

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

Writ Petition No. 11629 of 2013 with
Writ Petition No. 11630 of 2013 with
Writ Petition No. 11631 of 2013 with
Writ Petition No. 11632 of 2013 with
Writ Petition No. 11633 of 2013 with
Writ Petition No. 11634 of 2013 with
Writ Petition No. 11635 of 2013 with
Writ Petition No. 11636 of 2013 with
Writ Petition No. 11637 of 2013 with
Writ Petition No. 10326 of 2013 with
Writ Petition No. 10327 of 2013 with
Writ Petition No. 670 of 2013 with
Writ Petition No. 671 of 2013 with
Writ Petition No. 672 of 2013 with
Writ Petition No. 673 of 2013 with
Writ Petition No. 674 of 2013 with
Writ Petition No. 1564 of 2013 with
Writ Petition No. 1565 of 2013 and
Writ Petition No. 1566 of 2013

IN THE MATTER OF:

An application under Article 102(2)(a)(ii) of the
Constitution of the People's Republic of
Bangladesh.

AND

IN THE MATTER OF:

Bureau Veritas (BIVAC) Bangladesh Limited
....Petitioners (In all writ petitions)

Versus

Customs, Excise and VAT Appellate Tribunal,
10, Dilkusha Commercial Area, Jibon Bima
Bhaban, Dhaka and others
....Respondents (In all writ petitions)

Mr. M.A. Azim Khair, Advocate with
Mr. Md. Iqbal Hossain, Advocate
....For the Petitioners

Ms. Nasima K. Hakim, DAG with
Ms. Tahmina Polly, AAG,
Mr. Elin Imon Saha, AAG and
Mr. Ziaul Hakim, AAG

.... For the respondents

Present:

Mr. Justice Md. Iqbal Kabir

And

Mr. Justice S.M. Maniruzzaman

Judgment on 01.06.2023.

Md. Iqbal Kabir, J:

All the writ petitions are taken up together and disposed of by a single judgment as those are governed by the same principle of law and facts.

The petitioner Bureau Veritas (BIVAC) Bangladesh Limited, represented by its Managing Director has filed these cases against the same respondents the Customs authorities of Chattogram.

In Writ Petition No. 11629 of 2013, Rule Nisi was issued in the following terms:

"Let a Rule Nisi be issued calling upon the respondents to show cause as to why the order contained in Nothi No. CEVT/ Case (Cus) 971/ 2013/ 2258 dated 29.09.2013 issued under the signature of respondent No. 3 dated 02.10.2013 communicating the order passed by the respondent No. 1, Tribunal constituted by the President and the Member (Judicial) in rejecting the appeal on the ground of non-deposit of penalty as required under Section 194 of the Customs Act (Annexure-D) should not be declared to have been passed without lawful authority and is of no legal effect and/or pass such other or further order or orders as to this Court may seem fit and proper."

At the time of issuance of the Rule Nisi, this Court also passed the interim order in the following terms:

"Pending hearing of the Rule, let the operation of the impugned order passed by respondent No. 1 in Nothi No. CEVT/ Case (Cus) 971/ 2013/ 2958 dated 29.09.2013 stayed for a period of 4(four) months from date."

It is noted that the petitioner challenges the legality of the 19th individual order passed by the Tribunal which is a subject matter of the above writ petition, all facts are the same, only order, case number, penalty, and writ petition are separate therefore those are mentioned as follows:

1. Nothi No. No. S-2/ 280/ Bibidho/ AP/ Section-1/ 11-12/ 15549 dated 29.6.2013 Case No. 971/2013 imposed penalty amount in BDT. 20,000 (Annexure-A) has been challenged in Writ Petition No. 11629 of 2013.
2. Nothi No. 657/ AP/ Section-7(A)/ 11-12/ 15053 date 29.6.2013 Case No. 970/2013, imposed penalty amount

in BDT. 25,000 (Annexure-A) has been challenged in Writ Petition No. 11630 of 2013,

