

**IN THE SUPREME COURT OF INDIA AT NEW DELHI
CIVIL APPELLATE JURISDICTION**

SPECIAL LEAVE PETITION (CIVIL) NO. OF 2018

(Arising out of final impugned judgment & order dated 29.01.2018
passed by the Hon'ble High Court of Judicature at Bombay Civil
Appellate Jurisdiction in W.P. No. 809 of 2018)

(WITH PRAYER FOR INTERIM RELIEF)

IN THE MATTER OF:

M/s. Faqir Chand Vinod Kumar and Co.

....Petitioner

Versus

The Union of India and Anr.

.....Respondents

WITH

PAPER BOOK
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ADVOCATE FOR THE PETITIONER: R. P. GUPTA

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SUPREME COURT OF INDIA AT NEW DELHI
CIVIL APPELLATE JURISDICTION
SPECIAL LEAVE PETITION (CIVIL) NO. OF 2018

IN THE MATTER OF:

M/s. Faqir Chand Vinod Kumar and Co. Petitioner

Versus

The Union of India and Anr. Respondents

OFFICE REPORT ON LIMITATION

1. The petition (s) is/are within time.

2. The petition is barred by time and there is delay ofdays in filing the same against the order dated 29.01.2018 and petition for condonation of day delay had been filed.

3. There is delay of.....days in re-filing the petition and petition for condonation ofdays delay in refiling has been filed.

Dated:07.05.2018

New Delhi

SECTION OFFICER

PROFORMA FOR FIRST LISTING

SECTION-

Central Act: (Title): N.A.

Section: N.A.

Central Rule: (Title): N.A.

Rule No.(s): N.A.

State Act: (Title): N.A.

Section: N.A.

State Rule: (Title): N.A.

Impugned Interim Order: (Date): N.A.

Impugned Final Order / 29.01.2018

High Court: (Name)HIGH COURT OF JUDICATURE AT BOMBAY

Name of Judges: S.C. DHARMADHIKARI &
SMT. BHARATI H. DANGRE, JJ

Tribunal /Authority: (Name)N.A.

1. Nature of matter: Civil (**Yes**) Criminal (No)

2.(a) Petitioner Name: M/s. Faqir Chand Vinod Kumar and co.

(b) e-mail ID: **Not known**

(c) Mobile Phone No. **Not known**

3. (a) Respondents Name: Union of India and Anr.

(b) e-mail ID: **Not known**

(c) Mobile Phone No. **Not known**

4. (a) Main category classification:

(b) Sub classification:

5. Not to be listed before:- **NA**

6. Similar /Pending matter: - **No Similar Matter Pending**

7. **Criminal Matter: - N.A.**

(a) Whether accused /convict has surrendered: () Yes () No -
N.A.

(b) FIR No. – **N.A.** Date: - **N.A.**

(c) Police Station: - **N.A.**

(d) Sentence Awarded :-**N.A.**

(e) Sentence Undergone: - **N.A.**

8. Land Acquisition Matters: - N.A.

(a) Date of Section 4 Notification :- **N.A.**

(b) Date of Section 6 Notification :- **N.A.**

(c) Date of Section 17 Notification :- **N.A.**

9. Tax Matters: State the effect: N.A.

10. Special Category (first petitioner /appellant only): No

(Yes) Senior citizen > 65 years () SC /ST () Woman /child

() Disabled () Legal Aid case () In custody

11. Vehicle Number (in case of motor Accident Claim matters): - **N.A.**

12. Decided cases with citation: - N.A.

Submitted By

Drawn on:04.05.2018

Filed on:07.05.2018

(RAVI PRAKASH GUPTA)

Registration Code- 0597

raviprakashguptaadvocate@gmail.com

SYNOPSIS

The petitioner is filing the present special leave petition being aggrieved by the impugned judgment vide which the writ petition filed by the petitioner challenging the *ultra vires* proceedings of the respondents in denying the petitioner its vested rights in the exemption granted to it from payment of customs duty on import has been disposed of; without quashing these illegal proceedings wherein the respondents are palpably misreading/misapplying the impugned notification dt.21.12.2017 and arbitrarily/baselessly giving it retrospective operation.

As per the undisputed facts relevant for the present adjudication, the petitioner had presented a prior Bill of Entry on 25.11.2017. This was prior to the actual entry of the vessel in the port of Nhava Sheva in Mumbai carrying chickpeas imported by the petitioner from Australia. When the vessel reached India, pursuant to the filing of the Import General Manifest by the agents of the owners of the vessel, the 'entry inwards' under Section 31 of the Customs Act, 1962 ('the Act') was granted at 12:12 PM on 21.12.2017. The goods (chickpeas) were unloaded and pursuant to an assessment by the proper officer, an order was passed permitting clearance and final clearance u/s 47 was granted after an out of charge endorsement was made on the Bill of Entry at 04:51 PM on 21.12.2017. At the time of the above 'entry inward' and clearance, the rate of the basic customs duty applicable was 'Nil' as all pulses were exempted from custom duty vide Notification No. 50/2017-Customs dt. 30.06.2017. However, this notification was amended and the exemption *inter alia* on import of chickpeas was taken away. This amendment was published in the

Official Gazette at night on 21.12.2017 at 10:45 PM; much after the 'entry inward' and clearance and out of charge order had already been given to the petitioner.

It is on the basis of the above amendment that the respondents denied release of petitioner's goods despite them having been granted 'entry inward' u/s 31 and the Bill of Entry having been finally assessed and out of charge order passed u/s 47. The acts of the respondents in giving the clearly/expressly prospective notification retrospective operation is against the rights of the petitioner guaranteed under Articles 14, 19(1)(g), 20(1), 21, and 265.

It is the case of the petitioner that the new notification dt. 21.12.2017 could only apply prospectively. It cannot apply to imports *ex-post facto*, retrospectively. Therefore, as the new notification was notified in the Official Gazette only at 22:45 hours (10:45 PM) on 21.12.2017, it could only be applied prospectively to imports made after the notification and not before.

