

**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

D.B. Civil Writ Petition No. 5928/2021

1. M/s Fairdeal Shipping Agency Pvt Ltd., G-9, Ratna Sagar, Msb Ka Rasta, Johari Bazaar, Jaipur Through Its Authorized Person Shri Vinod Kumar Sharma
2. Vinod Kumar Sharma, S/o Shri Prabhu Dayal Sharma, Then Director M/s Fairdeal Shipping Agency Pvt Ltd., G-9, Ratna Sagar, Msb Ka Rasta, Johari Bazaar, Jaipur
3. Odyssey Imports, Link Jalupura, M I Road, Jaipur Through Its Proprietor Shri Pawan Kumar Modi
4. M/s Skyway Corporation, Link Jalupura, M I Road, Jaipur, Through Its Proprietor Shri Pawan Kumar Modi
5. M/s Triveni International, Flat No. A-503, 210, Jessore Road, Kolkatta - 700089 Through Its Partner Shri Pawan Kumar Modi
6. Pawan Kumar Modi S/o Shri Prabhu Dayal Modi, Flat No. A-503, 210, Jessore Road, Kolkatta - 700089

----Petitioners

Versus

The Joint Commissioner Of Customs (Preventive), Ncr Building, Statue Circle, C Scheme, Jaipur.

----Respondent

Connected With

D.B. Civil Writ Petition No. 5980/2021

1. Mahender Kumar Sethia S/o Shri S K Sethia, Aged About 59 Years, 402, Sould Space, Surya Nagar, Tilak Marg, Jaipur-4
2. Prateek Sethia S/o Mahender Kumar Sethia, Aged About 32 Years, 402, Sould Space, Surya Nagar, Tilak Marg, Jaipur-4
3. Nishant Jain S/o Bhag Singh Jain, Aged About 27 Years, 1090, Shyam Apartment, Rani Sati Nagar, Plot No. 301, Jaipur.
4. M/s Shri Sai Logistics, G-6 Ratna Sagar, Ground Floor, Msb Ka Rasta, Johari Bazaar, Jaipur Through Its Proprietor Shri Surrender Sharma
5. Vinod Kumar Sharma S/o Prabhu Dayal Sharma, Aged

About 50 Years, G-6 Ratna Sagar, Ground Floor, Msb Ka Rasta, Johari Bazaar, Jaipur

----Petitioners

Versus

The Additional Commissioner Of Customs (Preventive), Ncr Building Statue Circle, C Scheme, Jaipur

----Respondent

D.B. Civil Writ Petition No. 5981/2021

1. Deepak Agarwal S/o Shri Kunj Bihari Agarwal, Aged About 47 Years, 1601 Kacholia Gali, Chuara Rasta, Jaipur
2. Amit Agarwal S/o Shri Kunj Bihari Agarwal, Aged About 44 Years, 58, Shanti Niketan Colony, Jaipur.
3. Souyab Khan S/o Jafar Khan, Aged About 27 Years, I Makaan, Khaadi Wali Kothi, Near Shahi Masjid Chomu, Jaipur
4. M/s Shri Sai Logistics, G-6 Ratna Sagar, Ground Floor, Msb Ka Rasta, Johari Bazaar, Jaipur Through Its Proprietor Shri Surrender Sharma
5. Vinod Kumar Sharma S/o Prabhu Dayal Sharma, Aged About 50 Years, G-6 Ratna Sagar, Ground Floor, Msb Ka Rasta, Johari Bazaar, Jaipur

----Petitioners

Versus

The Additional Commissioner Of Customs (Preventive), Ncr Building Statue Circle, C Scheme, Jaipur

----Respondent

D.B. Civil Writ Petition No. 5984/2021

1. Deepak Agarwal S/o Shri Kunj Bihari Agarwal, Aged About 47 Years, 1601 Kacholia Gali, Chuara Rasta, Jaipur
2. Amit Agarwal S/o Shri Kunj Bihari Agarwal, Aged About 44 Years, 58, Shanti Niketan Colony, Jaipur.
3. Souyab Khan S/o Jafar Khan, Aged About 27 Years, I Makaan, Khaadi Wali Kothi, Near Shahi Masjid Chomu, Jaipur
4. M/s Shri Sai Logistics, G-6 Ratna Sagar, Ground Floor, Msb Ka Rasta, Johari Bazaar, Jaipur Through Its Proprietor Shri Surrender Sharma
5. Vinod Kumar Sharma S/o Prabhu Dayal Sharma, Aged

About 50 Years, G-6 Ratna Sagar, Msb Ka Rasta, Johari Bazaar, Jaipur

----Petitioners

Versus

The Additional Commissioner Of Customs (Preventive), Ncr Building Statue Circle, C Scheme, Jaipur

----Respondent

For Petitioner(s) : Mr. Arun Goyal, through V.C.

