

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 4007 OF 2019

IN THE MATTER OF:

Applications under Article 102 of the Constitution
of the People's Republic of Bangladesh.

And

IN THE MATTER OF:

Mohammad Ullah Mintu and another

.... Petitioner

-Vs-

***Commissioner of Customs, Customs House,
Chattogram and others.***

....Respondents

Mr. Md. Saiful Islam, Advocate

... for the Petitioner

Mr. Samarendra Nath Biswas, D.A.G. with

Mr. Md. Abul Kalam Khan Daud, A.A.G. with

Mr. A.H.M. Ziauddin, A.A.G. with

Mr. Md. Modersher Ali Khan (Dipu), A.A.G with

Mrs. Rehana Sultana, A.A.G.

..... For the Respondents-government.

Heard on: 23.10.2019 & 30.10.2019

And

Judgment on: 06.11.2019.

Present:

Mrs. Justice Farah Mahbub.

and

Mr. Justice S.M. Maniruzzaman

S.M. Maniruzzaman, J:

In this Rule Nisi, issued under Article 102 of the Constitution of the People's Republic of Bangladesh, the respondents have been called upon to show cause as to why failure of the respondents to make final assessment of the petitioner's imported goods covered under Letter of Credit No. 296816010224 dated 05.04.2016 under Bill of Entry No. C-1050615 dated

29.08.2016 within the stipulated period of 120 (one hundred and twenty) working days from the date of provisional assessment under the provision of section 81(2) of the Customs Act, 1969 should not be declared to have been done without lawful authority and hence, of no legal effect and also as to why a direction shall not be given upon the respondents to release/return the bank guarantee being No. SJIBL/BANG/INV/BG-06/2016 dated 04.09.2016 for Tk. 32,62,168.49 (Taka thirty two lac sixty two thousand one hundred sixty eight and paisa forty nine) lying with the respondent No. 4 and/or pass such other or further order or orders as to this Court may seem fit and proper.

However, at the time of issuance of the Rule, the contending parties were directed to maintain status-quo in respect of encashment of the bank guarantee for a prescribed period.

Facts, relevant for disposal of the Rule, in short, are that the petitioner is proprietor of “M/S. B.M. International” and is engaged in the business of import various commodity from abroad and after importation he sells the same in the local market.

In course of his business, he opened a Letter of Credit No. 296816010224 dated 05.04.2016 for importing “Seamless Pipe ASTM” from China under H.S. Code No. 7304.29.20. After arrival of the goods at Chattogram port, the petitioner however, collected shipping documents from his bank and accordingly, submitted the same to the customs authority through his C&F Agent for assessment and releasing the goods. After submitting the shipping documents, the customs authority generated Bill of Entry being No. C-1050615 dated 29.08.2016 for assessment and releasing of the goods. Thereafter, the concerned respondent customs authority physically examined the goods and did not accept the H.S. Code of the goods as declared by the petitioner. Rather, determined the goods to fall under H.S. Code No.

7304.90.00. The customs authority also suggested that the goods required to be (sample) examined in the BUET for determining the correct applicable H.S. Code. In this regard, the authority concerned suggested to allow the petitioner to release the goods by provisional assessment on furnishing bank guarantee for the differential amount of duty and taxes between the declared H.S. Code No. 7304.29.20 and the proposed H.S. Code No. 7304.90.00.

The petitioner duly accepted the said proposal of the respondent customs authority and made payment of all customs duties and taxes as his declared H.S. Code in cash and furnished bank guarantee being No. SJIBL/BANG/INV/BG-06/2016 dated 04.09.2016 for Tk. 32,62,168.49 (Taka thirty two lac sixty two thousand one hundred sixty eight and paisa forty nine) for the differential amount of duty and taxes. Pursuant thereto the customs authority released the goods on provisional assessment dated 06.09.2016.

However, the categorical assertion of the petitioner is that after releasing the respective goods by provisional assessment, the concerned respondent customs authority did not complete final assessment as required under section 81(2) of the Act, 1969. After expiry of the statutory period of 120 working days the respondent No. 2 issued letter upon the petitioner asking him to deposit required amount of money for chemical examination of the goods in order to determine the correct H.S. Code for the purpose of final assessment of the imported goods.

It has been further that the goods in question has been released by the petitioner of the provisional assessment dated 06.09.2016 and the concerned respondent failed to complete final assessment within the said statutory period of 120 working days. The petitioner challenging the inaction of the respondent to release the bank guarantee earlier filed a writ petition No. 18819 of 2017 and accordingly Rule Nisi was issued and also a direction was

given upon the respondent concern to dispose of the representation filed by the petitioner dated 14.12.2017 in respect of releasing the bank guarantee. Accordingly, the respondent customs authority disposed of the representation dated 14.12.2017 vide the order dated 14.01.2018 refusing to release the bank guarantee in favour of the petitioner. The said Rule was discharged for non prosecution vide order dated 12.05.2019.

By the supplementary affidavit it has been stated further that the petitioner after discharging the Rule of writ petition No. 18819 of 2017 filed a representation dated 07.07.2019 to the respondent No. 1 for releasing the bank guarantee but, the respondent did not response therein till date.

