Court No. - 39

Case :- WRIT TAX No. - 1287 of 2023

Petitioner :- M/S Maa Kamakhya Trader
Respondent :- Commissioner Of Customs (Preventive) And 2 Others
Counsel for Petitioner :- Shubham Agrawal
Counsel for Respondent :- Gaurav Mahajan,Dhananjay Awasthi

And

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Hon'ble Saumitra Dayal Singh,J.
Hon'ble Manjive Shukla,J.

1. Heard Sri Shubham Agrawal, learned counsel for the petitioner and Sri Dhananjay Awasthi & Sri Gaurav Mahajan, learned counsel for the revenue.

2. Present writ petition has been filed by the petitioner to challenge the seizure order dated 04.01.2024 (passed during pendency of the writ petition), the detention-memo dated 25.10.2023 whereby 49,210 Kgs. of Arecanuts being transported by the petitioner on two trucks bearing Registration Nos. UP-35-T-3671 and UP-71-T-9095 have been seized. The confiscation proceedings have not arisen yet.

3. Pleadings have been exchanged.

4. Besides the main Counter Affidavit and Rejoinder Affidavits filed, parties have also exchanged Supplementary Counter Affidavit & Supplementary Rejoinder Affidavit. Sri Awasthi has filed another Supplementary Counter Affidavit in reply to the Supplementary Rejoinder Affidavit.

5. Primary submission of learned counsel for the petitioner is, under the Customs Act, 1962 (hereinafter referred to as "the Act"), seizure of goods is an action preceding confiscation of prohibited goods. Thus, goods liable to confiscation under Section 111 of the Act may be seized under Section 110

of the Act. However, before seizure of goods may arise, the Proper Officer must have "reason to believe" that such goods are liable to be confiscated under the Act. Unless such "reason to believe" exists, no seizure may arise.

6. For "reason to believe" to be recorded, the goods (here Arecanuts), must be such as may have been imported from outside the country without valid customs clearance. Failing valid import, they would remain prohibited goods liable to be confiscated and therefore exposed to seizure proceedings.

7. On the contrary, if the Arecanuts are of Indian origin, no reason to believe may ever arise to confiscate such goods under the Act. Therefore, they may never be subjected to seizure proceedings under the Act.

8. On that test, it has been submitted, existence of "reason to believe" that the goods are liable to be confiscated is a *sine qua non* to uphold the seizure. While sufficiency of reason may never be an issue to be examined in a writ proceeding, it has been vehemently urged that for a “reason to believe" to exist, the belief that the goods were of foreign origin must be based on reasons arising from objective material.

9. Here, at the stage of detention and even at the stage of seizure the Customs Authority only considered: two trade opinions allegedly expressed by persons involved in the trade of Arecanuts; a report of the Arecanuts Research and Development Foundation, Mangalore (hereinafter referred to as "ARDF") dated 17.11.2023; alleged discrepancy of the total quantity and weight of Arecanuts purchased by the petitioner from its supplier, Sri Karni Traders, Guwahati and, doubts expressed as to valuation of goods disclosed by the petitioner.

10. Reliance has been placed on the decision of the Hon'ble Supreme Court in ***State of Uttar Pradesh & Others Vs. M/s Aryaverth Chawl Udyoug and Others 2017 U.P.T.C.-262*** to submit, no material exists to form any “reason to believe” and no “reason” exists to support the “belief” that the goods were of foreign origin. Reliance has also been placed on the decision of a coordinate bench of this Court passed in ***Jaymatajee Enterprise (Seller) and***

Another Vs. The Commissioner of Customs (Preventive) And 2 Others in Writ Tax No. 573 of 2020 (Neutral Citation No. - 2020:AHC:91647-DB).

11. Then relying upon the decision of the Meghalaya High Court in ***C.C. (Preventive), NER Region, Shillong Vs. Laltanpuii 2022 (382) E.L.T. 592 (Meghalaya)***, as affirmed by Hon'ble Supreme Court in ***Commissioner of Customs (Preventive) Vs. Laltanpuii 2022 (382) E.L.T. 588 (S.C.)***, it has been urged that the ARDF is not an accredited laboratory and no reliance could have been placed on its report to draw up any "reason to believe".

12. Relying on another decision of a coordinate bench of this Court passed in ***Commissioner Customs, (Preventive) Vs. M/S Maa Gauri Traders*** in Customs Appeal No. 3 of 2019 decided on 21.08.2019 (Neutral Citation No.-2019:AHC-LKO:18689-DB), it has been submitted, in any case the report of ARDF has not expressed any definite opinion that the Arecanuts in question were of foreign origin. Therefore, no "reason to believe" may have arisen on the strength of such an ambiguous report.