For Respondent(s) : Mr. Kinshuk Jain, through V.C.

HON'BLE THE CHIEF JUSTICE MR. AKIL KURESHI
HON'BLE MR. JUSTICE SAMEER JAIN
Judgment

Reportable

Per Hon'ble Mr. Justice Sameer Jain.

Judgment Reserved on: 20.01.2022

Judgment Pronounced on: 9.02.2022

1. By way of present petitions, the show cause notice (SCN) issued by officers of Directorate of Revenue Intelligence (DRI) under Sections 28 and 124 of the Customs Act, 1962 (in short, 'Act' of 1962), are challenged. In the instant matters D.B. Civil Writ Petition No.5928/2021 is taken as lead case and 5980/2021, 5981/2021 and 5984/2021 as connected matters, as cause and controversy in the matters are identical.

2. The contention of petitioners is that in the light of Apex Court judgment rendered by Larger Bench titled as **M/s Canon India Private Ltd. Vs. Commissioner of Customs** reported in **AIR 2021 SC 1699**, it has been held that officers of DRI are not "*proper officers*" to initiate proceedings by way of issuance of show cause notice, raising demand/confiscation under Section 28 and 124 of the Act of 1962 and the subsequent proceedings thereto are without jurisdiction and ultra vires to the Act of 1962.

3. The case of the petitioner is that he is a Customs House Agent and the co-petitioners were importers engaged in the import of Glass Chatons at Customs ports at Jaipur. One investigation was conducted by Additional Director, DRI (Zonal) Unit Ahmedabad, in connected matter by DRI, Jaipur who after the investigation demanded custom duty under Section 28 of the Act of 1962 and proposed confiscation of the seized goods and imposition of penalty under Section 124, 112, 114A of the Act, 1962. The show cause notice was issued as back as dated 06.08.2014 and in connected matter in 2019.

4. It is contended by learned counsel for the petitioner that the said show cause notice was adjudicated vide order dated 15.03.2021 in violation of principles of natural justice without grant of right to cross-examination, without consideration of Apex Court judgment in **Commissioner of Customs Vs. Sayed Ali & Anr.** reported in **(2011) 3 SCC 537** and **Cannon India Private Ltd (supra)**, wherein it has been held that DRI Officers are not proper officers and show cause notice issued by them are *ab initio void*, illegal and lacks jurisdiction and non-consideration of the above judgments is in violation of Article 141 of the Constitution of India. Similar controversy was raised in the bunch of writ petition referred above that the show cause notice issued under Section 124 of the Act of 1962, by the DRI Officers is without jurisdiction.

5. Per contra, learned counsel Mr. Kinshuk Jain representing the respondents has submitted that the present writ petitions are not maintainable as order in original is passed and appeal has been filed by the petitioners. As per him, it is a settled position of law that where an alternative remedy is available, the

writ petition is not maintainable. As per his submission, subsequent to the judgment of Apex Court in the case of **M/s Canon India Private Ltd (supra)**, a number of writ petitions were filed before various High Courts for quashing of show cause notices issued by DRI Officers in which directions have been given to first approach Adjudicating Authority to decide the issue of jurisdiction. He further submitted that judgment of **Canon India Private Ltd (supra)**, is distinguishable as the present matter pertains to Section 124 of the Act of 1962 qua the confiscation of goods whereas the Apex Court judgment pertains to provisions of Section 28 of the Act of 1962 for recovery of demand. In support of his contentions he has relied upon various High Court judgments wherein the concerned High Courts have directed the respondents to decide the same in accordance with law considering the judgment of Apex Court in **Canon India Private Ltd (supra)**. **In writ petition No.2582/2021 titled as Vaneesh Sachdeva Vs. Union of India of Bombay High Court, Rajesh Ved Prakash Vs. ADG RWP No.19126-28/2021 etc.**

6. We have considered the submissions made by respective counsels for the petitioners as well as for the respondent-Department, scanned the record of writ petition and analyzed the judgments cited at Bar.