It is humbly submitted that by virtue of Section 15 of the Act upon grant of 'entry inwards' u/s 31, vested rights had been created in the petitioner in respect of the prior Bill of Entry filed by the petitioner under the Notification dt.30.06.2017, wherein, pulses including chickpeas had been fully exempted from custom duty. These vested rights in the petitioner could not have been taken away without any valid legislation which specifically and expressly *ex-post facto* sought to take away these vested rights. A bare reading of the impugned Notification dt. 21.12.2017 shows that it was intended only 'hereby' to

repeal/substitute the specific provision of the Notification dt.30.06.2017.

Moreover, it is settled law that a retrospective delegated legislation cannot be passed unless the statute expressly empowers the authority/government to do so in express terms. In the present case, Section 25 of the Act did not confer any power on the government to pass a notification *ex-post facto*. Without such authority from the statute, the government could not have applied the notification retrospectively to imports in which the 'entry inwards' had been granted and/or in which the Bill of Entry had been finally assessed, and import had already been concluded and an out of charge order had been duly passed by the proper officer u/s 47.

The repeal of the specific entry from Notification dt. 30.06.2017 vide the impugned notification dt. 21.12.2017 will also be covered by the principles of Section 6 of the General Clauses Act.

That the impugned judgment overlooked all the above arguments of the petitioner by erroneously holding that disputed questions of facts arose in the present matter. It is humbly submitted that a bare perusal of the affidavit in reply of the respondents shows – as is also clear from the admitted documents on record- that it is undisputed that the 'entry inwards' u/s 31 and the clearance u/s 47 including the out of charge order were given much prior to the publication of the impugned notification in the Official Gazette. As stated earlier, the 'entry inwards' u/s 31 was granted at 12:12PM on 21.12.2017. Clearance u/s 47 and out of charge for the goods was given at 4:51 PM. Whereas the impugned notification was published much later in the night at 10:45

PM. These facts have not been controverted and are admitted. Therefore, the impugned judgment erred in recording that the writ petition involved disputed questions of fact.

Without considering the above facts and position in law, and while overlooking the fact that the proceedings before the respondents are completely illegal and *ultra vires*, the impugned judgment directed the petitioner's goods to be released by imposing very onerous conditions, which the petitioner had to comply with considering the perishable nature of the goods and the demurrage/warehousing charges being incurred thereon.

Being aggrieved by the above and the continuation of the *ultra vires* proceedings, the petitioner is filing the present special leave petition.

LIST OF DATES

Under Section 12 of the Customs Act, 1962 ('the Act') all goods imported into India are liable to customs duty except when they are expressly exempted u/s 25. When any goods arrive in India, before they are unloaded, the person-in-charge has to submit an arrival/import general manifest with the concerned authority u/s 30. Unloading of goods can only happen after the concerned officer has granted '*entry inwards*' to the vessel under Section 31. For getting custom clearance for such goods which have been unloaded u/s 31, an importer can either present a Bill of Entry ('BoE') within a day from the date of arrival of the vessel, or at any time within 30 days prior to the expected date of arrival under Section 46. Along with the BoE the importer is also required to self-assess the customs duty payable on the imported goods u/s 17. This self-assessment has to be as per the prevailing rates dealt with in Section 15. According to the said section, the rate of customs duty payable on any goods is the rate in force on the date on which the BoE is presented or in the case of a prior BoE, when the entry inwards order is granted by the proper officer. According to the proviso to Section 15, in case the BoE is presented prior to the arrival of the vessel, it would be deemed to have been presented on the date when the '*entry inwards*' is

granted u/s 31. Accordingly, it is on the basis of the BoE presented u/s 46 along with the self-assessment of duty done u/s 17, that the concerned officer being satisfied by the import duty paid etc. passes an order allowing the clearance of goods for home consumption and gives an out of charge under Section 47. Therefore, it is at the point of 'inward entry' in the case of a prior BoE that the rate of duty applicable freezes creating a vested right in the importer; and thereafter the import is completed at the point when goods are finally cleared u/s 47.

30.06.2017 Central Government exempted pulses from duty payable under the Customs Act, 1962 vide Notification No. 50/2017 – Customs dt. 30.06.2017. Copy of the notification dt. 30.06.2017 passed by Govt. of India Ministry of Finance (Department of Revenue) is annexed herewith and marked as **ANNEXURE P-1 (pages nos. 17-18)**.

12.11.2017 The Petitioner firm, which is in the business of trading in pulses, keeping in mind the above exemption, ordered 239 MT (approx..) of chickpeas from Australia at the rate of 795 US \$ per MT. The foreign seller shipped the said goods on board the vessel Conti Stockholm from Brisbane with the port of discharge being Nhava Sheva. A bill of lading was issued by the shipping company dt. 12.11.2017 evidencing shipment of the said goods. Copy of the

Bill of Lading dt. 12.11.2017 is annexed herewith and marked as **ANNEXURE P-2** (pages nos. 19-20).

25.11.2017 Petitioner filed a prior BoE for Home Consumption under Section 46 prior to the arrival of the above vessel/consignment. Copy of prior Bill of Entry for Home Consumption dt. 12.11.2017 Indian Customs Edi System – Imports Vi – 5R001 JNCH, Nhava Sheva, Tal: Uran, Dist-Raigad 400707 is annexed herewith and marked as **ANNEXURE P-3** (pages nos. 21-26).

21.12.2017 AT 12:12 HOURS (12:12 PM), 'entry inwards' was granted by the Custom authorities under Section 31. It is at this point that the rate of duty applicable to the imported goods froze as per Section 15 of the Act. Copy of the entry inwards is annexed herewith and marked as **ANNEXURE P-4** (pages nos. 27).

