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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 4606/2018 & CM Appl.No. 16714/2019 (stay)**

ZHINET BANU NAZIR DADANY Petitioner

Through: Mr.D.S.Chadha, Ms. Prabjyoti
K.Chadha, Ms. Harsimran Kaur &
Ms. Esha Sharma, Advocates

versus

UNION OF INDIA & ANR. Respondents

Through: Mr. Akshay Makhija, CGSC with
Ms.Mahima Bahl, Advocate for
Respondent No.1/UOI
Mr. Satish Agarwala, Advocate for
Respondent No.2

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE I.S.MEHTA

ORDER
17.05.2019

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Dr. S. Muralidhar, J.:

1. The Petitioner, a Kenyan National, has filed this petition seeking the return of gold weighing about 3732.48 gm brought by her to India which was seized by the Customs Authority on 5th January, 2015 at the IGI International Airport, New Delhi.

2. The Petitioner states that she arrived at Terminal-3 at IGI Airport, New Delhi from Nairobi on 5th January, 2015. She was carrying with her the abovementioned quantity of gold, which she proposed to use for making jewellery in India and then take the jewellery back to Kenya to sell for

profit. According to the Petitioner, she purchased the gold in Kenya after selling her car and taking loan from her friends and relatives. As she was exiting the 'Green channel' of the airport terminal, she was intercepted near the exit gate and asked if she was carrying any gold. When she replied in the affirmative, she was taken to the Preventive room where she took out the gold from her bag and gave it to the Customs Department. A *panchnama* was drawn up for that purpose. When the gold was not returned to her and no show cause notice (SCN) was also issued, she filed the present petition on 3rd April, 2018 impleading the Ministry of Finance (Respondent No.1) and the Commissioner of Customs (Respondent No.2).

3. The *panchnama* which is enclosed as Annexure P-1 however states that when the Petitioner was asked by the Customs officers whether she was carrying any dutiable goods/gold items which she needed to declare, she answered in the negative. Further in the customs declaration form in Column 9 she had not declared that dutiable goods were being carried by her or that she was carrying gold jewellery. She marked 'no' for the questions at Sr. No. 10 (i) to (ix) of the said form. When the Petitioner was diverted for X-ray of her hand purse and hand baggage, objectionable dark images were noticed in her purse. She was asked again whether she was carrying any gold items in her baggage. She again replied in the negative. When she was asked to take out the metallic items in her possession and asked to pass through the metal detector, there was no suspicious sound heard. Subsequently, when her hand purse was examined in detail in the Preventive room, two metal blocks kept in a grey and blue colour pouch and further wrapped in transparent cello tape were recovered. The pouches when opened, were found to contain 32

pieces of gold bars, each weighing 10 *tolas*. They were recovered.

4. During the course of the proceedings, a jewellery Appraiser was called to verify the weight and purity of the metal. In terms of his report, the value of the gold bars found weighing 3732.48 gms was assessed at Rs. 93,34,783/-.

5. The gold bars were seized under Section 110 of the Customs Act, 1962 (Act) on the ground that they were attempted to be imported into India illegally and cleared without payment of customs duty and therefore liable for confiscation under Sections 118 and 119 of the Act. Enclosed with the reply of the Respondents is the recorded statement of the Petitioner. She maintained in the said statement that the gold had been purchased by her in Nairobi by selling a car and taking loan; that she was a home maker. She offered to produce proof of the source of the money for purchasing the gold.

6. The petition first came up for hearing on 2nd May, 2018. It was asked to be again listed on 9th May, 2018. Again, at the request of counsel for the Respondent since he wanted time for instructions, it was asked to be listed on 16th May 2018, on which date the Court passed the following order:

“Counsel for the respondent-Directorate of Revenue Intelligence (DRI) states that he has not been able to take instructions. He is not even aware whether show cause notice was in fact issued after it was sent to the Ministry of Home Affairs. Counsel for the respondent- DRI further states that the proceedings pursuant to the show cause notice issued in 2012, are still pending. Counsel for the respondent on being questioned states that no criminal proceedings are pending against the petitioner.

Counsel for the petitioner, however, states that criminal proceedings are pending and the petitioner had appeared before the court of Additional Chief Metropolitan Magistrate in February, 2018.