3. Nothi No. S-2/ 273/ Bibidho/ AP/ Section-1/ 11-12/ 15547 date 29.6.2013, Case No. 969/2013, imposed penalty amount in BDT. 30,000 (Annexure-A) has challenged in Writ Petition No. 11631 of 2013,
4. Nothi No. S-2/ 276/ Bibidho/ AP/ Section-1/ 11-12/ 15050 date 29.6.2013, Case No. 968/2013, imposed penalty amount in BDT. 20,000 (Annexure-A) has been challenged in Writ Petition No. 11632 of 2013,
5. Nothi No. S-2/ 272/ Bibidho/ AP/ Section-1/ 11-12/ 15382 date 26.6.2013, Case No. 967/2013, imposed penalty amount in BDT. 30,000 (Annexure-A) has challenged in Writ Petition No. 11633 of 2013,
6. Nothi No. 8/ AP/ Section-3/ 11-12/ 16599 date 12.6.2013, Case No. 944/2013, imposed penalty amount in BDT. 30,000,7 (Annexure-A) has challenged Writ Petition No. 11634 of 2013,
7. Nothi No. S-2/ 269/ Bibidho/ AP/ Section-1/11-12/ 14323 date 6.6.2013, Case No. 943/2013, imposed penalty amount in BDT. 11,58,628 (Annexure-A) has challenged in Writ Petition No. 11635 of 2013,
8. Nothi No. 105/ AP/ Section-7B/ 12-13/ 15391 date 27.6.2013, Case No. 942/2013, imposed penalty amount in BDT. 30,000 (Annexure-A) has challenged in Writ Petition No. 11636 of 2013,
9. Nothi No. S-2-60/ Bibidho/ AP/ Section-4/ 11-12/ 14403 date 8.6.2013, Case No. 941/2013, imposed penalty amount in BDT. 50,000,10 (Annexure-A) has challenged in Writ Petition No. 11637 of 2013,
10. Nothi No. 920/ AP/ Section-7B/ 12-13/ 9184 date 12.4.2013, Case No. 752/2013, imposed penalty amount in BDT. 20,000 (Annexure-A) has been challenged in Writ Petition No. 10326 of 2013,
11. Nothi No. 151/ AP/ Section-4/11-12/ 10487 date 30.4.2013, Case No. 753/2013, imposed penalty amount in BDT. 50,000,12 (Annexure-A) has been challenged in Writ Petition No. 10327 of 2013.

12. Nothi No. 5-Cus/ PSI/ (2075) BV/ AM:/ ICD/ 2008/ group-2/ 3231(4) date 25.7.2010, Case No. 1071/2010, imposed penalty amount in BDT. 10,000 (Annexure-A) has challenged in Writ Petition No. 670 of 2013,
13. Nothi No. 359/ AP/ Section-6/ 2009-2010/ 2952-Cus date 9.9.2010, Case No. 1215/2010, imposed penalty amount in BDT. 27,75,221.35 (Annexure-A) has challenged in Writ Petition No. 671 of 2013,
14. Nothi No. 780/ AP/ Section-4/ 2003-2004/ 727-Cus date: 5.10.2010, Case No. 1255/2010, imposed penalty amount in BDT. 10,000 (Annexure-A) has challenged in Writ Petition No. 672 of 2013,
15. Nothi No. 401/ Amdani/ Section-4/ 09-10/ 718-Cus date: 5.10.2010, Case No. 1263/2010, imposed penalty amount in BDT 27,23,957.64 (Annexure-A) has challenged in Writ Petition No. 673 of 2013,
16. Nothi No. 358/ Amdani/ Section-4/ 09-10/ 711-Cus date 5.10.2010, Case No. 1264/2010, imposed penalty amount in BDT. 2,89,420.77 (Annexure-A) has challenged in Writ Petition No. 674 of 2013,
17. Nothi No. 190/ Amdani/ Section-4/ 09-10/ 733-Cus date 5.10.2010, Case No. 1219/2010, imposed penalty amount in BDT. 10,000 (Annexure-A) has challenged in Writ Petition No. 1564 of 2013,
18. Nothi No. 257/ AP/ Section-6/ 2009-2010/ 2953-Cus date 4.10.2010, Case No. 1220/2010, imposed penalty amount in BDT. 26,76,047.70 (Annexure-A) has challenged in Writ Petition No. 1565 of 2013,
19. Nothi No. 280/ AP/ Section-6/ 2009-2010/ 2955-Cus date: 4.10.2010, Case No. 1222/2010, imposed penalty amount in BDT. 18,39,982.40 (Annexure-A) has been challenged in Writ Petition No. 1566 of 2013.