21.12.2017 BoE presented by the petitioner was assessed u/s 17 r/w Section 15 thereof at 'Nil' rate of duty in terms of the above Notification No. 50/2017–Customs dt. 30.06.2017. An assessment order was accordingly passed. This is also evident from the endorsement on the BoE.

21.12.2017 AT 16:51 HOURS (04:51 PM), out of charge order was passed permitting clearance of the goods under

Section 47. It is at this point that the import of goods was fully complete and cleared. Copy of out of charge order dt. 21.12.2017, passed by Preventive Officer is annexed herewith and marked as **ANNEXURE P-5 (pages nos. 28)**.

21.12.2017

AT 22:45 HOURS(10:45 PM)), after the above import was concluded and the goods were permitted to be cleared, Notification No. 93/2017-Customs was published in the Official Gazette at 22:45hours (10:45 PM) whereby the earlier notification dt.30.06.2017 was amended and a basic duty of 30% was levied on '*Tur, Chickpeas or Masoor (Lentils)*'. Copy of Notification No. 93/2017- Customs dt. 21.12.2017 is annexed herewith and marked as **ANNEXURE P-6 (pages nos. 29)**.

Despite an order of clearance and release of the goods, the respondents refused to release the same under the assessed BoE. The concerned authority retrospectively sought to apply the above new notification to the concluded import of the petitioner despite the fact that the said notification was notified only at 10:45 PM whereas the goods imported by the petitioner had already been cleared much before at 04:51 PM. The concerned authorities without any legal basis sought to *ex-post-facto* apply the new notification to the petitioner.

29.12.2017 Petitioner made a representation through their advocates seeking release of their goods. It was contended by the petitioner that it was not covered by the new notification dt. 21.12.2017 and was entitled to the benefit of the exemption under notification dt. 30.06.2017. In support of this contention the representation cited judgments of this Hon'ble Court including the judgment reported in (2015) 321 ELT 192. However, the goods were not permitted to be released unless the full duty at 30% was paid. Copy of representation dt. 29.12.2017 is annexed herewith and marked as **ANNEXURE P-7** (pages nos. 30).

01.01.2018 A meeting was held in the office of the Dy. Commissioner of Customs to consider the petitioner's contention that the goods being perishable required to be released urgently. However, the respondents insisted on payment of 30% duty.

17.01.2018 Being aggrieved by the above, petitioner filed a writ petition before the Hon'ble High Court of Judicature at Bombay challenging the refusal by the respondents to release the goods until the full custom duty was paid. It was contended that at the time of assessment and clearance order by the proper officer there was no notification levying duty at the rate of 30%. The petitioners had also contended that applying the provisions of the notification to an already assessed

BoE would tantamount to the notification being given a retrospective effect, which was impermissible. Copy of the writ petition No.809 of 2018 dt. 17.01.2018 filed by before Hon'ble High Court of Judicature at Bombay is annexed herewith and marked as **ANNEXURE P- 8 (pages nos. 31-42)**.

25.01.2018

Respondents filed their affidavit in reply to the above writ petition. The respondents whilst not denying that the Notification No. 93/2017–Customs was published in the official gazette at 22:45 hours contended that the said notification came into force u/s 25(4) of the Act on the date of its issue i.e. 21.12.2017 effective the earlier midnight. It is pertinent to note that the respondents did not deny that the assessment was complete prior to the publication and that an out of charge order was also passed before the publication of the notification no. 93/2017. Copy of the reply in affidavit dt. 25.01.2018 filed by before Hon'ble High Court of Judicature at Bombay in writ petition No.809 of 2018 is annexed herewith and marked as **ANNEXURE P-9 (pages nos. 43-56)**.

27.01.2018

Petitioners were issued a show cause notice dt. 18.01.2018, which was received on 27.01.2018 asking them to show cause as to why the BoE should not be reassessed u/s 17(4) of the Customs Act, 1962 charging basic customs duty at 30%. Copy of the

show cause notice passed by Dy. Commissioner of Customs Gr-I/IA, JNCH, Nhava Sheva is annexed herewith and marked as **ANNEXURE P -10** (pages nos.57-61).

29.01.2018

The writ petition filed by the petitioner was disposed of by the Hon'ble High Court vide the impugned judgment and directed release of goods however subject to the following conditions: -

“(i) On the petitioner depositing with the respondents 50% of the duty amount in cash and securing the rest by a bank guarantee of a nationalised bank, which shall be kept alive till the adjudication proceedings are concluded and three months thereafter, the respondents shall provisionally release the goods.

(ii) The petitioner shall also furnish a bond equivalent to the value of the goods.

(iii) On both conditions being satisfied, there will be a provisional release of the goods and this action of the respondents would be without prejudice to the rights and contentions of both parties.”

08TH May, 2018

Considering the perishable nature of the goods and the demurrage/warehousing charges, the petitioner complied with the above onerous conditions so as to save itself from further loss. However, being aggrieved by these conditions and the continuance of the *ultra vires* proceedings the petitioner is filing the present Special Leave Petition.

THE SUPREME COURT OF INDIA

(Order XXI Rule 3(1)(a))

CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION

(Under Article 136 of the Constitution of India)

SPECIAL LEAVE PETITION (CIVIL) No..... OF 2018

(Arising out of final impugned judgment & order dated 29.01.2018 passed by the Hon'ble High Court of Judicature at Bombay Civil Appellate Jurisdiction in W.P. No. 809 of 2018)

(WITH PRAYER FOR INTERIM RELIEF)

BEFORE

BEFORE

HIGH COURT ; THIS COURT

IN THE MATTER OF:-

M/s. Faqir Chand Vinod Kumar and Co.