It is apparent that there is lack of communication and proper instructions are not being given to the counsel for the respondent- DRI.

In these circumstances, we would issue notice to the respondents to file a detailed reply/counter affidavit, which would be filed within four weeks. Rejoinder affidavit, if any, may be filed within four weeks after service of the counter affidavit.

We clarify that this order would not mean that the proceedings pursuant to the show cause notice or the criminal proceedings pending have been stayed or interjected. The same would continue in accordance with law.

Relist on 6th August, 2018.”

7. On 6th August, 2018 further time of four weeks was granted to file counter affidavit. On 10th October, 2018 counter affidavit was permitted to be filed subject to the Respondents depositing Rs.20,000/- as costs. Again, time was extended for that purpose on 30th November, 2018. The case was adjourned to 11th February, 2019.

8. In between those two dates, on 15th January 2019, an adjudication order was passed by the Commissioner of Customs (Airport and General), confiscating the seized gold and imposing the penalty of Rs.18 lacs on the Petitioner under Sections 112 and 114 AA of the Act.

9. Thereafter on the date that the petition was next listed i.e. 11th February, 2019, the Respondents offered to file the counter affidavit during the course of the day. The case was adjourned to 17th May, 2019. In relation to the central point urged in the petition that no show cause notice was ever issued to the Petitioner it was averred in para 4 that an SCN dated 30th June, 2015 was issued.

10. In para 5 of the counter affidavit, it was stated as under:

“5. As per record, available in the office of respondent No.2, the Show Cause Notice issued to the petitioner, had been forwarded to the Under Secretary (Legal) IS-Div-11, Ministry of Home Affairs, New Delhi, vide letter No. VIII (AP)10/P&I/980/C/Arrival/2014/10540 dated 30.06.2015 for service upon the noticee/petitioner. Vide letter dated 19.11.2015 High Commission of India, Kenya stated that the petitioner "no longer resides at the physical address provided".

11. It was thereafter averred in paras 16 and 17 as under:

“16. With reference to ground 5, a Show Cause Notice was issued to the petitioner in time. Since the petitioner was a foreign national, the Show Cause Notice was forwarded to the petitioner through diplomatic channel. However, she was not found at the given address. Correspondence in this regard is Annexure:-

17. with reference to ground 6, the gold recovered from the possession of the petitioner had been seized under Section 110 of the Customs Act, 1962 and an Show Cause Notice dated 30.06.2015 has already been issued. Further, after providing her ample opportunities to attend personal hearings and support her claims, the case has been adjudicated vide Order-in-Original No.08/AS/JC/2019 dated 15.01.2019 passed by the Joint Commissioner of Customs, IGI Airport, New Delhi, a copy of

which is Annexure-B.”

12. It was also averred in para 19 as under:

“19. The plea during the course of arguments that if the petitioner was not available at her address, the department could have served the Show Cause Notice when she had appeared before CMM, New Delhi in February, 2018, it is submitted that as per provisions of the Customs Act, 1962 notice has to be given within six months of the seizure of the goods and the department had already issued the required Show Cause Notice within the prescribed time limit at the available address of the petitioner through diplomatic channel.”

13. For the first time the SCN dated 30th June, 2015 was enclosed with the counter affidavit. A copy of the adjudication order in original was also enclosed. Importantly, in the counter affidavit, it was disclosed for the first time in para 20 that as per available records, the case property has been already disposed of in accordance with the provisions of Section 110 (1A), (1B) and (1C) of the Act. No details were given as to when the seized gold was disposed of.

14. On 1st March, 2019 the Petitioner filed CM No. 16718/2019 for an early hearing of the petition. It was pointed out in this application that it was only with the counter affidavit that the above order in original dated 15th January, 2019 was received by the Petitioner and even that order was incomplete as seven pages were missing therefrom. Simultaneously, the Petitioner also filed a rejoinder maintaining that the SCN had not been served on the Petitioner as contemplated under Section 153 read with Section 110 of the Act. It was pointed out the SCN should have been served/received within six

months from the date of seizure of gold. It was also pointed out that no record had been produced by the Respondents to prove that such an SCN had been issued. Even the adjudication order was passed only after the Petitioner approached this Court. In the criminal case instituted in the Court of the Chief Metropolitan Magistrate, Patiala House Court, the Petitioner had attended hearings from 2015 till 2019. Even during that time no SCN was served upon her. In the rejoinder the Petitioner pointed out that the procedure for disposing of the seized gold was not followed and that was illegal.