It is noted that Tribunal rejected the appeal on the ground of non-deposit of penalty as required under section 194 of the Customs Act. Therefore, challenging such rejection orders above mentioned 19th writ petitioners has been filed. However, at the time of issuance of the Rule Nisi, this Court passed the interim order in each and every writ petition mentioned above, thereby impugned order was stayed.

Since all facts are the same, therefore, for betterment only the fact of writ petition No. 11629 of 2013 is stated herein below.

Brief facts stated in writ petition No. 11629 of 2013 are that the petitioner is a limited company incorporated under the Companies Act having its office at the address given in the cause title. The petitioner company is the agent of the BIVAC International S.A. Bureau Veritas Group and has been engaged by the Government of Bangladesh to render Pre-shipment Inspection (P.S.I) Agency Service.

M/S. Maf International, 527 Station Road, Chattogram in order to import "Chinese Cinnamon" from China, opened L/C No. 0667110110924 dated 29.06.2011 through AB Bank Ltd. The petitioner, through the said Bank, obtained a request letter from the said importer to carry out a Pre-shipment Inspection of the goods to be imported under the aforesaid L/C. The petitioner upon observing the necessary formalities as required under the PSI order, sent the necessary documents to the liaison office of the petitioner in China, the China office after holding Inspection in accordance with the PSI order, 2002 as well as the international commercial transaction, issued CRF (Clean Report of Findings) certificate No. BV11189e61 dated 14.02.2012. After the arrival of the goods, the importer, to release the goods, filed a Bill of Entry and the Customs authority raised an objection stating that the invoice value of the consignment is 910.00 USD per MT and the PSI certified value is 965.84 USD per MT. on examination it was found that the certified value for last 90 days of SGS, a PSI agency, was certified s USD 1200.00per MT. For certifying less value, the government incurred revenue loss and, as such, the Customs authority by letter dated 29.07.2012 asked the petitioner to show cause as to why action should not be taken against the petitioner under Rule 25(2) of the PSI Rule, 2002.

After several correspondences on 02.07.2013 petitioner received an order being noticed Order No. 173 dated 29.06.2013 passed in Nothi No. S-2/ 280/ Bibidho/ AP/ Section-1/ 11-12/ 15549-Cus passed by the Commissioner of Customs House, Chattogram purportedly exercising power under serial No. 2 of Table (1) of sub-rule (2) of Rule 25 of the PSI Rule, 2002 imposed penalty to the amount of Tk. 20,000.00. The said order was passed by the Commissioner of Customs (respondent No. 2) as an adjudicating authority which is not a decision or order passed under section 82 or section 98 of the Customs Act and the petitioner being a person aggrieved by the said order dated 29.06.2013 preferred an appeal

being No. CEVT/ Case(Cus) 971/ 2013 under section 196A of the Customs Act, but the appellate authority by order dated 29-09-2013, rejected the appeal for failing to deposit the penalty as required under section 194(1) of the Customs Act.

The petitioner having no other alternative remedy filed this instant writ petition invoking Article 102 of the Constitution and obtaining the instant Rule Nisi.

Mr. M.A. Azim Khair, the learned Advocate for the petitioner submits that in view of the decision reported in 57 DLR-p-74 penalty levied under section 10(5) of the PSI order cannot be said to have been levied "under this Act" since the Act is never intended to cover the PSI order, the order of respondent No.1 is violative and inconsistent. According to him in case of appeal preferred by the PSI agency against penalty levied under the PSI Rules, the provisions of section 194 of the Customs Act are not applicable and the appeal can be heard and disposed of without asking for any deposit.

He submits that any public demand is protected and secured under the Performance Bond and if the matter would not be heard without deposit it would create undue hardship on the petitioners. In support of his submission cited a decision where it observed that a Pre-Shipment Agent is not required to make any form of deposit under section 194(1) of the Customs Act, 1969 for preferring an appeal under section 196A against the penalty imposed by the Commissioner, if he can show that the Performance Bond earlier furnished by him is still valid.

He next submits that the impugned order passed by respondent No.1 is not an order under section 193A of the Customs Act, the provision for filing the appeal under section 196A of the Customs Act is not applicable. As such, the impugned order is arbitrary, malafide, and illegal.