A partnership firm registered under the Indian Partnership Act, 1932, having its Registered office at 4094-95, Naya Bazar, Delhi 110006

Petitioner

Petitioner

Versus

The Union of India

Through the Secretary, Revenue,
Ministry of Finance, Government of India,
North block, New Delhi-110001

Respondent No.1

Respondent No.1

2. the Deputy Commissioner of Customs,
(Import), Group-I, Jawaharlal Nehru Custom House,
Nhava Sheva, Tal. Uran,
Raigad District-400707
Maharashtra

Respondent No.2

Respondent No.2

(All are Contesting Respondents)

TO

**THE HON'BLE THE CHIEF JUSTICE OF INDIA AND
HIS COMPANION JUDGES OF SUPREME COURT**

**THE SPECIAL LEAVE PETITION OF THE
PETITIONERS**

MOST RESPECTFULLY SHOWETH :

1. This is the Special Leave Petition under Article 136 of the Constitution of India against the final impugned judgment & order dated 29.01.2018 passed by the Hon'ble Judicature at Bombay Civil Appellate Jurisdiction in W.P. No. 809 of 2018

1A. That there are no provisions for writ appeal or LPA against the impugned nor has the Petitioner filed any other SLP against it.

2. **QUESTIONS OF LAW**

The following questions of the law arise for consideration by this Hon'ble Court:

A. Whether the impugned judgment is liable to be set aside for failing to consider that any retrospective application of the impugned notification dt. 21.12.2017 which was a delegated legislation is against Articles 14, 19(1)(g), 20, 21, and 265 of the Constitution?

B. Whether the impugned judgment failed to consider that there were no disputed questions of fact involved in the present matter as all relevant facts including the time of 'entry inwards' u/s 31; the time of clearance and out of charge order u/s 47; and the time of publication of the impugned notification in the gazette, were all admitted and undisputed?

C. Whether the proceedings undertaken by the respondents including the show cause notice dt. 18.01.2018 is *ultra vires* the Act and is completely null and void?

- D. Whether the impugned judgment is liable to be set aside for failing to consider that vested rights had accrued in the petitioner *vis-à-vis* the exemption under Notification dt. 30.06.2017 when the goods were allowed '*entry inwards*' under Section 31 and then again when the goods were cleared u/s 47 of the Act?
- E. Whether the impugned judgment is liable to be set aside for failing to consider that the import of goods had been fully completed once the clearance order was passed u/s 46 of the Act?
- F. Whether the impugned judgment is liable to be set aside for failing to consider that a notification cannot be given retrospective operation unless the statute empowers the authority to pass such a notification giving it retrospective operation?
- G. Whether the impugned judgment is liable to be set aside for failing to consider that Section 25 of the Customs Act, 1962 does not empower the government to pass a notification giving it retrospective operation?
- H. Whether the impugned judgment is liable to be set aside for failing to consider that a notification cannot be given retrospective operation unless the parent section under which the notification was issued itself expressly states so?
- I. Whether the impugned judgment is liable to be set aside for failing to consider that the language used in Notification dt. 21.12.2017 clearly showed that it was prospective and not retrospective in operation?

J. Whether the impugned judgment is liable to be set aside for failing to consider that giving notification dt. 21.12.2017 retrospective operation would be violative of Article 20(1)?

K. Whether the impugned judgment is liable to be set aside for failing to consider that the show cause notice has been issued without any authority of law in complete violation of the procedure prescribed for the same under the Act?

3. DECLARATION IN TERMS OF RULE 3(2) :

The Petitioner states that no other petition seeking leave to appeal has been filed by him against the Impugned Judgment and Order dated 29.01.2018

4. DECLARATION IN TERMS OF RULE 5:

The Annexures P-1 to P- 9 produced alongwith the SLPs are true copies of the pleadings/documents which formed part of the records of the case in the Court/Tribunal below against whose order the leave to appeal is sought for in this petition.

5. G R O U N D S:

A. For that the impugned judgment failed to consider that the new notification dt. 21.12.2017 could only apply prospectively. It cannot apply to imports *ex-post facto*, retrospectively. Therefore, as the new notification was notified in the Official Gazette only at 22:45 hours (10:45 PM) on 21.12.2017, it could only be applied prospectively to imports after the publication of the notification in the Official Gazette and not before. Any *ex-post facto* application of this new notification would be against Articles 14, 19(1)(g), 20(1), 21, and 265.

B. For that the impugned judgment failed to consider that a tax liability is contingent on facts required by the charging section. In the Customs Act, 1962 the charging section is Section 12. According to the said section the taxable event is the import, which according to Section 2(23) means '*bringing into India from a place outside India*'. As stated above, under Section 15 the rate of tax gets fixed as soon as a Bill of Entry ('BoE') is presented; and in case it is presented prior to the entry of goods, as soon as the '*entry inwards*' is granted u/s 31. In the present case, the entry inwards was granted at 12:12 PM itself. In fact, a full clearance was given to the goods at 4:51 PM u/s 47 of the Act. Therefore, the transaction had fully been completed. Without an amendment to Section 12, no tax could have been levied on the goods imported by the petitioner once the rate of duty had frozen under Section 15 and/or the assessment and out of charge completed u/s 47. By applying the impugned notification u/s 25 retrospectively, the authorities are arbitrarily *de facto* trying to amend the Act itself. Such colourable exercise of power is liable to be quashed at the first instance as it violates Articles 14, 19 (1)(g), and 265.

C. For that the impugned judgment failed to consider that vested rights had been created in the petitioners under the Notification dt. 30.06.2017, wherein, pulses including chickpeas had been fully exempted from payment of the basic customs duty. These vested rights in the petitioner could not have been taken away without any valid legislation which specifically and expressly *ex-post facto* sought to take away these rights. In fact, had there

been such a law, it itself would have been questionable on grounds of constitutional invalidity. Therefore, no action against the petitioner could have been taken without a valid legislation so empowered by the competent legislature.