13. Relying on the Tax Invoices issued by the supplier, Sri Karni Traders including Invoice Nos. 10 and 11 dated 19.10.2023 and 20.10.2023 for sale of 9,800 kgs. and 11,200 kgs. of Assam Dried Arecanuts, it has been submitted (in the alternative) tangible, credible and undoubted material existed as was shown to the authorities-specifically by means of reply dated 1.12.2023 filed on 2.12.2023 through email mode that the entire quantity of 49,210 kgs. of dried Arecanuts was of Indian origin. Inquiry made from M/s Karni Traders did not bring out any doubt as to the Indian origin of the goods.

14. Relying on such facts, it has been submitted, the revenue authorities have hopelessly failed to discharge the essential burden cast on them to establish that they had "reason to believe" that the goods i.e. Arecanuts were of foreign origin. Instead, the revenue authorities have only and heavily relied on their unfounded "belief" that the goods were of foreign origin. In absence of "reasons" formed on the strength of any tangible and credible material to support such belief, the entire action of seizure proposing to confiscate the goods, is without jurisdiction.

15. The alleged discrepancy in valuation of goods is described as inconsequential in as much as no reason to believe may arise on the strength of such allegation.

16. On the other hand, learned counsel for the revenue heavily relied on the fact circumstance that the revenue authorities have acted bona-fide. Upon detention of the goods, they obtained opinions of two traders dealing in Arecanuts. Both opined that the goods were of foreign origin. Not relying on such opinion alone, the revenue authorites then obtained report of the ARDF. That report reads as below:

*"**TEST REPORT OF ARECANUT***

Sample received from	*Deputy Commissioner, Office of the Commissioner, Customs (Preventive) Commissionerate, Kendriya Bhavan, Sector- H, Aliganj, Lucknow*
Letter No	***C.No.GEN/INV/SMLG/OTH/538/2023/1712 Dated 27.10.2023***
Sample details	***Sample No 1; Detention Case Dated 25.10.2023***
Quantity received	*About 150gms*

Physical Characteristics:

Appearance	*Red sliced Arecanuts*
Quality	*good*

IDENTIFICATION OF ORIGIN

Based on Cut test, Appearance, Size etc.

Texture:

From the sliced Arecanuts supplied it was found that the nuts are of medium in size with round to oval in shape with brownish colour. The nuts were harvested at different stages of maturity. Some of the nuts were harvested at immature stages, dehusked, sliced, boiled, dipped in areca tannin and dried. Such nuts when observed exhibited a marbled interior with uniform dark brown and white colour inside. This resembles to the Arecanuts of India. Some others were harvested at mature stages. Such nuts were first dehusked, sliced, dipped in areca tannin and dried without boiling. Such nuts when cut open exhibited a marbled interior, more of dark brown portion with mostly compact white pith. This resembles to the arecanuts of ***Indonesian origin****. Both types are almost equal in numbers.*

Final Conclusion:

The sample of red sliced Arecanuts provided by the Deputy Commissioner, Office of the Commissioner, Customs (Preventive) Commissionerate, Kendriya Bhavan, Sector- H, Aliganj, Lucknow vide letter No. ***C.No.GEN/INV/SMLG/OTH/538/2023/1712 Dated 27.10.2023 (Sample No 1; Detention Case Dated 25.10.2023)*** *under its seal has been tested and seems to be a mixture of Indian and Indonesian arecanuts with almost equal in numbers. The quality of Arecanuts is good.*

Date: 17-11-2023"

17. Then, it has been submitted, the revenue authorities made further inquiries from the petitioner and its supplier. On its part, the petitioner failed to comply with four summons issued to him and failed to furnish any cogent explanation. At the same time, in view of the pleadings made in the Supplementary Rejoinder Affidavit and its reply, query was raised to learned counsel for the revenue to ascertain if the reply dated 2.12.2023 (Annexure RA 5 to the rejoinder-affidavit) was served on the respondents. Candidly, that fact was not disputed.

18. With respect to inquiries made from Sri Karni Traders, it is not the case of the revenue that the said dealer disputed the origin of goods from inside the country. No material is disclosed to have arisen in that inquiry as may have indicated to the revenue authorities that the goods in question were of foreign origin.