He submits that section 194 of the Customs Act contemplates deposit of duty demanded or penalty levied "under this Act" which for all practical purposes means only the duty demanded or penalty levied under the Customs Act which cannot be extended to include the penalty levied under the PSI Order and therefore, the act of the respondent is without jurisdiction.

He also submits that the impugned order having been passed without giving the petitioner an opportunity of being heard, the same is violative of the principle of Audi Altarem Partem" and therefore, the same

is liable to be declared to have been passed without lawful authority and is of no legal effect.

Ms. Nasima K. Hakim, the learned DAG without filing any affidavit-in-opposition submits the petitioner committed the offense by violating section 7(A)(E) of the P.S.I Order 1999 and accordingly, he was penalized under section 10(3) of the order. Against such a penalty, the petitioner preferred an appeal under section 193 of the Customs Act. Appeal filed under section 196 (A) or 192 of the Customs Act, 1969 be regulated under the provision of the said Act.

Ms. Nasima K. Hakim, further submits that the Government, having been empowered under section 25(A) of the Customs Act, made the Pre-shipment Inspection Order (P.S.I) 1999. She further submits that appeal is the creature of statutes; in availing the right to appeal, the petitioner is obliged to fulfill the condition prescribed for maintaining such an appeal. However, when the petitioner/appellant failed to comply with the condition under section 194 of the Customs Act by depositing a portion of the penalty demanded, the Commissioner, Customs Excise and VAT Appeal passed the order rejecting the appeal.

Ms. Hakim lastly submits that the rules, orders regulations, etc. made under a statute are to carry out the purpose of the statute. The plain, literal, and grammatical reading of section 194 is that by the expression "under this Act", any appeal filed under section 193 or section 196 of the Act comes under this Act and must be guided and regulated under this Act.

We have heard the learned Advocates of both parties and perused the writ petitions and annexures thereto, and gone through the referring decisions placed by the learned Advocate also consulted respective laws as well.

It is noted that the petitioner received an order being adjudication order No. 73 dated 29.06.2013 passed in Nothi No. S-2/ 280/ Bibidho/ AP/ Section-1/ 11-12/ 15549-Cus passed by the Commissioner of Customs House, Chattogram purportedly exercising power under serial No. 2 of Table (1) of sub-rule (2) of Rule 25 of the PSI Rule, 2002 imposed penalty to the amount of Tk. 20,000.00. The said order was passed by the Commissioner of Customs (respondent No. 2) as an adjudicating authority which is not a decision or order passed under section 82 or section 98 of the Customs Act and the petitioner being a person aggrieved by the said order dated 29.06.2013 preferred an appeal being

No. CEVT/ Case(Cus) 971/ 2013 under section 196A of the Customs Act. The appellate authority dismissed the appeal under section 194 (1) of the Customs Act 1969 as the same was filed without depositing a certain amount of the penalty.

Relying upon the decision of Intertek Testing Service (BD) Ltd. and another vs. President, Appellate Tribunal Custom, Excise, and VAT reported in 57 DLR-74 Mr. Khair submits that the penalty levied under Article 10(3) of the P.S.I. order cannot be said to have been levied under the Customs Act. According to him the Custom Act is never intended to cover the PSI 1999 order, the appellate authority in passing the impugned order under section 194 of the Customs Act, committed illegality beyond its jurisdiction, and also committed gross illegality in demanding deposition of a certain portion of penalty levied under Article 10(3) of the P.S.I order 1999 and as such the impugned decision by the appellate authority rejecting the appeal on the plea of non depositing the certain amount of penalty levied by the authority being illegal and without lawful authority and the same is not sustainable.

Having considered the submissions made by the learned Advocate for the petitioner and also having considered the decision cited in support of the Rule, we have a respectful agreement and find no room to differ.

In light of the above, we are of the view that the impugned order rejecting the appeal on the ground of non-deposit of the penalty is illegal and without lawful authority.

In the result, the Rule Nisi issued in the above cases are made absolute.

The interim order granted at the time of issuance of Rule is hereby recalled and vacated.

Respondent No.1 is directed to dispose of the appeals on merits, in accordance with the law without receiving the deposit of penalty.

There will be no order as to cost.

Communicate the order.

S.M. Maniruzzaman, J:

I agree.