D. For that the impugned judgment failed to consider that vested rights accrued in the petitioner at the time of '*entry inward*' u/s 31 and thereafter, at the time of clearance u/s 47 of the Act so as to get the benefit of the notification dt. 30.06.2017. The repeal of the specific entry from Notification dt. 30.06.2017 vide the impugned notification dt. 21.12.2017 would be covered by the principles of Section 6 of the General Clauses Act. A bare reading of the impugned Notification dt. 21.12.2017 shows that it was intended only '*hereby*' to repeal/substitute the specific provision of the Notification dt. 30.06.2017. Therefore, the said impugned notification could not have applied retrospectively to unsettle vested rights.

E. For that the impugned judgment failed to consider that as per Section 25 of the Act it was necessary for a notification to be published in the Official Gazette before it could be treated as a valid notification. In the present case it is clear from the reading of the notification itself that it was published only at 10:45 PM on 21.12.2017. Therefore, the notification could not have been sought to be applied on imports in which '*entry inwards*' had been granted u/s 31 and/or import had already been completed and goods allowed to be cleared prior to such publication. The notification prior to publication was *non-est*.

F. For that the impugned judgment failed to consider that the Act does not confer any power on the government to pass a notification with retrospective or *ex-post facto* operation. It is humbly submitted that delegated legislation is valid only if it has statutory/constitutional backing. It is settled law that a retrospective delegated legislation cannot be passed unless the statute expressly empowers the authority/government to do so in express terms. Therefore, the law requires an act to expressly confer power on the government to unsettle settled transactions *ex-post facto*. Without such express power/authority every notification which is sought to have retrospective operation is liable to be quashed. In the present case, Section 25 of the Act does not confer any power on the government to pass a notification *ex-post facto*. Without such authority from the statute, the government could not have applied the notification retrospectively to imports in which the 'entry inwards' had been issued and/or in which the import had already been concluded and clearance ordered by the proper officer.

G. For that arguendo the impugned judgment also failed to appreciate that the applicability of the said notification can also be seen in light of Article 20(1). It is humbly submitted that there are various penal provisions under the Act. Any provision of law which could have retrospective penal liability is against Articles 20(1), 14, and 21. Therefore, any extension of this notification to the petitioner *ex-post facto* would itself be utterly against Article 20(1).

H. For that the clearance under Section 47 could not have been reviewed and recalled. It is humbly submitted that there is no provision in the Act to recall an order of clearance once it was so passed. Moreover, the malafide and pre-determined show cause notice could not have been issued as it did not follow the mandatory procedure prescribed u/s 17(4) of the Act and that too within the prescribed time limit.

I. For that the impugned judgment is liable to be set aside for erroneously holding the following: -

“...Upon perusal of the writ petition and this affidavit, we are of the view that there is a dispute on facts. Whether a bill of entry was assessed prior to a notification being made known to the public or as contended by the respondents, the case is covered by that notification, which was duly published is a matter which cannot be resolved in writ jurisdiction...”

It is humbly submitted that a bare perusal of the affidavit in reply of the respondents show – as is also clear from the admitted documents on record- that it is undisputed that the ‘*entry inwards*’ u/s 31 and the clearance u/s 47 were given much prior to the publication of the impugned notification in the Official Gazette. As stated earlier, the ‘*entry inwards*’ u/s 31 was granted at 12:12PM on 21.12.2017. Clearance u/s 47 was given at 4:51 PM. Whereas the impugned notification was published much later in the night at 10:45 PM. These facts have not been controverted and are admitted. Therefore, the impugned judgment erred in recording that the writ petition involved disputed questions of fact.

6. GROUNDS FOR INTERIM RELIEF:

- a. For that the petitioner has a good prima facie case and balance of convenience is in his favour. The actions of the respondents are completely *ultra vires* and illegal and violate fundamental rights of the petitioner guaranteed under Articles 14, 19, 20, 21, and 265.

7. MAIN PRAYER:

It is most respectfully prayed that this Hon'ble Court may be pleased to :-

- (a) grant Special Leave Petition under article 136 of the Constitution of India against the final impugned judgment & order dated 29.01.2018 passed by the Hon'ble Judicature at Bombay Civil Appellate Jurisdiction in W.P. No. 809 of 2018; and /or
- b) pass any other or further orders as may be deemed fit and proper in the circumstances of the case.

8. INTERIM RELIEF:

1. Grant *ex-parte ad-interim* stay of final impugned judgment & order dated 29.01.2018 passed by the Hon'ble Judicature at Bombay in W.P. No. 809 of 2018, in particular, the conditions imposed on the petitioner for release of the goods imported by the petitioner;
2. Grant *ex-parte ad-interim* stay of Show Cause Notice dt. 18.01.2017 issued by the respondents against the petitioner;
3. Grant *ex-parte ad-interim* directions to the respondents to release the bank guarantee furnished and refund the amount paid pursuant to the conditions imposed in the final impugned

judgment & order dated 29.01.2018 passed by the Hon'ble
Judicature at Bombay in W.P. No. 809 of 2018;

4. pass any other or further orders as may be deemed fit and proper
in the circumstances of the case.

Drawn & Filed by :

Drawn on: 04.05.2018

Filed on: 07.05.2018

RAVI PRAKASH GUPTA

Advocate for the Petitioner

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
SPECIAL LEAVE PETITION (CIVIL) NO. OF 2018**

IN THE MATTER OF: -

M/s Faqir Chand Vinod Kumar & Co.

...Petitioner

Versus

Union of India &Anr.
...Respondents

AFFIDAVIT

I, Chirag Jisdal S/o Shiv Shankar Jindal, aged about 30 years, R/o CD-10, Vishakha Enclave, Pitam Pura, North West Delhi, do hereby solemnly affirm and state as under: -

1. That I am a partner in the Petitioner firm in the aforesaid matter and I am fully conversant with the facts and circumstances of the present case and competent and authorized to swear and affirm this affidavit on behalf of Petitioner.
2. That I have read the accompanying Special Leave Petition containing Pages to Paragraph to , Grounds to and List of Dates and Facts to and I.A.s and understood the contents thereof. The facts stated therein are true and correct to the best of my knowledge and belief derived from the record of the case, which I believe to be true.
3. That Annexures are true copies of their respective original documents.
4. That the averments made in para (1) to (3) of this Affidavit are true to the best of my knowledge and belief and nothing material has been concealed therefrom.