In that view of the matter, the petitioner has filed the instant writ petitions challenging the inaction of the respondents failure to make final assessment of his imported goods within due time as required under the law and also seeking direction to return the bank guarantees furnished by him before the respondent customs authority as security on provisionally assessment and accordingly, obtained the present Rules along with order of statusque.

Mr. Md. Saiful Islam, the learned Advocate appearing on behalf of the petitioner of all the writ petitions submits that the respondent customs authority miserably failed to make final assessment of the imported goods of the petitioner as per the specific provision of law, in as much as, section 81 of the Act, 1969 clearly stipulates to make final assessment of goods within 120 (one hundred and twenty) working days from the date of provisional assessment and the concerned respondents failed to make final assessment of the imported goods of the petitioner within the said stipulated period; and thus, acted illegally. He further submits that the respondent customs authorities have not made any final assessment within the stipulated 120

working days period of law and further most illegally by a letter dated 24.01.2019 asked the petitioner to deposit money for chemical examination of the imported goods from BUET after long days of the provisional assessment of the goods; these sort of actions by the respondents are utterly illegal, malafidy, arbitrary and without any sanction of law. He lastly goes to argue that the date of provisional assessment of the goods in question on 06.09.2016 and the concerned respondents failed to make provisional assessment of the petitioner's imported goods final within of the said statutory period 120 (one twenty) working days under section 81(2) of the Act, 1969, which is a mandatory provision of law but grossly violated by the remiss actions of the respondents and for these bank guarantees furnished by the petitioner in good faith are now at risk of sudden arbitrarily encashment by the respondents. Accordingly, he submits that a direction is required to be given upon the respondent No. 1 to return/release the bank guarantee being No. SJIBL/BANG/INV/BG-06/2016 dated 04.09.2016 issued by Shahjalal Islami Bank Ltd, Bangshal Branch, Dhaka lying with them in favour of the petitioner. In support of his aforesaid submissions, the learned Advocate for the petitioner has referred to the decisions of the case of *Government of Bangladesh and others -vs- Md. Salim Hossain* reported in *11 BLT (AD) page 71* and *Nasir Glass Industries Limited -vs- National Board of Revenue and others* reported in *17 BLT (HCD)243*.

Per contra, Mr. Abdul Kalam Khan Daud, the learned Assistant Attorney General appearing on behalf of the respondent No. 1, Commissioner of Customs by filing Vokatnama. No affidavit in opposition has been filed by the respondents controverting the assertions so made in the writ petition. So, the statement made in the writ petition has been uncontroverted. However, the learned Assistant Attorney General submits that the goods has

been released by the customs authority on provisional assessment as the instance of petitioner but, the petitioner however did not deposit expenses for chemical examination of the goods as required under section 200 of the Act till date and for this reason, the respondent customs authority could not complete chemical examination of the goods in question. Hence, the petitioner cannot claim any benefit for his own fault.

In the said context the learned Assistant Attorney General prays that the Rule may be disposed of with direction upon the respondent concern to complete final assessment of the goods in question as early as possible.

Heard the learned Advocate for the petitioner of all the writ petitions and the learned Deputy Attorney General appearing for the respondent No. 1, have perused the writ petitions, materials on record so appended thereto and relevant provision of law.

The cardinal issue requires to be determined in this writ petition is that whether the customs authorities have completed final assessment of the petitioner's imported goods in question within the stipulated period of 120 working days as prescribed under section 81 of the Act, 1969 and the petitioner is entitled to get return the bank guarantees furnished by him at the time of releasing of the goods on provisional assessment.

In order to appreciate the respective arguments of both the parties, it is pertinent to look into the relevant provision of law i.e. section 81 of the Act, 1969 for proper disposal of the instant Rules. Section 81 reads as follows;

81. Provisional assessment of duty.- (1) Where it is not possible immediately to assess the customs duty that may be payable on any imported goods entered for home-consumption or for warehousing or for clearance from a warehouse for home-consumption or on any goods entered for exportation, for the

reason that the goods require chemical or other test [or a further enquiry] for purposes of assessment, or that all the documents or complete documents or full information pertaining to those goods have not been furnished, an officer not below that rank of [Assistant Commissioner of Customs] may order that the duty payable on such goods be assessed provisionally:

Provided that the importer (same in the case of goods entered for warehousing) or the exporter pays such additional amount as security or furnishes such guarantee of a scheduled bank for the payment thereof as the said officer deems sufficient to meet the excess of the final assessment of duty over the provisional assessment.

[(2) Where any goods are allowed to be cleared or delivered on the basis of such provisional assessment, the amount of duty actually payable on those goods shall, within a period of one hundred and twenty working days from the date of the provisional assessment, where there is a case pending at any court, tribunal or appellate authority, from the date of receipt of the final disposal order of that case, be finally assessed and on completion of such assessment the appropriate officer shall order that the amount already guaranteed be adjusted against the amount payable on the basis of final assessment, and the difference between them shall be paid forthwith to or by the importer or exporter as the case may be:

Provided that the Board may, under exceptional circumstances recorded in writing, extend the period of final assessment specified under this sub-section.