7. Before addressing the issue on merits, the preliminary objection raised by respondent counsel pertaining to maintainability of writ petition has to be considered. In this regard it is submitted that by way of celebrated judgment of Hon'ble Apex Court titled as **Whirlpool Corporation v. Registrar of Trade Marks**

Mumbai reported in (1998) 8 SCC 1 wherein the Apex Court in Para-15 held as under:-

"Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field."

8. It has been held that entertaining writ petition under Article 226 of the Constitution of India is a self imposed restriction if the petitioner is aggrieved and is not having efficacious and effective remedy, the same can be invoked but in the circumstance, when there is violation of fundamental rights or the action of the respondent is without jurisdiction and there is violation of principles of natural justice, the writ courts/constitutional courts have a bounden duty to entertain the writ petition.

9. In the case in hand, it is an admitted fact that a show cause notice was issued, order in original was passed, appeal was preferred but the issue whether DRI Officers are proper officers under the Act of 1962 and have power to issue a show cause notice was not analyzed and ignored though the said controversy was no more *res integra*. The petitioner has also raised the said issue before the learned Adjudicating Authority and placed reliance on the judgment of **Canon India (supra), Sayed Ali (supra) & M/s Mangli Impex Vs. Union of India (2016-335 ELT 605 Del)**. It is also to be taken note of that the judgment of Cannon

India Private Ltd (supra) was pronounced on 09.03.2021 and the OIO was passed on 15.03.2021 but the same was ignored, rather vide para-28.1 of the OIO it was held as under:

"I find that the aforesaid judgment was challenged by the Department before the Hon'ble Supreme Court under SLP(C) No.20453/2016 [now Civil Appeal No.6142/2019] which vide order dated 01.08.2016 granted stay on the operation of the judgment dated 03.05.2016 passed by the Hon'ble Delhi High Court. In view of the fact that the Supreme Court has granted unconditional stay on the decision of the Hon'ble Delhi High Court in the case of M/s Mangli Impex Vs. Union of India (2016-335 ELT 605 Del), the ratio of the decision of the aforesaid case cannot be made applicable to the present case."

10. In the compelling circumstances, when the entire proceedings were initiated by way of show cause notice which was issued by DRI Officers who lacked jurisdiction to issue show cause notices as held by Apex Court, we deem it appropriate to entertain the present writ petition overruling the argument on alternative remedy as raised by respondent counsel.

11. That qua the submission made by petitioner counsel that the show cause notice and the entire proceedings subsequent thereto lacks jurisdiction, he drew our attention to Para-16 to 23 of Cannon India Private Ltd (supra) which is reproduced as under:-

"16. At this stage, we must also examine whether the Additional Director General of the DRI who issued the recovery notice under [Section 28\(4\)](#) was even a proper officer. The Additional Director General can be considered to be a proper officer only if it is shown that he was a Customs officer under the [Customs Act](#). In addition, that he was entrusted with the functions of the proper officer under [Section 6](#) of the Customs Act. The Additional Director General of the DRI can be considered to be a Customs officer only if he is shown to have been appointed as Customs officer under the [Customs Act](#).

17. Shri Sanjay Jain, learned Additional Solicitor General, relied on a Notification No.17/2002 - Customs (NT) dated 7.3.2002 to show all Additional Directors General of the DRI have been appointed as Commissioners of Customs. At the relevant time, the Central Government was the appropriate authority to issue such a notification. This notification shows that all Additional Directors General, mentioned in Column (2), are appointed as Commissioners of Customs.

18. The next step is to see whether an Additional Director General of the DRI who has been appointed as an officer of Customs, under the notification dated 7.3.2002, has been entrusted with the functions under [Section 28](#) as a proper officer under the [Customs Act](#). In support of the contention that

he has been so entrusted with the functions of a proper officer under [Section 28](#) of the Customs Act, Shri Sanjay Jain, learned Additional Solicitor General relied on a Notification No.40/2012 dated 2.5.2012 issued by the Central Board of Excise and Customs. The notification confers various functions referred to in Column (3) of the notification under the [Customs Act](#) on officers referred to in Column (2). The relevant part of the notification reads as follows:-