DEPONENT

VERIFICATION

I, the above named, deponent do hereby verify that the contents of paras 1 to 4 of this affidavit are true to my own knowledge. No part of its is false and nothing material has been concealed.

VERIFIED AT AS ON , 2018

DEPONENT

ORIGINAL (CUSTOMS COPY)

INDIAN CUSTOMS EDI SYSTEM – IMPORTS VI – 5R001

JNCH, NHAVA SHEVA, TAL: URAN, DIST-RAIGAD 400707

BILL OF ENTRY FOR HOME CONSUMPTION

(Custom Stn: INNSAI)CHA: AAAFV2081LCH001 (V. ARJOON

BE No. /Dt./cc/Typ: 4152457/25/11/2017/N/H

Importer Details : 0588043176 PAN: AAAFF0055EFT001 AD Code:
0510005

Faqir Chand Vinod Kumar and Co.

o : 4094/95

Naya Bazar

AD 400707 110006 Payment method: Transaction

IGM No. 2182319/15/12/2017 Port of Loading: Brisbane

Cntry of Orgn. Australia Cntry of Consgn.

BL No. HdMuauns1701846 H/BL No.

Date:12/11/2017 Date:

No. of Pkgs. 10 Con Gross Wt.: 239.020 Mts

Marks; As per B/L & Nos.

Inv. No. & Dt. INV17/11/13318-1 Agrocorp International Pte
07/11/2017 Ltd.

Inv. Val: 190020.90 USD TOI: 10, Anson Road, #34-
CF 04/05/06 Intern National

Freight: 0.00 Plaza, Singapore – 079903,

Insurance: 5924.00 INR Cust. House: Singapore

SVB Load (ASS): HSS Load Rate: 0.00%

SVB Load (Dty): Amount: 0.00

Misc. Charges: 0.00 0.00

Discount Rate: 0.00 Discount

EDD: 0.00

Amount: 0.00

Third Party

XBE Duty FG Int.: 0.00

BuyerSeller Reltd: No

Item Details:

Exchange rate: 1.00 USD = 66.2000 INR

Sino Qty Unit	RITC	Description unit price Ass Val	CTH CETH	C. Notn C. NSNO E. Notn E. NSNO	Rsp Cus Dty Rt. Exc Dty Rt.	Loa d Pro v BC D amt (Rs.) CV D amt (Rs.)
1	07132000	Desi Chick Peas				
239.02 MTS		795.000000	07132000	050/2017/20	0.00%	0.00
		12585307.58	Noexcise		0.00%	0.00
	Educational Cess on CVDs				0.00%	0.00
	Sec. & Higher Edu. Cessl on CVD				0.00%	0.00
	Custom Education Cess				2.00%	0.00

Customs Sec & Higher Edu. Cess					1.00	0.0
					%	0
	IGST			002/2017	0.00	0.0
				45	%	0
	GST Cess			001/2017	0.00	0.0
				56	%	0

	Rs.12585307.58	Page Total	Rs.	0.00
	Rs.12585307.58	BE Gross Total	Rs.	0.00
BCD	Rs. 0.00	NCD Duty	Rs.	0.00
ANTID	Rs. 0.00	Safeguard Duty	Rs.	0.00
CVD	Rs. 0.00	Sch 2 Spl Excise Duty	Rs.	0.00
CESS	Rs. 0.00	GSIA	Rs.	0.00
TTA	Rs. 0.00			
Edu. Cess CVD	Rs. 0.00	Customs Edu. Cess.	Rs.	0.00
Health CVD	Rs. 0.00	Addl. Duty (imports)	Rs.	0.00
SHE. Cess CVD	Rs. 0.00	SH Cust Edu. Cess	Rs.	0.00
Duty Payable			Rs.	0
Rs. Zero only				

Container Details

1. 2182319 F CNSU2072190	2. 2182319 F FCIU5157878
3. 2182319 F GLDU5393935	4. 2182319 F HDMU2761171
5. 2182319 F HDMU2761490	6. 2182319 F HDMU2762901
7. 2182319 F HDMU2764102	8. 2182319 F OCGU2006740
9. 2182319 F TGHU0306641	10. 2182319 F TRHU3489949

GSTIN Details

Document no.	Typ State cd/Name	IGST Ass. Val	IGST Amt	GST Cess Amt.
07AAAFF0055E1Z2	G 07 Delhi	12585308	0	0

SW Annexure

Inv. No.	Item No.	Agency	NOC status
1	1	FS	Pending
1	1	PQ	Pending

Declaration

1. I/We certify that the above entries are correct.
2. I/We further declare that wherever the RSP is applicable same has been truthfully declared

CHA

Importer

V. Arjoon

Faqir Chand Vinod Kumar and Co.

Signature

Signature

INDIAN CUSTOMS EDI SYSTEM – IMPORTS VI – 5R001

JNCH, NHAVA SHEVA, TAL: URAN, DIST-RAIGAD 400707

Examination Order

Dated: 21.12.2017

BE No. 4152457, BE dt. 25/11/2107

CC N, Type H

Importer: FAQIR CHAND VINOD KUMAR AND CO.

IEC (058804316)

CHA (AAAFV2081LCH001)

Appraising Ground: 1

Examination Order:

Assessment and Examination has not been prescribed for this BE.