19. In such facts, relying on the order passed in ***State of U.P. Vs. GLS Films Industries Pvt. Ltd. 2022 (63) G.S.T.L. 3 (SC)*** and order passed by coordinate Bench of this Court in ***Adarsh Tobacco Co. Vs. State of U.P. 2023 (74) G.S.T.L. 43 (All.)***, it has been submitted, the stage has not arrived for the petitioner to claim any relief pending final decision by the Customs Authorities. That proceeding may be faced by the petitioner in adjudication case. At that stage, all defences would be open to the petitioner-to establish that the goods were of Indian origin. Further reliance has been placed on the order passed in ***Collector of Customs, Madras and Others Vs. D. Bhoormull 1983 (13) E.L.T. 1546 (S.C.)*** to submit,"reason to believe" cannot be of mathematical precision. Since in general terms-upon trade opinion as also

the expert opinion obtained by the revenue authorities, it was clearly indicated that the goods were of foreign origin, relevant “reason” exists to “believe” that the Arecanuts are of foreign origin. The revenue authorities have rightly initiated confiscation proceedings against the petitioner, by seizing the goods.

20. Having learned counsel for the parties and having perused the record, in the first place, it is a sine qua non that goods may not be confiscated under the Act unless they belong to a prohibited category. For goods to be of prohibited category, either a general prohibition on their import may exist or they may be goods as may not have been validly imported. Also, it is a matter of common knowledge that Arecanuts are grown within the country. Mainly, these are grown in the north-eastern part that has land border with other countries with similar geography, climate, flora and fauna and also in some southern States. Therefore, there must have existed some credible material with the revenue authorities to establish that the goods had been brought from outside the country. It not being a case of detention at the customs frontiers, the revenue was burdened to bring some objective material as may have led to formation of a “reason”, in that regard. While sufficiency of reasons is not an aspect to be examined or decided in these proceedings, the relevancy of material remains an essential test to be satisfied by the revenue.

21. Since jurisdiction to seize the goods arises on the formation of such “reason to believe”, we cannot allow the revenue to casually pass that test. Presumption of legality of a transaction arising on the strength of a Tax Invoice may be destroyed only on the strength of valid “reason”. Here, the goods were accompanied with Tax Invoices issued by the supplier, Sri Karni Traders. The discrepancy alleged in absence of Invoice Nos. 10 and 11 may not stand in face of undisputed facts that such documents were also made available to the revenue authorities with the reply sent through e-mail on 2nd December, 2023.

22. Those Tax Invoices were not required to accompany the goods. The petitioner’s Tax Invoices that were issued to the purchaser Sri Balaji Traders

were found accompanying the goods. Therefore, only a suspicion arose to the revenue authorities that the goods sold by the petitioners may have been procured from outside the country. Yet, to reason that the transaction, had originated from outside the frontiers of the country, there was no material with the revenue authorities, at that stage. The revenue only obtained purely subjective opinions - one from traders and another from ARDF. While the opinion of the traders (on the face of it) were subjective, formed on ocular observations of the two traders, the alleged expert opinion of the ARDF is no more than that. As extracted above, it only brings out that there exist two qualities of Arecanuts found loaded on the two trucks in question. No scientific or established/recognised test was performed by the ARDF on the sample Arecanuts and no objective test report was submitted by the ARDF in support of its opinion that some of Arecanuts "may be" of foreign origin.

23. Unless there pre-existed objective/scientific test to determine the origin of goods and/or unless the ARDF report had arisen on such a test to ascertain the origin of goods, the report of the ARDF though described as one of a neutral third party, it may never be acknowledged as cogent or objective material that may lead to formation of a "reason to believe" that the goods were of foreign origin.

24. Second, even that opinion is not definitive but only suggestive. The words "resembles and seems" used in the report to record the opinion of the ARDF itself admit of possibility of the facts being otherwise. In fact, no definite opinion has been expressed that the goods were of foreign origin. Unless such definitive opinion existed, the report itself may never form objective material to form a "reason to believe". Suspicions, howsoever strong may never replace/substitute "reasons" that may be tested against material on which it may arise.

25. Similar conclusion has been reached by this Court with respect to similar report of the ARDF with respect to Betel nuts in ***Commissioner Customs, (Preventive) Vs. M/S Maa Gauri Traders (Supra),*** wherein it was observed as below:-

> *"The report of the ARDF has also been held to be not reliable in as much as it could not be shown with any degree of certainty that the origin of the betel nuts could be established by testing in a laboratory, as is clear by the answer to the RTI query given by Directorate of Arecanut And Spice Development, Ministry of Agriculture and Farmers Welfare, Government of Kerala."*

26. Third, no material has been shown to us to reach conclusion different from that reached by the Meghalaya High Court in ***C.C. (Preventive), NER Region, Shillong*** wherein it was observed as below:-

> *"4. The Division Bench of the Tribunal recorded the finding that the confiscated betel nut is non-notified goods and therefore, burden to prove the fact of smuggling lies on the department and same has not been discharged. In this regard, the department relied upon the certificate issued by the Arecanut Research and Development Foundation, Mangalore to show that the confiscated goods/betel nuts are of foreign origin. However, the Tribunal refused to consider this certificate on the ground that the said Institution is not accredited and hence the report was not relied on. The Tribunal in this regard relied on the decision of the Patna High Court reported in 2020 (371) ELT 353 (Patna)."*

Therefore, we are not inclined to give any undue credence to the report of ARDF than it may otherwise deserve.

