

GAHC010270532019



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WA 297/2019

1:MD. TAJAL HUSSAIN
S/O- MUSHABBIR ALI, R/O- KALAIN, LAKHIPUR PART-I, P.O. KALAIN,
KATIGORAH, CACHAR.

VERSUS

1:THE STATE OF ASSAM AND 6 ORS.
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM,
FINANCE (TAXATION) DEPARTMENT, DISPUR, GUWAHATI.

2:THE COMMISSIONER OF STATE TAXES
GOVT. OF ASSAM
KAR BHAWAN
DISPUR
GUWAHATI.

3:THE COMMISSIONER OF POLICE
GUWAHATI COMMISSIONERATE
PANBAZAR
GUWAHATI

4:THE DEPUTY COMMISSIONER OF POLICE
GUWAHATI (WEST).

5:THE ASSISTANT COMMISSIONER OF POLICE
JALUKBARI DIV.
GUWAHATI (WEST).

6:THE OFFICER IN CHARGE
JALUKBARI POLICE STATION

GUWAHATI.

7:THE INVESTIGATING OFFICER
JALUKBARI
P.S. CASE NO. 1362/2019 DATED- 03-09-2019 JALUKBARI POLICE STATION
GUWAHATI

Advocate for the Petitioner : DR. A SARAF

Advocate for the Respondent : SC, FINANCE AND TAXATION

BEFORE
HONOURABLE MR. JUSTICE ACHINTYA MALLA BUJOR BARUA
HONOURABLE MR. JUSTICE NELSON SAILO

Date : 25-11-2019

JUDGMENT & ORDER

(AM Bujor Barua, J.)

Heard Dr. A Saraf, learned senior counsel for the appellants. Also heard Mr. D. Saikia, learned senior counsel for the respondents No.1, 4, 5, 6 and 7 and Mr. B Choudhury, learned counsel for the respondents No.2 and 3 as well as Mr. S.C Keyal, learned ASGI for the Customs Department.

2. Considering the conclusion of the learned Single Judge in the judgment and order dated 25.10.2109 in WP(C)No.7081/201 and the other connected writ petitions that the investigation revealed the commission of the principal offences under the Customs Act of 1962 (in short Customs Act) and the consequential direction to hand over the investigation to the customs authorities, along with the seized goods and trucks for further investigation, we required the presence of the authorities under the Customs Department to respond in this writ appeal. Accordingly, Mr. Sujithkumar P. Sompur, Joint Director, DRI Guwahati Zonal Unit and Mr. SC Keyal, learned ASGI representing the Customs Department are present and heard.

3. As all the appeals are based on a common set of facts, involving the same question of law, and more so considering the aspect that the learned Single Judge also passed a common judgment and order in the writ petitions, all the appeals are being heard and given a final consideration together.

4. On 21.08.2019, the police officials of the Jalukbari Police Station upon receiving certain information that trucks carrying areca nuts from Cachar district were moving without proper documents, had detained 25 Nos. of trucks. Subsequently one more truck was detained.

5. On 22.08.2019, a team of police officials proceeded to Cachar and Karimganj districts to enquire about the details of the trucks. But upon enquiry, the identity of the consignors could not be ascertained and some of the consignor firms were also found to be fictitious. According to the police officials, their investigation revealed certain manipulation of records and forgery of documents in the entire process. In the resultant situation, the ejahar dated 03.09.2019 was lodged by Sanjit Kumar Roy, Inspector and Officer-in-Charge of the Jalukbari Police Station. The ejahar stated in detail as regards the particulars of the various owners of the seized trucks and centered around the aspect that in respect of most of the truck owners certain discrepancies were found. One of the core allegation made in the ejahar was that the documents pertaining to payment of goods and service tax (GST) were not found in order and, therefore a view was formed that the appellants were involved in evasion of GST dues. Another allegation in the ejahar was that the documents submitted by them were not genuine and were forged with fake signatures. The allegations made in the ejahar dated 03.09.2019 if taken at its face value, would entail a proceeding against the appellants under the GST laws for the purported evasion of the GST dues and with regard to the allegation that the documents were not genuine and were forged with fake signatures, it would entail a prosecution under the Code of Criminal Procedure (for short CrPC) for having committed an offence under the Indian Penal Code (for short IPC).

