

LEX/BDHC/0047/2021

IN THE SUPREME COURT OF BANGLADESH (HIGH COURT DIVISION)

Writ Petition No. 15007 of 2018

Decided On: 19.09.2021

Appellants: **G.A.B. Limited**
Vs.

Respondent: **The Commissioner of Customs, Customs House, Dhaka and Ors.**

Hon'ble Judges/Coram:

Syed Refaat Ahmed and Sashanka Shekhar Sarkar, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: Abdullah Mahmood Hasan and Md. Forrukh Rahman, Advocates

For Respondents/Defendant: Omar Farouq, Advocate

JUDGMENT

Syed Refaat Ahmed, J.

1. In this Application under Article 102 of the Constitution a Rule Nisi was issued on 23.1.2019 calling upon the Respondents to show cause as to why the action of the Respondents by way of segregating the single data processing machine named as "Orga Tex Professional Central Management Machine " and changing the description, HS Code and determining separate value of the goods imported by the Petitioner without any objective basis and the Final Assessment Order dated 6.1.2019 purporting to assess the goods imported by the Petitioner covered under Bill of Entry No. C-431293 dated 8.5.2018 in violation of the Valuation Rules, 2000 and/or the General Rules for the Interpretation of the Harmonized System (GIR) by ignoring the declared correct HS Code and the Invoice value, shall not be declared to have been made without lawful authority and are of no legal effect as being violative of the Petitioner's fundamental rights guaranteed under articles 27, 31, 40, 42 and 83 of the Constitution and also as to why the Respondents shall not be directed to assess the goods covered by the above-mentioned Bill of Entry on the basis of the declared correct HS Code and Invoice value and also to follow the mandatory provisions as contained in the Valuation Rules, 2000 and/or Rules 1 and 2 of the GIR and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. The question that is focal to this Writ Petition is whether machinery imported by the Petitioner as "a fully integrated machine" permits of "segregation" for the dual purpose of classification for assessment purposes and assigning a particular HS Code in preference to another. The consignment in question is Orga Tex Professional Central Management Machine ("OTPCMM") which in the relevant Bill of Entry has been declared as bearing HS Code No. 8471.90.00. The Petitioner's grievance primarily stems from the fact that the Customs Authority for assessment purposes has segregated the components of the OTPCMM and imposed customs duty on several individual constituent components in a manner that the Petitioner is initially said to have not anticipated at all. It is also the case that the Customs Authority in that classification exercise by segregation has identified and classified a bulk of the constituent components of the

OTPCMM as a separate class of imported goods classifiable generally as "software" and broadly assessable under HS Code No. 8523.49.10 and/ or the subheads arising thereunder. This segregation of the contended single consignment of OTPCMM into several items attracting separate valuation and assignment of HS Code Numbers distinct from HS Code No. 8471.90.00 are argued to be ' arbitrary and operating to the prejudice of the Petitioner. This is the sum and substance of the Petitioner's case before this Court justifying the filing of this Writ Petition.

3. From this Court's perspective the initial point of enquiry has been the extent to which faced with this set of facts the Court may feasibly embark upon a determination of the contended wrongfulness of such segregation and by extension necessarily the question of wrongful and arbitrary assignment of HS Code in preference to or in exclusion to another. Upon a perusal of the terms in which the Rule Nisi of 23.1.2019 has been issued it is abundantly clear that the Petitioner basically requires of this Court a finding that the Customs Authority has acted illegally by ignoring the declared HS Code as evident in Bill of Entry No. C-431293 of 8.5.2018. Much of the Petitioner's learned Advocates' arguments has been to impress upon this Court that such action of contended arbitrary selection of HS Code has been without any objective basis in general and in particular in violation of the Valuation Rules, 2000 and the GIR and that this Court by identifying and sanctioning the reference to such objective standards through judicial review may be able to remedy the wrong so done the Petitioner by the Customs Authority. To that extent this Court is also expected to mandatorily require the Respondents to assess the goods covered by the said Bill of Entry on the basis of the "declared correct" HS Code and invoice value. The learned Deputy Attorney General, Ms. Nasima K. Hakim, as assisted by the learned Assistant Attorney General Mr. Elin Saha, has at this juncture and at the very outset submitted on the limits to judicial review of such grievance by reference to the judgment in Bangladesh vs Sherajul Islam reported in 20 BLC (AD) (2015) 64. Ms. Hakim has argued that the spectre of a jurisdictional constraint as articulated by the Appellate Division in the Sherajul Islam case looms large here by reference to the ratio decidendi of the Sherajul Islam case i.e., that the classification of imported goods and assessment thereon by the Customs Authority raise disputed questions of fact which do not permit of being resolved in the writ jurisdiction. Ms. Hakim submits that the Petitioner requires this Court to reconsider and evaluate correctly the classification of imported goods and the assessment thereon by the Customs Authority which shall necessarily take this Constitutional Court into the realm of sifting through disputed questions of fact which ought not practicably be undertaken in exercise of its original summary jurisdiction. This Court finds itself to be in agreement with that line of submission and indeed finds itself fully subscribing to the ratio decidendi of the Sherajul Islam case as is indeed attracted to this case.