15. Thereafter when the applications were listed on 9th April, 2019 this Court passed the following order:

“C.M. Appl. No. 16714/2019, 16718/2019

We have heard learned counsel for the petitioner.

Original file containing the show cause notice and all further proceedings, including notices, if any, as well as endorsements/receipts of the documents/copies of show cause notices, furnished or supplied, should be produced in court on the next date of hearing, having regard to the complaint in these proceedings that the principles of natural justice were not complied with. Petitioners urged that neither copies of show cause notice nor even the documents were furnished and moreover the notice of hearing did not precede the order in Original.

List on 17.05.2019, the date already fixed.”

16. Today Mr. Satish Aggarwala, learned counsel for the Respondent No.2, produced the original file of the case. What it contains is a copy of the SCN dated 30th June, 2015 which in the end indicates that it was sent to the

Petitioner by speed post at an address in Kenya with a PO (post office) box number '11045-011'. It is written in brackets below the address "through Kenya Embassy". It is not clear on what precise date was the notice dispatched by speed post since there is no postal receipt available in the file. Nor is there any tracking report which would indicate the fate of the letters so sent by the speed post.

17. Mr. Satish Aggarwala informs the Court that the SCN was not in fact served on the Petitioner as by a letter dated 19th November, 2015 the High Commission of Kenya stated that the Petitioner "no longer resides at the physical address provided". Mr. Aggarwala produced a copy of a letter dated 19th November, 2015 from the Attache (CPPO) High Commission of India at Nairobi, Kenya to the Under Secretary in the Ministry of Home Affairs (MHA) which reads thus:

"Sir,

Please refer to your letter No. 25012/07/2015- Legal Cell (42) dated 8th July, 2015 forwarding therewith a Show Cause Notice issued under Customs Act, 1962 by Mr. Mohammad Ali, Additional Commissioner, Office of the Commissioner of Customs, T-3, Indira Gandhi International Airport, New Delhi for service upon Ms. Zhinet Banu Nazir Dadany, W/o Mansur Daud, R/o H.No. 167, Ismaily Flats, Nagra Parel Road, Nairobi, Kenya, P.O. Box 11045-011.

2. This Mission had forwarded the Notice to Ministry of Foreign Affairs and International Trade of the Government of Kenya with a request to forward the Court Notice expeditiously to the appropriate authorities to serve on Ms. Zhinet Banu Nazir Dadany and to send a proof of service to this Mission for further submission to the concerned authority in India. Ministry of Foreign Affairs have now conveyed vide their Note No. MFA.

LEG 10/42 Vol. VI (76) dated 30th October, 2015 (copy enclosed) that the notice was not effected upon the above named as she no longer resides at the physical address provided. However, they have not send us Affidavit of Service and original unserved Show Cause Notice. We are taking up the matter with them and will be sent to you as and when the same is received.”

18. The above letter makes it clear that the Petitioner was not served with the SCN. Counsel for the Petitioner points out that the Petitioner’s address continues to remain what is indicated in the SCN. However, they have a system of post office boxes in Kenya and letters are delivered to the post office box. There is no proof of any attempt having been made to serve the SCN to the Petitioner.

19. The record reveals that the seizure of the gold was made on 5th January, 2015. An SCN had to be served within a period of six months thereafter in terms of Section 110 (2) read with Section 124 (1) (a) of the Act. This is a mandatory requirement as has been explained in several decisions of this Court including *Iqbal Hussain v. Union of India 2017 (351) E.L.T. 145 (Del)*, *Jang Bahadur Singh Gujral v. Directorate of Revenue Intelligence 2016 (332) E.L.T 246 (Del)*, *Sai Incorporation v. Principal Commissioner of Customs 2016 (338) E.L.T.578 (Del)*, *Kore Koncepts v. Deputy Commissioner of Customs (SIIB) 2016 (333) E.L.T. 76 (Del)* and *Jatin v. Union of India 2013 (287) E.L.T 3 (Del)*.