6. In the said circumstances, the WP(C)No.6762/2019 was preferred for a declaration that the seizure/detention dated 21.08.2019 be declared to be illegal, without jurisdiction, with a further direction to the respondent authorities, more particularly the police officials of Jalukbari Police Station to forthwith release the said goods and to allow the goods to move to its scheduled destination.

7. The appellant took the stand that under Section 67 of the Assam Goods and Services Tax Act, 2017 (for short, AGST Act 2017), the search and seizure can be made only upon the proper officer, being not below the rank of Joint Commissioner, having reason to believe that tax input credit has been claimed in excess of the entitlement under the Act or there has been an evasion of tax payable under the Act. Accordingly, it was the contention that the search and seizure made by the police officials of the Jalukbari Police Station and then go ahead with the investigation and thereafter lodge an ejahar alleging evasion of GST dues, would be an aberration of the established procedure of law.

8. In the affidavit-in-opposition filed by the police authorities in the writ petition, a reference was

made to the letter No.DRI F.No.103/DRI/GZU/Enq/Betel Nuts/2019/1368 dated 09.09.19 from the Joint Director, Directorate of Revenue Intelligence, Guwahati Zonal Unit wherein it was stated that the betel nuts which were seized were obtained from the suppliers in the markets at Champhai and Khawzawl areas in Mizoram and they have been brought across the border of Myanmar inasmuch as, there is no production of betel nuts in the entire district of Champhai. References were made that on earlier occasions also other persons have been implicated by the DRI in cases of smuggling of betel nuts in Myanmar under the Customs Act. In the communication of the authorities under the DRI dated 09.09.2019, it has been provided as under:

“In the instant case, it appears that all the above requirements and legalities have been not adhered compromising the revenue as well as the Bio Security of the country and have been imported illegally into India across the Indo Myanmar border especially from the Champhai area which amounts to smuggling. Hence these subject goods contained in the said 25 trucks detained by you vide your above referred reference are liable for seizure under Section 110 of the Customs Act 1962, as they are liable for confiscation under Section 111 of the said Act read with the concerned relevant provisions of the Foreign Trade Policy.”

9. The said provision clearly indicates that it was also the case of the authorities in the DRI that the betel nuts that were transported not only compromised the revenue under the Customs Act, but also the bio-security of the country would be adversely affected. For the purpose as betel nuts/areca nuts is an agricultural produce, reference was made to Note 3 of the General Note regarding import policy which was as under:

“All primary agricultural products will be subject to a Bio Security & Sanitary – Phytosanitary import permit, to be issued by the Department of Agriculture and Co-operation, Ministry of Agriculture & Farmers Welfare, as per condition of Plant Quarantine (Regulation of Import into India) Order, 2003 (as amended from time to time)”.

10. The provisions of Note 3 of the General Note regarding import policy required that all primary agricultural products be subjected to a bio-security and sanitary-phytosanitary import permit procedure to be issued by the Department of Agriculture and Co-operation, Ministry of Agriculture & Farmers Welfare, as per condition of Plant Quarantine (Regulation of Import into India) Order, 2003.

11. In the aforesaid background, the writ petitions preferred by the appellants herein was given a final consideration by the common judgment and order dated 25.10.2019.

12. In the proceeding before the learned Single Judge, it was the contention of the appellants/writ petitioners that the goods in question were seized by the police authorities of Assam on the premises that the trucks carrying the areca nuts were moving from Cachar in Assam towards the State of West Bengal with proper documents and therefore, for the purpose, no detention and seizure of the trucks containing the areca nuts could have been made. In response thereof, it was the contention of the police authorities that under Section 4(2) of the CrPC, the police authorities can investigate any offence, including an offence under the GST Act. Further, an ejahar had also been lodged before the Jalukbari police station alleging that fraud and forgery could be detected in the tax documents submitted by the appellants and hence, over and above it would also be an offence under Sections 120(B)/420/467/471 of the IPC. It being so, a seizure is permissible under the law under Section 102(1) of the CrPC. Further, as communicated by the authorities under the DRI, there are also allegation of violations under the Customs Act and it also being an offence, the same would be within the purview of the investigation initiated by the police authorities. The ejahar dated 03.09.2019 had been registered as Jalukbari PS Case No.1362/2019.