"[To be published in the Gazette of India, Extraordinary, Part II, [Section 3](#), Sub-section (ii)] Government of India Ministry of Finance (Department of Revenue) Notification No.40/2012-Customs (N.T.) New Delhi, dated the 2nd May, 2012 S.O. (E). – In exercise of the powers conferred by sub-section (34) of [section 2](#) of the Customs Act, 1962 (52 of 1962), the Central Board of Excise and Customs, hereby assigns the officers and above the rank of officers mentioned in Column (2) of the Table below, the functions as the proper officers in relation to the various sections of the [Customs Act](#), 1962, given in the corresponding entry in Column (3) of the said Table: -

Sl. No.	Designation of the officers	of	Functions under Section of the Customs Act, 1962
(1)	(2)		(3)
1.	Commissioner of Customs	(i)	Section 33
2.	Additional Commissioner or Joint Commissioner of Customs	(i)	Sub-section (5) of section 46 ; and
		(ii)	Section 149
3.	Deputy Commissioner or Assistant Commissioner of Customs and Central Excise	(i)
		(ii)
		(iii)
		(iv)
		(v)
		(vi)	Section 28 ;

19. It appears that a Deputy Commissioner or Assistant Commissioner of Customs has been entrusted with the functions under [Section 28](#), vide Sl. No.3 above. By reason of the fact that the functions are assigned to officers referred to in Column (3) and those officers above the rank of officers mentioned in Column (2), the Commissioner of Customs would be included as an officer entitled to perform the function under [Section 28](#) of the Act conferred on a Deputy Commissioner or Assistant Commissioner but the notification appears to be ill-founded. The notification is purported to have been issued in exercise of powers under sub-Section (34) of [Section 2](#) of the Customs Act. This section does not confer any powers on any authority to entrust any functions to officers. The sub-Section is part of the definitions clause of the Act, it merely defines a proper officer, it reads as follows:-

"2. Definitions – In this Act, unless the context otherwise requires, -

... (34) 'proper officer', in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the [Principal Commissioner of Customs or Commissioner of Customs]. "

20. [Section 6](#) is the only Section which provides for entrustment of functions of Customs officer on other officers of the Central or the State Government or local authority, it reads as follows:-

"6. Entrustment of functions of Board and customs officers on certain other officers – The Central Government may, by notification in the Official Gazette, entrust either conditionally or unconditionally to any officer of the Central or the State Government or a local authority any functions of the Board or any officer of customs under this Act."

21. If it was intended that officers of the Directorate of Revenue Intelligence who are officers of Central Government should be entrusted with functions of the Customs officers, it was imperative that the Central Government should have done so in exercise of its power under [Section 6](#) of the Act. The reason why such a power is conferred on the Central Government is obvious and that is because the Central Government is the authority which appoints both the officers of the Directorate of Revenue Intelligence which is set up under the Notification dated 04.12.1957 issued by the Ministry of Finance and Customs officers who, till 11.5.2002, were appointed by the Central Government. The notification which purports to entrust functions as proper officer under the [Customs Act](#) has been issued by the Central Board of Excise and Customs in exercise of non-existing power under [Section 2](#) (34) of the [Customs Act](#). The notification is obviously invalid having been issued by an authority which had no power to do so in purported exercise of powers under a section which does not confer any such power.

22. In the above context, it would be useful to refer to the decision of this Court in the case of [Commissioner of Customs vs. Sayed Ali and Another](#)⁵ wherein the proper officer in respect of the jurisdictional area was considered. The consideration made is as hereunder:-

"16. It was submitted that in the instant case, the import manifest and the bill of entry were filed before the Additional Collector of Customs (Imports), Mumbai; the bill of entry was duly assessed, and the benefit of the exemption was extended, subject to execution of a bond by the importer which was duly executed undertaking the obligation of export. The learned counsel argued that the function of the preventive staff is confined to goods which are not manifested as in respect of manifested goods, where the bills of entry are to be filed, the entire function of assessment, clearance, etc. is carried out by the appraising officers functioning under the Commissioner of Customs (Imports).

17. Before advertent to the rival submissions, it would be expedient to survey the relevant provisions of the Act. [Section 28](#) of the Act, which is relevant for our purpose, provides for issue of notice for payment of duty that has not been paid, or has been short-levied or erroneously refunded, and provides that:

"28. Notice for payment of duties, interest, etc. – (1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer may,-

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research 5 (2011) 3 SCC 537 or charitable institution or hospital, within one year;

(b) in any other case, within six months, from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been so short-

levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words 'one year' and 'six months', the words 'five years' were substituted."