20. It was further explained in *Chaganlal Gainmull v. Collector of Central Excise 1999 (109) E.L.T. 21 (SC)* that if the SCN was not issued within six

months from the date of seizure the consequence would be that the person from whom the gold was seized would become entitled to its return. Even the adjudication order in the present case would be illegal as the Commissioner passed the same ex parte without the SCN having been actually served upon the present Petitioner at all in the present case.

21. The second illegality committed is the disposal of the seized gold without notice having been issued to the Petitioner. In this regard Mr. Satish Aggarwala referred to Section 110 (1) (a) of the Act which reads as under:

“110 (1) (A). The Central Government may, having regard to the perishable or hazardous nature of any goods, depreciation in the value of the goods with the passage of time, constraints of storage space for the goods or any other relevant considerations, by notification in the Official Gazette, specify the goods or class of goods which shall, as soon as may be after its seizure under sub-section (1), be disposed of by the proper officer in such manner as the Central Government may, from time to time, determine after following the procedure hereinafter specified.”

22. There is no explanation offered by the Respondents as to why they were constrained to dispose of the seized gold, when it was neither perishable nor hazardous. Also, there is no answer why it had to be disposed of without notice being issued to the person from whom it was seized. This is irrespective of whether the SCN was served or not. The CBEC has issued a circular dated 14th February 2006 in this regard where it was impressed upon the field formations as under:

“An instance has recently been brought to the notice of the Board where seized goods were disposed of without issuing notice to the owner of the goods. The seizure having been set

aside by the adjudicating authority, the owner of the goods sought their return but was advised to obtain the sale proceeds, which were significantly lower than the seizure value. In subsequent proceedings, the High Court has directed the refund of an amount higher than the sale proceeds, as well as payment of interest. The loss to the exchequer has resulted from a failure to comply with the requirements of Section 150 of the Customs Act, 1962.

2. It is impressed upon field formations that where any goods, not being confiscated goods, are to be sold under any provision of the Customs Act, they shall be sold by public auction or by tender or in any other manner after notice to the owner of the goods.

3. It is further clarified that the requirement to issue notice to the owner of the goods shall also obtain in case of goods that have been confiscated but in respect of which all appeal/legal remedies have not been exhausted by the owner of the goods.”

23. In the present case with the seized material not being perishable, being gold bars, there was no reason for the Respondents to have hurriedly disposed it off and that too without notice to the Petitioner. When it was plain that even the SCN was not served upon the Petitioner, there was no reason to proceed with disposal of the seized gold without notice. It also appears that the Respondents hurriedly went ahead and passed an adjudication order more than four years after the gold was seized only after the present petition was filed. As pointed out by the Petitioner, during the time when the proceedings were in progress before the criminal court and the Petitioner was also attending those proceedings, no attempt was made to serve a copy of the SCN upon her there. The entire manner in which the Respondents have proceeded to pass the adjudication order and also dispose

of the gold without notice to the Petitioner leaves no doubt that not only the disposal of the seized gold, but the adjudication order as well, are both unsustainable in law.

24. Accordingly the adjudication order dated 15th January, 2019 is hereby set aside. As far as the return of the seized gold is concerned, the Court has been presented with a *fait accompli*, with the Respondents already having hurriedly disposed of the said gold. Mr. Satish Aggarwala on instructions states that the proceeds collected during the auction were equal to the value of the gold being an amount of Rs.93,34,783/-.

25. The Court accordingly directs that the Respondents will refund to the Petitioner the aforementioned sum of Rs.93,34,783/- (or the precise amount recovered by the Respondents by auction/sale proceedings) not later than 30th June 2019 failing which the Respondents will pay simple interest at 6% p.a. on the said sum for the period of delay.

26. The petition is allowed in the above terms. The application is disposed of. It will be open to the Petitioner to seek other remedies in relation to any further grievance she may have in accordance with law.

S. MURALIDHAR, J.

I.S. MEHTA, J.

MAY 17, 2019

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