Per-contra, it was the contention of the appellants that Section 4(2) of the CrPC cannot be invoked in respect of an offence under the GST Act or the Customs Act inasmuch as, the provisions of the two Acts are self-contained for the purpose of investigation and prosecution and hence, the detention of the goods by the police authorities cannot stand justified by referring to any offence that may have been committed under the GST Act or the Customs Act.

13. The learned Single Judge in the judgment dated 25.10.2019 arrived at its conclusion that the police authorities of Assam would have the jurisdiction to investigate certain offences under the Indian Penal Code, if made out, even though such offences may also be offences under the GST Acts or the Customs Act subject to the provisions of Section 26 of the General Clauses Act that no one will be liable to be punished twice for the same offence. The learned Single Judge was also of the view that although the trucks containing the areca nuts were seized essentially for fraud and forgery, their investigative role would primarily be confined to forgery of documents and cannot investigate whether there was any violation of the Customs Act. Accordingly, it was held that as regards the violation of the Customs Act, it would be appropriate for the police to hand over the investigation to the Customs authority so far as it relates to the allegations of smuggling. Similarly for the violation of the taxation laws under the AGST Act, it was held that the police authorities would have no jurisdiction and power to investigate such violation and the same would be governed by the provisions of the GST Acts under which a separate procedure for investigation is provided for. However in paragraph-53 of the judgment it was also provided that even if the statutes permit independent and separate investigation,

but if such investigations involved coercive actions, similar to as contemplated under the CrPC, the investigations ought to be undertaken simultaneously, or else there would be a distinct possibility of infraction of the fundamental rights under Articles 14, 21 and 22. Further, as the documents produced revealed the commission of the principal offence under the Customs Act, it would be appropriate to hand over the investigation to the authorities under the customs department for further investigation under the Customs Act along with the seized goods and trucks. It was held that the initial seizure of the areca nuts and the trucks by the police authorities of Assam cannot be said to be without authority. Accordingly, it was concluded that no case for interference was made out for acceding to the prayer in the writ petitions for a declaration that the detention of the trucks containing the areca nuts was illegal and unsustainable.

14. Being aggrieved, the intra-court appeals have been preferred.

15. The core contention of Dr. Ashok Saraf, learned senior counsel for the appellants is that Section 67 of the GST Acts provides for the power of inspection, search and seizure for any claim for input tax credit in excess of the entitlements under the Act or for any contravention of the provisions of the Act or the Rules made thereunder to evade tax. In view of such specific provision for inspection, search and seizure and the further provisions in the Acts itself providing for the procedure to be followed by the authorities under the GST Act, the refusal of the learned Single Judge in the judgment dated 25.10.2019 to declare the detention and seizure to be illegal, in respect of the offences under the GST Acts would be unsustainable.

16. Similarly, for the alleged violation of the provisions under the Customs Act, Section 100 provides for the power to search the suspected persons and Section 110 provides for the power of seizure and confiscation of any goods that may be involved in such violations. Thereafter, the Customs Act itself provide for the complete procedure as to how the matter is to be proceeded with.

17. On behalf of the police authorities of Assam, it had been reiterated that the ejahar itself discloses certain offences of fraud and forgery under the Indian Penal Code and after the ejahar was lodged on 03.09.2019, the goods in question were seized under the law on 04.09.2019. It being so, no case has been made out by the appellants for a declaration that the detention and seizure of the trucks containing the areca nuts are liable to be declared to be illegal and unsustainable.