Section 81 provides that when the customs authority is of the opinion that it is not possible to assess the duty and taxes immediately that may be payable on any imported goods or any goods entered for exportation for the reason that the goods require chemical or other test for purpose of assessment or that all the documents or complete documents or full information pertaining to those goods have not been furnished, an officer not below the rank of Assistant Commissioner of Customs may order that the duty payable on such goods be assessed provisionally. The importer or exporter pays such additional amount as security or furnishes such guarantee of a schedule bank for the payment thereof as the officer seems sufficient to meet the excess of the final assessment of duty over the provisional assessment. When any goods are released on the basis of such provisionally assessment, the amount of duty actually payable on those goods shall, within a period of 120 (one hundred twenty) working days be finally assessed but where any case pending before the any Court, or authority the date for final assessment be counted from the date of receipt of the final disposal order of the case. As per proviso of this section only the Board may under exceptional circumstances recorded in writing extend the period of final assessment specified under this section.

In the instance case admittedly the petitioner released his imported goods on provisional assessment dated 06.09.2016 on furnishing bank guarantee for the differential amount of duties and taxes as security.

However, the concerned customs authorities failed to complete provisional assessment as final within the prescribed period of 120 working days and also failed to extend the said period for final assessment from the Board as per proviso of section 81(2) of the Act, 1969; although, they could have assessed the goods finally under the said provision of law, but they did not take any step to that effect as yet. It appears from the record that 207 days

was expired from the date of provisional assessment till the date on 21.12.2017 i.e. till filing of writ petition No. 18819 of 2017

In this regard in the case of ***Government of Bangladesh and others - vs- Md. Salim Hossain(Supra)***, it has been held that;

“The customs authority as per provision of section 81 of the Act was required to make the provisional assessment final within the reasonable time. In respect of the consignments of the respondent the customs authority made provisional assessment in between July, 1991 and February, 1992, but till August 1997 the customs authority did not make the assessment final although the authority had the materials before it for making the final assessment of duties and other levies on the imported goods of the respondent taking the value at US\$ 400 per Metric ton. The customs authority inspire of having the materials for making the provisional assessment final did not make final assessment till August, 1997 taking the value of the imported goods at US\$ 400 per Metric ton. The customs authority inspire of having the materials for making the provisional assessment final did not make final assessment till August, 1997 taking the value of the imported goods at US\$ 400 per

metric ton, and thus the respondent was compelled to file the writ petitions seeking direction for the refund of the excess amount of duties realized from him at the time of provisional assessment without legal basis. In our view in the background of the facts of the case the High Court Division has committed no error in making direction for refund of the excess amount of duties realized against the goods imported by the respondent”

Similar view has been adopted by this High Court Division in the case of ***Nasir Glass Industries Limited -vs- National Board of Revenue and others (Supra)*** that;

“Section 81(2) of the Customs Act categorically says that the final assessment is to be made within 150 working days from the date of release of the goods on the basis of provisional assessment and since more than 180 days have passed after provisional assessment made on 17.05.2005, the Customs authority under no circumstances can ask for encashment of the bank guarantee. Thus, since the respondents failed to obtain an expert opinion and since the respondents failed to assess the goods finally within 150 working days from the date of

provisional assessment the order for encashment of the bank guarantee by the impugned letter is illegal and without lawful authority.”

In view of the statutory provision of law and the ratio settled by our Apex Court, we are of the view that on the failure of the customs authority to complete provisional assessment as final within the statutory period of 120 working days as prescribed under section 81(2) of the Act, 1969 or failure to extend the said period for final assessment from the Board, the provisional assessment made by the customs authority on the basis of declared value/H.S Code shall be deemed to be treated as final. Consequent thereof the concerned importer/exporter is entitled to get return the bank guarantee(s) furnished by him as security on provisional assessment.

In the instant case admittedly, the respondents customs authorities failed to assess the goods in question finally within the said statutory period; moreover, it also failed to show from record that said period has subsequently be extended by the Board in exercise of power as provided under the proviso to subsection (2) of section 81 of the Act. In view of the above stated position of fact the customs authority has no scope to withheld the bank guarantee furnished by the petitioner for the differential amount of duties and taxes against the provisional assessment of the imported goods in question as security for the purpose of final assessment.

In view of the above facts and circumstances of the cases, findings and observations we find substance in the submissions made by the learned Advocate for the petitioner and merit of the Rule.

Accordingly, the Rule is made absolute.

The respondent No. 1, the Commissioner of Customs, Customs House, Chattogram is directed to return the bank guarantee No. SJIBL/BANG/INV/BG-06/2016 dated 04.09.2016, issued by the Shahjalal Islami Bank Ltd, Bangshal Branch, Dhaka in favour of the petitioner within 30 days from the date of receipt of the copy of this judgment and order positively.

There will be no order as to costs.

The order of status quo granted earlier by this Court is hereby recalled and vacated.

Communicate the copy of this judgment and order to the concerned respondents forthwith.

Farah Mahbub, J:

I agree.