18. It is plain from the provision that the 'proper officer' being subjectively satisfied on the basis of the material that may be with him that customs duty has not been levied or short levied or erroneously refunded on an import made by any individual for his personal use or by the Government or by any educational, research or charitable institution or hospital, within one year and in all other cases within six months from the relevant date, may cause service of notice on the person chargeable, requiring him to show cause why he should not pay the amount specified in the notice. It is evident that the notice under the said provision has to be issued by the 'proper officer'.

19. [Section 2\(34\)](#) of the Act defines a 'proper officer', thus:

'2. Definitions.-

(34) 'proper officer', in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Commissioner of Customs;' It is clear from a mere look at the provision that only such officers of customs who have been assigned specific functions would be 'proper officers' in terms of [Section 2\(34\)](#) the Act. Specific entrustment of function by either the Board or the Commissioner of Customs is therefore, the governing test to determine whether an 'officer of customs' is the 'proper officer'.

20. From a conjoint reading of [Sections 2\(34\)](#) and [28](#) of the Act, it is manifest that only such a Customs Officer who has been assigned the specific functions of assessment and re-assessment of duty in the jurisdictional area where the import concerned has been affected, by either the Board or the Commissioner of Customs, in terms of [Section 2\(34\)](#) of the Act is competent to issue notice under [section 28](#) of the Act. Any other reading of [Section 28](#) would render the provisions of [Section 2\(34\)](#) of the Act otiose inasmuch as the test contemplated under [Section 2\(34\)](#) of the Act is that of specific conferment of such functions."

23. We, therefore, hold that the entire proceeding in the present case initiated by the Additional Director General of the DRI by issuing show cause notices in all the matters before us are invalid without any authority of law and liable to be set-aside and the ensuing demands are also set- aside.

12. On perusal of judgment referred above and relying on provisions of [Section 2\(34\)](#) which defines "proper officer", [Section 6](#) which defines "functions and powers of custom officer" and [Section 28](#) which refers to "procedure of demand and recovery by the proper officer" having jurisdiction to issue show cause notice

and to carry out adjudication, we hold that the entire proceedings initiated by officers of DRI in as much as by issuance of show cause notice under Section 28/124 of the Customs Act lacks jurisdiction and are without any authority of law because the present show cause notice is not issued by custom officer but by DRI officer who has not been assigned specific function/power under Section 6 to issue show cause notice U/S 28 of the Act of 1962. DRI officer is not Competent Authority to issue show cause notice and adjudicate the same as "proper officer". The Act, the notification relied upon do not define and bring the DRI officers within four corners of "proper officers" having functions and powers to act under Section 28 of the Act of 1962

Hence, in the light of above discussion they lack jurisdiction.

It is also noteworthy to mention that learned counsel for the respondent has raised further argument that the present show cause notice in the connected matters is issued U/S 124 of the Customs Act qua the confiscation of the goods and therefore the judgment of **Canon India (supra)** is not applicable.

The said contention of the respondent is also not tenable as it is held that DRI Officers lacks jurisdiction qua the functions to be executed under the Act of 1962, the proceedings under Section 124 is also illegal, *void ab initio* and nullity. The same view has been endorsed by Hon'ble Delhi High Court in **M/s Rani Enterprises Vs. PCC, ICD, Patparganj in WP (C) No.11721/2021** by order dated 12.10.2021, para 8 of which is reproduced as under:-

"8. It is rather unfortunate that despite a clear enunciation and pronouncement of the law on the

aspect of 'Proper Officer' under Section 110 of the Customs Act, the concerned officials of the Respondents are repeatedly seizing goods without having the authority and jurisdiction to do so. Perhaps, the judgment in Cannon India (supra), has not been either read by the concerned officials or has not been understood in the correct perspective. As a result, this court is flooded with litigation on the same issue and we cannot help but observe that it is the action of the Respondents in not applying the binding dicta of the Hon'ble Supreme Court, which is breeding unnecessary litigation."

13. In the light of above discussions, the writ petitions are allowed. The proceedings issued by show cause notice and subsequent demands confirmed by OIO are set aside, as prayed in the writ petitions. Consequential relief by way of refund/release of seized goods, if any, is allowed.

14. No order as to costs.

15. All pending applications are also disposed of.

(SAMEER JAIN),J

(AKIL KURESHI),CJ

JKP/82-85



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