18. We have given our consideration to the rival submissions.

19. Section 67 of the GST Acts provides as follows:-

“67 Power of inspection, search and seizure- (1) Where the proper officer, not below the rank of

Joint Commissioner, has reasons to believe that—

(a) a taxable person has suppressed any transaction relating to supply of goods or services or both or the stock of goods in hand, or has claimed input tax credit in excess of his entitlement under this Act or has indulged in contravention of any of the provisions of this Act or the rules made thereunder to evade tax under this Act; or

(b) any person engaged in the business of transporting goods or an owner or operator of a warehouse or a godown or any other place is keeping goods which have escaped payment of tax or has kept his accounts or goods in such a manner as is likely to cause evasion of tax payable under this Act,

he may authorise in writing any other officer of central tax to inspect any places of business of the taxable person or the persons engaged in the business of transporting goods or the owner or the operator of warehouse or godown or any other place.

(2) Where the proper officer, not below the rank of Joint Commissioner, either pursuant to an inspection carried out under sub-section (1) or otherwise, has reasons to believe that any goods liable to confiscation or any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under this Act, are secreted in any place, he may authorise in writing any other officer of central tax to search and seize or may himself search and seize such goods, documents or books or things:

Provided that where it is not practicable to seize any such goods, the proper officer, or any officer authorized by him, may serve on the owner or the custodian 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:

Provided further that the documents or books or things so seized shall be retained by such officer only for so long as may be necessary for their examination and for any inquiry or proceedings under this Act.

(3) The documents, books or things referred to in sub-section (2) or any other documents, books or things produced by a taxable person or any other person, which have not been relied upon for the issue of notice under this Act or the rules made thereunder, shall be returned to such person within a period not exceeding thirty days of the issue of the said notice.

(4) The officer authorised under sub-section (2) shall have the power to seal or break open the door of any premises or to break open any almirah, electronic devices, box, receptacle in which any goods, accounts, registers or documents of the person are suspected to be concealed, where access to such premises, almirah, electronic devices, box or receptacle is denied.

(5) The person from whose custody any documents are seized under sub-section (2) shall be entitled to make copies thereof or take extracts therefrom in the presence of an authorised officer at such place and time as such officer may indicate in this behalf except where making such copies or taking such extracts may, in the opinion of the proper officer, prejudicially affect the investigation.

(6) The goods so seized under sub-section (2) shall be released, on a provisional basis, upon execution of a bond and furnishing of a security, in such manner and of such quantum, respectively, as may be prescribed or on payment of applicable tax, interest and penalty payable, as the case may be.

(7) Where any goods are seized under sub-section (2) and no notice in respect thereof is given 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 period of six months may, on sufficient cause being shown, be extended by the proper officer for a further period not exceeding six months.

(8) The 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, specify the goods or class of goods which shall, as soon as may be after its seizure under subsection (2), be disposed of by the proper officer in such manner as may be prescribed.

(9) Where any goods, being goods specified under sub-section (8), have been seized by a proper officer, or any officer authorised by him under sub-section (2), he shall prepare an inventory of such goods in such manner as may be prescribed.

(10) The provisions of the Code of Criminal Procedure, 1973, relating to search and seizure, shall, so far as may be, apply to search and seizure under this section subject to the modification that sub-section (5) of section 165 of the said Code shall have effect as if for the word "Magistrate", wherever it occurs, the word "Commissioner" were substituted.

(11) Where the proper officer has reasons to believe that any person has evaded or is attempting to evade the payment of any tax, he may, for reasons to be recorded in writing, seize the accounts, registers or documents of such person produced before him and shall grant a receipt for the same, and shall retain the same for so long as may be necessary in connection with any proceedings under this Act or the rules made thereunder for prosecution.

(12) The Commissioner or an officer authorised by him may cause purchase of any goods or services or both by any person authorised by him from the business premises of any taxable person, to check the issue of tax invoices or bills of supply by such taxable person, and on return of goods so purchased by such officer, such taxable person or any person in charge of the business premises shall refund the amount so paid towards the goods after cancelling any tax invoice or bill of supply issued earlier."