27. As to the other material, in the first place, the petitioner was not required to carry the Tax Invoice of purchases made by its supplier- Sri Karni Traders. Prima facie, the Tax Invoices issued by M/s Sri Karni Traders were evidence of valid purchase made by the petitioner within the country. In absence of a legal requirement, the absence of the purchase documents of Sri Karni Traders (during transportation by the petitioner), may never have led to formation of a "reason to believe" that goods were of foreign origin. At most, a suspicion may have arisen to the revenue authorities, at that stage. However, once the purchase documents of Sri Karni Traders were made available by the petitioner along with his reply dated 2.12.2023 and other reply (which the revenue does not dispute), the suspicion that may have existed stood resolved - to the benefit of the assessee. Before any "reason to believe" may have arisen, the revenue authorities were obligated to conduct an enquiry and/or verification if the goods had originated from outside the country. Here, no material existed to doubt the origin of Aeranuts from within the country. Thus, revenue has failed to discharge its burden.

28. The test for "reason to believe" is simple and has been consistently applied by the Courts. In ***CST Vs. Bhagwan Industries (P) Ltd. (1973) 3***

SCC 265. The Supreme Court had occasion to consider the meaning given to that phrase used in Section 21 of the U.P. Sales Act, 1948. It was then observed:-

> *"11. The controversy between the parties has centered on the point as to whether assessing Authority in the present case had reason to believe that any part of the turnover of the respondent had escaped assessment to tax for Assessment Year 1957-58. Question in the circumstances arises as to what is the import of the words "reason to believe", as used in the section. In our opinion, these words convey that there must be some rational basis for the assessing Authority to form the belief that the whole or any part of the turnover of a dealer has, for any reason, escaped assessment to tax for some year. If such a basis exists, the assessing Authority can proceed in the manner laid down in the section. To put it differently, if there are, in fact, some reasonable grounds for the assessing Authority to believe that the whole or any part of the turnover of a dealer has escaped assessment, it can take action under the section. Reasonable grounds necessarily postulate that they must be germane to the formation of the belief regarding escaped assessment. If the grounds are of an extraneous character, the same would not warrant initiation of proceedings under the above section. If, however, the grounds are relevant and have a nexus with the formation of belief regarding escaped assessment, the Assessing Authority would be clothed with jurisdiction to take action under the section. Whether the grounds are adequate or not is not a matter which would be gone into by the High Court or this Court; for the sufficiency of the grounds which induced the assessing Authority to act is not a justiciable issue. What can be challenged is the existence of the belief but not the sufficiency of reasons for the belief. At the same time, it is necessary to observe that the belief must be held in good faith and should not be a mere pretence.*
>
> *12. It may also be mentioned that at the stage of the issue of notice the consideration which has to weigh is whether there is some relevant material giving rise to prima facie inference that some turnover has escaped assessment. The question as to whether that material is sufficient for making assessment or reassessment under Section 21 of the Act would be gone into after notice is issued to the dealer and he has been heard in the matter or given an opportunity for that purpose. The assessing Authority would then decide the matter in the light of material already in its possession as well as fresh material procured as a result of the enquiry which may be considered necessary."*
>
> *(emphasis supplied)*

29. Then, in ***Phool Chand Bajrang Lal Vs. ITO, (1993) 4 SCC 77***, the same expression used in Section 127 of the Income Tax Act came up for interpretation before the Supreme Court. There, it was observed as below:-

> *"25. From a combined review of the judgments of this Court, it follows that an Income-tax Officer acquires jurisdiction to reopen an assessment under Section 147(a) read with Section 148 of the Income-tax Act, 1961, only if on the basis of specific, reliable and relevant information coming to his possession subsequently, he has reasons, which he must record, to believe that, by reason of omission or failure on the part of the assessee to make a true and full disclosure of all material facts necessary for his assessment during the concluded assessment proceedings, any part of his income, profits or gains chargeable to income-tax has escaped assessment. He may start reassessment proceedings either because some fresh facts had come to light which were not previously disclosed or some information*

with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information. Since the belief is that of the Income-tax Officer, the sufficiency of reasons for forming this belief is not for the court to judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non-specific information. To that limited extent, the court may look into the conclusion arrived at by the Income-tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income-tax Officer and further whether that material had any rational connection or a live link for the formation of the requisite belief." *(Emphasis supplied)*