4. The disputed questions of fact purely emerging from the documents brought on record and comprising of details apparent on the face of such record are starkly evident upon a perusal of the Affidavit-in-Opposition filed on behalf of the Respondent No. 1, Commissioner of Customs, Dhaka. The Affidavit-in-Opposition has been considered against the backdrop of the questions that arose in this Court's mind from the Petitioner's pleadings as to whether the Customs Authority was under a fundamental misconception as to the nature, characteristics, utility etc. of the OTPCMM evident in the setting aside of a sizeable chunk of the machine's components and identifying the same as "software " for assessment purposes. A further question that this Court would like to pose is whether the Customs Authority in so acting ought to have benefited from the Petitioner's input as to the true nature and operational and functional aspects of the OTPCMM and whether the assessment process, accordingly, should have been a participatory process enabling the Petitioner to have a meaningful role in enlightening

the Customs Authority as to the true identity and nature of its imported consignment and also farther whether, for example, independent expert opinion ought to have been sought in this regard. Indeed, we note that the Petitioner in this case had put in an application to this Court to initiate a process of independent and authoritative expert testing of the consignment in question as a prelude to a final substantive disposal of the Rule Nisi.

5. As previously indicated, it is the Respondent No. 1, Commissioner's Affidavit-in-Opposition that has neatly placed the case before us at least from a comprehensive factual perspective. The Affidavit-in-Opposition notably underscores the fact, as indeed was not expressly done by the Petitioner in the main Application but has been sought to be done through its reply to the Affidavit-in-Opposition, that the Petitioner imported this particular consignment upon opening a Letter of Credit (LC) in which the importable consignment is identified under two HS Code Nos. i.e., 8471.90.00 as well as 8523.49.10. The significance of this being that the LC applies to both software and machineries as above signified through two different HS Code assigned to the importable consignment. It is here that Mr. Elin Saha, AAG submits by reference to the Affidavit-in-Opposition that the Petitioner with mala fide intention sought to evade the legitimate levy of taxes and duties as starkly evident in the Bill of Entry which is the first document of note that digresses notably from the importation documents and the documents generated by the manufacturer/seller by declaring the consignment as classifiable only and exclusively under HS Code No. 8471.90.00 wholly to the exclusion of HS Code No. 8523.49.10.

6. Short of undertaking a substantive evaluation of the assessment undertaken by the Customs Authority and, thereby, delving into the merit of the Petitioner's case, it is evident at least from a perusal of the Customs assessment sheet that the Customs Authority has gone ahead and restored HS Code No. 8523.49.10 as the referable and assignable code for valuation purposes and as applicable to a sizeable chunk of the OTPCMM under the general category of "software ". It is here, spurred on by the clarification provided by the Commissioner of Customs in his Affidavit-in-Opposition, that the Petitioner has with greater explanation brought on record its own admission and recognition that the OTPCMM does indeed permit of and is comprised of two types of components, i.e.,

1. Orga Tex Professional Software; and

2 . Orga Tex Optiweigh System including Mettler Toledo Scales and Label Printer.

7 . Predicated on the above and highlighting the dissimilarity in description of the consignment in the LC and the Bill of Entry the option was indeed open to the Customs Authority to invoke section 32 of the Customs Act, 1969 ("Act") upon raising the allegation of a misdeclaration but that is evidently not the avenue chosen in this case by such Authority. Instead an assessment has been done resulting in a final assessment order dated 6.1.2019 in a manner that is disputed and challenged in this Writ Petition. It is at this juncture that both the Commissioner of Customs and the Petitioner have thrown light on alternative forums of redress given that this Court is generally disinclined for reasons hereinabove provided by particular reference to the Sherajul Islam Case to consider and dispose of the Rule Nisi on merit.