IEC CCR Examination Instruction

Compulsory Compliance Requirements: 1

Mandatory Compliance Requirements Examination Instructions (CTH) – 07132000 “VERIFY THAT THE RATE OF IGST/GST COMPENSATION CESS HAS BEEN CORRECTLY LEVIED AND EXEMPTION IF ANY, CORRECTLY CLAIMED.” # Mandatory compliance Requirements Examination Instructions (FOR NOTIFICATION) -050/2017 20 VFY GOODS ARE PULSES. GOODS OF PEAS (PISUM SATIVUM) AND NOT ALLOWED, REFER CBEC NOTFN. NO.84/2017 DATED 08.11.2017

Inspector Report

TRUE TYPED COPY

ANNEXURE- P-

INDIAN CUSTOMS EDI SYSTEM – IMPORTS VI – 5R001
JNCH, NHAVA SHEVA, TAL: URAN, DIST-RAIGAD 400707

Out of charge order – Importer / Date Copy

Order No. 2026338452
Name: Pramod Ramachandra Narang
BE No. 4152457, BE Dt.25112017 CC: N. TYPE: H
Importer: Faqir Chand Vinod Kumar And Co. (05880431746)
CHA : V. ARJOON (AAAFV2081LCH001)
Total Packages: 10 Gross Wt.: 239.020 Mts
IGM No../ IR 2182319 Inward Dt. 21/12/2017
B.L. NO./MAWB No. HOMOAOONS1701846 HBL/HAMB No.
B.L.Dt/MAWB Ot: 12/11/2017 HBL/HAWB/Ot
Marks and No.: As Per B/L
Total Ass. Value: Rs.12585308.00 Duty Amount : Rs.0
Examined/CC : Examined

Instruction Io Gate Officer

Container No.:	CNSU2072190	seal No.:	F49486	Status:	F
Container No.:	FCIU5157878	seal No.:	F49493	Status:	F
Container No.:	GLOU5393935	seal No.:	F49490	Status:	F
Container No.:	HOMU2761171	seal No.:	F49498	Status:	F
Container No.:	HOMU2761490	seal No.:	F49492	Status:	F
Container No.:	HOMU2762901	seal No.:	F49499	Status:	F
Container No.:	HOMU2764102	seal No.:	F49491	Status:	F
Container No.:	OCCO0306641	seal No.:	F49495	Status:	F
Container No.:	IGHU0306641	seal No.:	F49497	Status:	F
Container No.:	IRHO3489949	seal No.:	F49494	Status:	F

Signature of officer (Out of Charge)

Preventive Officer

Dated: 21/12/2017 (NIC)

TRUE TYPED COPY

OFFICE OF THE COMMISSIONER OF CUSTOMS (NS-I)
AWAHARLAL NEHRU CUSTOM HOUSE, NHAVA-SHEVA, TALUKA
URAN, DISTRICT- RAIGAD, MAHARASHTRA -400 707.

F No. S/26-Misc-1190/2017-18/Gr-I/JNCH Date. 18.01.2017

To,

M/s. Faqir Chand Vinod Kumar & Co.,

4094-95, Naya Bazar,

Delhi-110006.

Sub: Request for issue of SCN in respect of goods pending for clearance as per B/E No. 4152457/25.11.2017.

Please refer to your letter dated 12.01.2018 on the above mentioned subject.

2. Please refer to your letter dated 10.01.2018 regarding request for provisional assessment in respect of goods importer under B/E No. 4152457 dated 25.11.2017.

3. M/s. Faqir Chand Vinod Kumar & Co. has filed the subject advance B/E No 4152457 dated 25.11.2017 for clearance of 'Desi Chick Peas' and the duty chargeable is nil by virtue of Notfn no. 50/2017 (20). In the instant case entry inward date is 21.12.2017. The bill of entry has been presented for verification of self-assessment under section 17 of Customs Act, 1962.

4. Government of India issued notification No. 93/2017-Customs on dated 21.12.2017 wherein 30% BCD was imposed on 'Desi Chick Peas'. In the instant case date of said notification and entry inward date are same i.e. 21.12.2017. Date for determination of rate of duty has to be taken/determined as per section 15 and section 25 of Customs Act, 1962 which reads as below:

SECTION 15. Date for determination of rate of duty and tariff valuation of imported goods.

(1) [The rate of duty and tariff valuation, if any, applicable to any imported goods, shall be the rate and valuation in force,

(a) in the case of goods entered for home consumption under section 46, on the date on which [a bill of entry in respect of such goods is presented under that section];

(b) in the case of goods cleared from a warehouse under section 68, on the date on which a bill of entry for home consumption in respect of such goods is presented under that section;

(c) in the case of any other goods, on the date of payment of duty

[Provided that if a bill of entry has been presented before the date of entry inwards of the vessel or the arrival of the aircraft (or the vehicle) by which the goods are imported, the bill of entry shall be deemed to have been presented on the date of such entry inwards or the arrival, as the case may be.)

(2) The provisions of this section shall not apply to baggage and goods imported by post.

SECTION 25. Power to grant exemption from duty. –

(1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification goods of any specified description from the whole or any part of duty of customs leviable

[(2) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by special order in each case, exempt from the payment of duty, under circumstances of an exceptional nature to be stated in such order, any goods on which duty is leviable.

[(2A) The Central Government may, if it considers it necessary or expedient so to do for the purpose of clarifying the scope or applicability of any notification issued under sub-section (1) or order issued under sub-section (2), insert an explanation in such notification or order, as the case may be, by notification in the Official Gazette, at any time within one year of issue of the notification under sub-section (1) or order under sub-section (2), and every such explanation shall have effect as if it had always been the part of the first such notification or order, as the case may be.]

[(3) An exemption under sub-section (1) or sub-section (2) in respect of any goods from any part of the duty of customs leviable thereon (the duty of customs leviable thereon being hereinafter referred to as the statutory duty) may be granted by providing for the levy of a duty on such goods at a rate expressed in a form or method different from the form or method in which the statutory duty is leviable and any exemption granted in relation to any goods in the manner provided in this sub-section shall have effect subject to the condition that the duty of customs chargeable on such goods shall in no case exceed the statutory duty.