30. Also, in **ACIT vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd. (2008) 14 SCC 208**, the expression "reason to believe" used under Section 247 of the Income Tax Act was dealt with. The Supreme Court observed as below:-

"9. Section 147 authorises and permits the assessing officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification. If the assessing officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the assessing officer should have finally ascertained the fact by legal evidence or conclusion. The function of the assessing officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers." *(Emphasis supplied)*

31. Considering the above, in ***State of Uttar Pradesh & Others Vs. M/s Aryaverth Chawl Udyoug and Others (Supra)*** the Supreme Court has concluded as below:-

28. This Court has consistently held that such material on which the assessing Authority bases its opinion must not be arbitrary, irrational, vague, distant or irrelevant. It must bring home the appropriate rationale of action taken by the assessing Authority in pursuance of such belief. In case of absence of such material, this Court in clear terms has held the action taken by assessing Authority on such "reason to believe" as arbitrary and bad in law. In case of the same material being present before the assessing Authority during both, the assessment proceedings and the issuance of notice for re-assessment proceedings, it cannot be said by the assessing Authority that "reason to believe" for initiating reassessment is an error discovered in the earlier view taken by it during original assessment proceedings. (See: DCM v. State of Rajasthan, (1980) 4 SCC 71).

29. The standard of reason exercised by the assessing Authority is laid down as that of an honest and prudent person who would act on reasonable grounds and come to a cogent conclusion. The necessary sequitur is that a mere change of opinion while perusing the same material cannot be a "reason to believe" that a case of escaped assessment exists requiring assessment proceedings to be reopened. (See: Binani Industries Ltd., Kerala vs. Respondent:Assistant Commissioner of Commercial Taxes, VI Circle, Bangalore and Ors., (2007) 15 SCC 435; A.L.A. Firm v. CIT, (1991) 2 SCC 558). If a conscious application of mind is made to the relevant facts and material available or existing at the

relevant point of time while making the assessment and again a different or divergent view is reached, it would tantamount to "change of opinion". If an assessing Authority forms an opinion during the original assessment proceedings on the basis of material facts and subsequently finds it to be erroneous; it is not a valid reason under the law for re-assessment. Thus, reason to believe cannot be said to be the subjective satisfaction of the assessing Authority but means an objective view on the disclosed information in the particular case and must be based on firm and concrete facts that some income has escaped assessment.'

(Emphasis supplied)

32. Thus, a consistent view exists - where exercise of executive power and assumption of jurisdiction hinges on prior recording of "reason to believe" that true objective test in law must be satisfied by the authority wielding the power. Curtailment of free trade has serious consequences. While the revenue authorities would be within their jurisdiction to exercise their power to seize and confiscate goods that may have been smuggled inside the customs frontiers, yet with respect to natural products, that are also grown inside the country, no presumption is available to presume or assume that such goods are smuggled unless the assessee or the citizen otherwise satisfies that they are of Indian origin. For assumption of jurisdiction in such cases, credible material must be shown to exit in the hands of the authorities and objective consideration must be shown to have been made to such material - to record the "reason" that may have led to formation of the "belief" that the goods are of foreign origin. Whenever such exercise is completed successfully, the jurisdiction may arise to the revenue authorities to detain and seize the goods. Thereafter, it may remain for the assessee to establish all defences. At the same time, in absence of objective material and in absence of "reasons" the belief that the goods were of foreign origin may remain non-actionable. It may give rise to no jurisdiction either to seize or confiscate the goods or to undertake any proceedings to that effect.

33. For the reasons noted above in the present facts, we find that the revenue authorities have hopelessly failed to bring out to record the objective material and have further failed to establish formation of any "reason" for the "belief" entertained by them that goods were of foreign region. In similar circumstances, the co-ordinate bench of this Court had allowed the writ petition for similar reasons in ***Jaymatajee Enterprise (Seller) and Another (Supra).***

34. Accordingly, the writ petition is ***allowed***. The order dated 04.01.2024 (passed during pendency of the writ petition) and the detention-memo dated 25.10.2023 are quashed. Let goods be released forthwith. No order as to costs.

Order Date :- 20.2.2024
A. Mandhani/Salim

(Manjive Shukla, J.) (S.D. Singh, J.)