20. A reading of Section 67(1) shows that where the proper officer not below the rank of Joint Commissioner has reasons to believe that there is any violation or evasion of tax under the GST Acts, he may authorize in writing any other officer of the department to inspect any of the places of business of the taxable person. Under Section 67(2) where the proper officer either pursuant to an inspection carried out under Section 67(1) or otherwise has reasons to believe that any goods liable to confiscation or any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under the Acts, are secreted in any place, he may authorize in writing any other officer to search and seize such goods, documents, books or things. Provisions of Section 67 of the AGST Act contains a clear provision that prior to any inspection, or as a matter prior to any search and seizure, a recording of reasons by the proper officer for such belief is a requirement of the law and only thereupon the process for search, seizure or confiscation can be undertaken.

21. Sections 100 and 101 of the Customs Act of 1962 are as follows:-

“100. Power to search suspected persons entering or leaving India, etc.

(1) If the proper officer has reason to believe that any person to whom this section applies has secreted about his person, any goods liable to confiscation or any documents relating thereto,

he may search that person.

(2) This section applies to the following persons, namely:-

(a) any person who has landed from or is about to board or is on board any vessel within the Indian customs waters';

(b) any person who has landed from or is about to board, or is on board a foreign-going aircraft ;

(c) any person who has got out of, or is about to get into, or is in, a vehicle, which has arrived from, or is to proceed to any place outside India ;

(d) any person not included in clause (a), (b) or (c) who has entered or is about to leave India ;

(e) any person in a customs area.

101. Power to search suspected persons in certain other cases.

(1) Without prejudice to the provisions of section 100, if an officer of customs empowered in this behalf by general or special order of the Commissioner of Customs, has reason to believe that any person has secreted about his person any goods of the description specified in sub-section (2) which are liable to confiscation, or documents relating thereto, he may search that person.

(2) The goods referred to in sub-section (1) are the following :-

(a) gold ;

(b) diamonds;

(c) manufactures of gold or diamonds ;

(d) watches;

(e) any other class of goods which the Central Government may, by notification in the Official Gazette, specify."

22. Both sections 100 and 101 of the Customs Act provide that if the proper officer or the officer of the Customs empowered by a general or a special order of the Principal Commissioner of Customs or Commissioner of Customs has reasons to believe that any person has secreted about his person any of the goods or documents liable for confiscation, such officer may search that person. Upon such search, the person concerned may be arrested under Section 104 and the goods, documents, things etc may be seized under Section 110 of the Act or confiscated under Section 111.

23. A reading of Sections 100 and 101 of the Customs Act shows that if the proper officer or the empowered officer has reasons to believe that a person to whom the provision applies has secreted about his person any goods or documents liable for confiscation, a search may be conducted and pursuant thereto the subsequent actions be taken which may result in arrest, seizure or confiscation. Provisions of Section 100 and 101 of the Customs Act also contains a clear provision that prior to any search, arrest, seizure or confiscation, the proper officer or the empowered officer is required to have a reason to believe that the person concerned was involved in violation of any of the provisions of the Customs Act, and only upon the existence of such reasons to believe, the process for search, arrest, seizure or confiscation can be undertaken.

24. From the provisions of Section 67 of the AGST Act and 100 and 101 of the Customs Act, a process for search, seizure, confiscation etc for violating any of the provisions of the AGST Act or the Customs Act can only be initiated upon having reasons to believe by the proper or appropriate officer that a person concerned was involved in violation of any of the provisions of the GST Acts or the Customs Act.

25. In the instant case, the documents made available on record so far as it relates to violation of the provisions of the AGST Act are not being relied upon by the respondents to indicate any such violation of the provisions of the AGST Act. What is contended is that some such documents are either fraudulent or it contains forged signatures resulting in offences under Sections 120(B)/420/467/471 of the IPC.

26. Accordingly, we are of the view that if the authorities under the AGST Act of the State of Assam are of the view that the appellants are required to be proceeded with or prosecuted under the AGST Act, it would be appropriate to invoke the provisions of Section 67 of the AGST Act and proceed accordingly. But without invoking the provisions of Section 67 of the AGST Act and following the procedure prescribed therein, it would be inappropriate to allow the police authorities of Assam to continue with the detention and the seizure of the trucks containing the areca nuts on the plea that the appellants have violated some or any of the provisions under the AGST Act.