Explanation. - "Form or method", in relation to a rate of duty of customs, means the basis, namely, valuation, weight, number, length, area, volume or other measure with reference to which the duty is leviable.]

[(4) Every notification issued under sub-section (1) or sub-section (2A) shall, unless otherwise provided, come into force on the date of its issue by the Central Government for publication in the Official Gazette.]

[(6) Notwithstanding anything contained in this Act, no duty shall be collected if the amount of duty leviable is equal to, or less than, one hundred rupees.]

5. Therefore, as per section 15 and 25 of Customs Act, 1962 and in view of the above said notification goods covered under instant bill of entry are liable to be charged BCD @ 30%. The facts were brought to the notice of importer/custom house broker. In this regard, keeping natural justice in mind, a Personal Hearing before Deputy Commissioner of Customs, Group-1 was conducted on 01.01.2018 on request of the importer and the same was attended by importer, advocate and custom broker authorised by the importer. During the Personal Hearing they wanted to explore the option of Provisional assessment and/or warehousing the goods under section 49 of CA. Subsequently vide letter dt. 10.01.2018, they requested for provisional assessment and vide letter dt. 12.01.2018 for section 49 permission.

During the personal hearing it was requested to released the goods provisionally and/or warehousing the goods under section 49 of Customs Act. Section 18 of Customs Act, 1962 is reproduced below:-

SECTION 18. Provisional assessment of duty-

[(1) Notwithstanding anything contained in this Act but without prejudice to the provisions of section 46,-

(a) where the importer or exporter is unable to make self-assessment under sub-section (1) of section 17 and makes a request in writing to the proper officer for assessment; or

(b) where the proper officer deems it necessary to subject any imported goods or export goods to any chemical or other test; or

(c) where the importer or exporter has produced all the necessary documents and furnished full information but the proper officer deems it necessary to make further enquiry; or

(d) where necessary documents have not been produced or information has not been furnished and the proper officer deems it-necessary to make further enquiry,

.....

6. The importer's request of provisional assessment cannot be considered as the instant case does not get covered under any of the conditions of section 18 of Customs Act and there are no grounds for provisional assessment of duty. Therefore bill of entry is required to be

re-assessed charging BCD @30%. The bill of entry has been presented for verification of self-assessment under section 17 of Customs Act, 1962. The instant case is of re-assessment u/s 17 (4) of Customs Act and subsequently passing speaking order u/s 17 (5). Section 17 of Customs Act is reproduced below:-

SECTION 17. Assessment of duty. (1) *An importer entering any imported goods under section 46, or an exporter entering any export goods under section 50, shall, save as otherwise provided in section 85, self-assess the duty, if any, leviable on such goods.*

(2) *The proper officer may verify the self-assessment of such goods and for this purpose, examine or test any imported goods or export goods or such part thereof as may be necessary.*

(3) *For verification of self-assessment under sub-section (2), the proper officer may require the importer, exporter or any other person to produce any document or information, whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained and thereupon, the importer, exporter or such other person shall produce such document or furnish such information.*

(4) *Where it is found on verification, examination or testing of the goods or otherwise that the self-assessment is not done correctly, the proper officer may, without prejudice to any other action which may be taken under this Act, re-assess the duty leviable on such goods.*

(5) *Where any re-assessment done under sub-section (4) is contrary to the self-assessment done by the importer or exporter regarding valuation of goods, classification, exemption or concessions of duty availed consequent to any notification issued therefor under this Act and in cases other than those where the importer or exporter, as the case may be, confirms his acceptance of the said re-assessment in writing, the proper officer shall pass a speaking order on the re-assessment, within fifteen days from the date of re-assessment of the bill of entry or the shipping bill, as the case may be.*

(6) *Where re-assessment has not been done or a speaking order has not been passed on reassessment, the proper officer may audit the assessment of duty of the imported goods or export goods at his office or at the premises of the importer or exporter, as may be expedient, in such manner as may be prescribed.*

Explanation - For the removal of doubts, it is hereby declared that in cases where an importer has entered any imported goods under section 46 or an exporter has entered any export goods under section 50 before the date on which the Finance Bill, 2011 receives the assent of the President, such imported goods or export goods shall continue

to be governed by the provisions of section 17 as it stood immediately before the date on which such assent is received.]

7. Therefore, in light of the facts above M/s. Faqir Chand Vinod Kumar & Co. is required to explain why Bill of B/E No. 4152457 dated 25.11.2017 should not be re-assessed u/s 17(4) of Customs Act, 1962 charging BCD @ 30% as imposed by Government of India vide notification no. 93/2017-Customs dated 21.12.2017 and subsequently passing speaking order u/s 17 (5) of Customs Act, 1962.

8. Re-assessment u/s 17(4) of Customs Act, 1962 has been kept in abeyance as requested by M/s. Faqir Chand Vinod Kumar & Co. in their letter dated 10.01.2018.

9. Permission for warehousing of goods u/s 49 of Customs Act, 1962 is hereby granted for thirty days.

10. M/s. Faqir Chand Vinod Kumar & Co. is hereby directed to submit reply within 07 (seven) days from the receipt of this letter failing which B/E will be re-assessed as stated in para no. 6 supra.

Note:-

1. This letter is being issued to comply with the principles of natural justice as the same has been insisted by the importer.

2. This letter has not been issued under section 28 and/or section 124 of Customs Act, 1962 as the instant case is not a case of 'Recover of [duties not levied or not paid or short-levied or short-paid] or erroneously refunded' Off 'issue of show cause notice before confiscation of goods' for the purpose of issuing show cause notice u/s 28 of CA, 1962 and u/s 124 of CA, 1962.

Thanking You,

(PALLAVI GUPTA)

Dy. Commissioner of Customs Gr-I/IA

JNCH, Nhava Sheva.

TRUE COPY