8. There is also the question raised at this point as to in whom between the Petitioner and the Customs Authority the responsibility lies to take the issues arising in this case

before an identifiable appropriate forum. Both parties have brought considerable information on record which this Court deems prudent to reflect on briefly albeit with the purpose of indicating the avenues better pursued by the parties instead of this present judicial forum. The Commissioner of Customs laying the onus and responsibility in this regard solely on the shoulders of the Petitioner informs this Court that the Import Policy Order, 2015-2018, as the learned DAG and learned AAG both submit to be still in force and applicable, provides an alternate forum in the name and form of the Import Trade Control (ITC) Committee. It suffices to note here that the ITC Committee as dealt with in chapter 8 of the Import Policy Order is authorized to adjudicate at the behest of an importer like the Petitioner any dispute between an importer and the Customs Authority arising from an ITC classification or description of goods imported under the First Schedule of the Customs Act. Information made available to us by the learned DAG and AAG to the best of their knowledge, however, provide no confirmation of the ITC Committee having ever been established and remaining operational.

9. The Petitioner, without sufficiently explaining its own responsibility for the divergence in the assignment of HS Codes in its importation documents and the Bill of Entry, through its Affidavit-in-Reply ultimately saddles the Customs Authority with the responsibility to examine goods upon consultation with an importer on points of classification through a participatory process. It is submitted that this the Customs Authority failed to do prior to the final assessment order made on 6.1.2019. It is in this context that the Petitioner apprises this Court of the NBR's General Order being আদেশ নং-০৩/জারাবো/২০০২/ডক dated 27.1.2002 on শ্রেণীবিন্যাস বা অন্যবিধ ঠিকায়ন সমস্যার তুলিত পদ্ধতি গ্রহণের ব্যবে Format আকারে প্রস্তাব প্রেরণ প্রসঙ্গে.

The mechanism for submitting proposals for classification or reference of other assessment problems to the NBR by the Customs Authority upon following a format is laid out in detail in the said General Order. That General Order upon a cursory glance provides a checklist of all steps to be taken by the Customs Authority including an identification of the dispute at hand, detailed proposal of the importer, opinion of the relevant Customs House/Commissionerate and in case particularly of, and as relevant to this case, the reclassification of any consignment, a full description of the consignment, the importers' proposal, expert opinion taken upon testing of samples, the Customs evaluation of the same and the final proposal following therefrom for reclassification. It is interesting to note that this General Order of 2002, as the learned DAG Ms. Nasima K. Hakim assures us is still current and effective in confirmation of the similar assertion by the Petitioner, followed the insertion in the Act in 2000 of section 219A allowing the NBR to make Customs Rulings in any matter raised in an application by any person as the Petitioner or by an Officer of the Customs or taken up for consideration of the NBR's own motion, thereby, being indicative of a procedural link to be essentially drawn between the two processes.

10. The ruling of the Appellate Division in the Sherajul Islam case is better understood against the perspective of these specialised high-powered alternate fora established and permitted under the law to address expeditiously and conclusively disputes of the kind at hand in lieu of a forum as this Constitutional Court. There is, however, no information before us presently whether either or any party in this case has sought actively and positively to approach any or all of this fora for a substantive disposal of the dispute that has arisen. This Court now, therefore, alerts all parties concerned as to the probable availability of these alternate avenues which to the extent feasible in the facts and practicable given the realities on the grounds ought to have been and can still be pursued to address and resolve the underlying dispute.

11. There is one other matter that this Court deems prudent to address before leaving off and that has to do with a cumbersome exercise undertaken by this Court on behalf

of both the Petitioner and the Customs Authority to physically locate and identify the Petitioner's consignment which all concerned, including the present custodian of the consignment, Biman Bangladesh Airlines, were for an unduly long period of time completely in the dark about. It is noted that the inability to trace the present physical location of the consignment of OTCMM was unduly holding up a final determination of the Petitioner's grievance. It is with that overriding interest and objective in mind enuring to the benefit of all and indeed a final disposal of this matter by this Court that Biman Bangladesh Airlines Limited and Salvation Logistic Limited represented by its Managing Director were added as parties by this Court's Order of 6.2.2020. Biman Bangladesh Airlines was brought on board as a necessary party for the reason that the Petitioner's consignment was being held by Biman Bangladesh Airlines in its cargo facility and Salvation Logistic Limited was similarly added as a necessary party by reason of being the Petitioner's C&F Agent. That exercise led to a somewhat protracted endeavour at this Court's behest to physically locate the consignment as was otherwise taken by all parties concerned as having gone "missing". This Court's Order of 12.8.2021 as finally records the information received of the consignment's actual physical location provided in Court through an Affidavit-in-Compliance by two named Biman functionaries is reproduced hereinbelow for general reference:

"An Affidavit-in-Compliance dated 11.8.2021 has been filed on behalf of the Added Respondent No. 11, Biman Bangladesh Airlines Limited represented by Manager (Cargo), Head Office. Balaka, Kurmitala, Dhaka- 1229, Bangladesh further to and in keeping with the terms of this Court's Order dated 30.6.2021.

As evident in that Order of 30.6.2021 this Court has had to digress from a consideration of the substantive issues raised under the Rule Nisi in the interest of first ascertaining the physical location and identifying the Petitioner's consignment further to an apprehension raised in the Petitioner's pleadings as to the exact whereabouts of such consignment. Two functionaries of Biman Bangladesh Airlines being Mr. Meer Akteruzzaman, Manager Commercial and Mr. Md. Rashedul Karim, (General Manager (Cargo) have in full compliance with this Court's Order of 30.6.2021 registered their physical presence in Court on both 11.8.2021 and 12.8.2021. Furthermore Mr. Meer Akteruzzaman by a duly affirmed affidavit of 11.8.2021. and as substantiated by supporting documentation duly annexed, has revealed inter alia that the Petitioner's consignment is presently to be found at Warehouse No. 1 of the Importation Terminal, Hazrat Shahjalal International Airport, Dhaka

In the context above, this Court has through the learned Advocate of the Added Respondent No. 11, Mr. Md. Shahidul Islam conveyed clearly the Court's instruction to the two functionaries so present in Court today that the consignment so physically identified and located shall henceforth be retained in storage by Biman Bangladesh Airlines by way of safe custody in Warehouse No. 1 of Importation Terminal, Hazrat Shahjalal International Airport, Dhaka until final determination of this Rule Nisi/any order to the contrary issued by this Court. Both Mr. Meer Akteruzzaman and Mr. Md. Rashedul Karim as represented by Mr. Md. Shahidul Islam in Court have expressed their clear understanding of such instructions given.

Predicated on the above, it has now become incumbent upon the Petitioner represented by Mr. Forrukh Rahman to ensure expeditious hearing and disposal of the Rule Nisi henceforth. It is also imperative that the Attorney General's Office representing the relevant Customs Commissionarate file an Affidavit-in-

Opposition no later than 18.8.2021 in light of all pleadings on record including the Affidavit-in-Compliance of the Added Respondent No. 11.

Moreover, and as prayed for in the Affidavit-in-Compliance, further physical presence/ personal appearance in Court of Mr. Meer Akteruzzaman and Mr. Md. Rashedul Karim is, hereby, dispensed with until further Order(s), if any, issued to the contrary. That notwithstanding the Added Respondent No. 11 shall by 18.8.2021 file a Supplementary Affidavit-in-Compliance specifically bringing on record all documents listed under সূত্র (reference) in the Biman communication of 9.2.2020 (Annexure-2 of the Affidavit-in-Compliance) as well as dated photographs in evidence of the present condition, manner of storage and exact location of the Petitioner's consignment.

Let this matter appear in the list as a part-heard matter on 22.8.2021. "

Accordingly, all parties concerned are put on notice of the fact in particular that the Added Respondent No. 11, Biman Bangladesh Airlines represented by its Manager (Cargo) remains instructed by this Court to ensure the safe custody of the consignment of OTPCMM, physically traced and identified (as further affirmed through photographs produced through an Affidavit-in-Compliance dated 11.8.2021) and all parties concerned including the Added Respondent No. 11, Biman Bangladesh Airlines shall maintain status quo as to the present location of such consignment remaining in the safe custody of Biman Bangladesh Airlines in Warehouse No. 1 of the Importation Terminal, Hazrat Shahjalal International Airport, Dhaka until a final determination is made by any concerned and relevant authority to whom either or any of the parties may refer the dispute at hand.

12. Resultantly, this Rule is disposed of with the observations and directions above.

13. There is no Order as to costs.

14. Communicate this Judgment and Order at once.

Sashanka Shekhar Sarkar, J.

I agree.

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