27. But again as per the ejahar dated 03.09.2019, it is also the allegation that the appellants, or some of them, were involved in fraud and forgery as regards certain documents related to the GST. If the police authorities of Assam are of the view that the appellants are required to be proceeded with or prosecuted for such fraud or forgery simpliciter, which on its own may be an offence under Sections 120(B)/420/467/471 of the IPC, it would be for the police authorities to proceed against them strictly by following the required procedure prescribed under the CrPC and bring such investigation to its logical end.

28. But as regards the stand of the police authorities of Assam that they have the power to seize any property under Section 102 of the CrPC, it again has to be circumscribed that any seizure effected by invoking Section 102(1) of the CrPC would have to be subjected to the procedure prescribed under Section 102(3), i.e. to forthwith submit a report of the seizure to the Magistrate having jurisdiction over the matter. Without such procedure being undertaken, any detention of the trucks containing the areca nuts and their resultant seizure would have to be said to be without authority and jurisdiction. In the event the seizures are being followed up with submission of reports to the Magistrate having jurisdiction, it would be subjected to the procedures under the CrPC, including that of Section 451.

29. We have also taken note of the report of the Ministry of Agriculture and Farmers Welfare, Government of India dated 20.11.2019 which provides that "Since phytosanitary risk is involved the sample is rejected and further consignment may be destructed or deported", in respect of the samples of the areca nuts that were taken from the seized trucks containing such areca nuts.

30. By taking note of the report of the Ministry of Agriculture and Farmers Welfare, Government of India as regards the bio-security aspects of the areca nuts and also the stand of the Customs department that the areca nuts may have been smuggled in from across the Myanmar border in violation of the provisions of the Customs Act, we are of the view that if the proper officer or the empowered officer has reasons to so believe, it would be appropriate to initiate proceedings under Section 100/101 of the Customs Act and thereafter follow the procedures prescribed in the Act as regards search, arrest, seizure or confiscation. Without following the prescribed procedure of the Customs Act, it would be inappropriate for the police authorities of Assam to continue with the detention and the seizure of the trucks containing the areca nuts by taking the plea that provisions of the Customs Act had also been violated by the appellants.

31. We also cannot be oblivious to the aspect that the detained/seized areca nuts may result in a bio-security threat as provided in the report of the Ministry of Agriculture and Farmers Welfare, Government of India. Therefore, we are of the view that it is for the appropriate authorities, particularly the authorities under the Customs Department to take a call on the matter as to what further is required to be done in respect of the detained/seized areca nuts, but such call has to be by strictly following the provisions of the Customs Act.

32. In view of the above, we provide that the detained/seized goods be retained by the police authorities of Assam for a period of seven days from today. In the meantime, the GST authorities of the Government of Assam, the police authorities of the Government of Assam and the Customs authority of the Customs Department, Government of India shall take their respective decisions on how to proceed with the matter of the detained/seized trucks of areca nuts within the period of seven days. If any such decision is taken to proceeded against the appellants, the same be done by the respective authorities strictly as per the provisions of the GST Acts, the CrPC/IPC or the Customs Act, as the case may be.

We also provide that if the police authorities of Assam had already initiated and proceeded against the appellants under the CrPC for the offences under the IPC, the same be continued only by following the procedure provided under the CrPC and the appellants also avail the release of the goods, if lawfully seized as per the provisions of the CrPC.

33. In the event, no such appropriate decision is taken or the matter is proceeded under the appropriate provisions of law, as indicated above, by any of the aforementioned authorities, it would stand declared at the expiry of seven days that the detention and seizure of the 26 numbers of trucks of areca nuts belonging to the appellants would be illegal and unsustainable. It is again provided that in the event any of the three authorities proceeds against the appellants as per the respective laws indicated above, such proceedings shall be subjected to the logical outcome under the GST Acts, CrPC/IPC or the Customs Act, as the case may be.

34. The judgment dated 25.10.2019 in WP(C) No.6762/2019 and other connected writ petitions stands modified as indicated above and the appeals stand disposed of as indicated above.

JUDGE

JUDGE

Comparing Assistant