believe that it was liable for confiscation under Section 111(o) of the Act. They also had the power to seize the machine from the custody of any person who was found in possession as Section 110 does not put any restriction on the power of the respondent Nos. 1 and 2 to seize goods where they are in custody of a person other than the importer of the goods. However, a safeguard has been inserted by Sub-section (2) of Section 110 that where goods are seized under Sub-section (1), show cause notice under Section 124(a) shall have to be issued within 6 months or the extended period of further 6 months. The short question for our consideration is whether issuing of a notice to the owner original importer of the goods is enough or whether notice is also required to be issued to the person from whose custody the goods are seized.

10. It is axiomatic to say that where civil rights of a person are likely to be affected by an administrative or quasijudicial order, rules of natural justice require that the person affected be given a reasonable opportunity of being heard before the order is passed unless the statute under which the order is passed specifically excludes such opportunity. Even where the statute specifically excludes the opportunity of being heard, Courts would be entitled to consider the legality and constitutional validity of such a provision but, in any event, where the statute does not exclude their observance, the authority passing the order affecting civil rights of a person must follow the principles of natural justice which include giving of a reasonable opportunity of being heard to the person affected. It is in this light that we must interpret the provisions of Section 110(2) read with Section 124 of the Act. Where an importer of goods transfers the goods, may be in violation of a condition of import, the transferee may not necessarily know that the goods are being transferred in breach of any condition prohibiting the transfer. The transferee, who has bonafidely purchased the imported goods for consideration without notice of any breach of condition of import or violation of any prohibition, may be in possession of the goods. Though Section 110 confers a power on the customs authorities to seize the goods from possession of such transferee even without notice, Sub-section (2) of Section 110 read with Section 124 of the Act cast an obligation on the customs authorities to issue a show cause notice within 6 months

or extended period of further 6 months to show cause why the order of confiscation of the goods should not be made. Opportunity must be given to the person in possession of the goods because their confiscation would affect his civil right to possess the goods which were seized from his custody. It is for this reason that Section 124 uses the expression 'the owner of the goods or such person' and says that no order of confiscating the goods or imposing any penalty on any person shall be made unless the owner of the goods or such person is given a notice in writing informing him the grounds on which it is proposed to confiscate the goods or to impose a penalty. The word 'or' appearing in the expression 'owner of the goods or such person' is obviously used conjunctively and not disjunctively. A notice may be required to be given only to the owner where he is in possession of the goods and they are seized from his custody, but where the goods are seized from the custody of a person other than the original owner - importer, the notice must also be given to the person from whose custody the goods are seized. If we interpret the expression 'owner of the goods or such person' only to mean the owner, that would render the word 'such person' otiose and, in any event, would render the validity of the section susceptible to challenge on the ground of being unreasonable and violative of rights of the person in possession of being denied the opportunity of even being heard before his rights are affected. We are clearly of the view that the person from whose custody the goods have been seized under Section 110 of the Act is entitled to a notice under Section 124 of the Act and is entitled for a reasonable opportunity of making a representation and reasonable opportunity of being heard before an order of confiscation of goods is passed. In the present case, admittedly no notice under Section 110(2) read with 124 of the Act has been issued to the petitioner within a period of 6 months. In fact the notice has not been issued till today. Consequently, the continued detention of the goods seized beyond the statutory period of 6 months (which can be extended upto one year) under Section 110(1) of the Act is illegal.

11. In *Assistant Collector of Customs v. Charan Das Malhotra* (supra), watches of foreign make were seized from the custody of the respondent on 19th March 1963. On production of vouchers for part of watches seized, they were released on 18th September 1963 and 27th February 1964. The balance of the watches for which vouchers could not be produced were not released by the customs authorities. On

6th March 1964, the customs authorities served on the respondent a notice under Section 124(a) of the Act to show cause why the rest of the watches should not be confiscated. The notice was obviously issued beyond the period of 6 months from the seizure but the customs authorities claimed that an order of extension of time was passed by the Collector under Section 110(2) of the Act. The orders of extension were admittedly passed *ex parte*. The High Court directed release of the goods and on appeal, the Supreme Court confirmed the decision of the High Court. The Supreme Court held that on failure to issue show cause notice within 6 months, a civil right accrued to the respondent to have possession of the goods and since the order granting extension sought to defeat the right, the order for extension of time could not be passed without giving an opportunity of being heard to the respondent from whose custody the goods were seized. Indeed as the Supreme Court has held that a notice is required to be given to the person from whose custody the goods were seized even for granting extension of time to issue show cause notice, obviously a notice is required to be given to the person from whose custody the goods are seized before passing an order of confiscation.

12. As in the present case, the notice has not been given to the petitioner within the statutory period of 6 months, the continued seizure of the machine is bad in law and is hereby quashed. Rule is accordingly made absolute in terms of prayer Clause (a). We make it clear that this order would not prevent the respondents from taking any other action against the respondent No. 3 to whom a notice has been issued within the statutory period and/or qua the machine, if it is otherwise permissible in law.