IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)
Present:
Mr. Justice Md. Iqbal Kabir
And
Mr. Justice Md. Riaz Uddin Khan

WRIT PETITION NO. 9067 OF 2022

IN THE MATTER OF:

An application under Article 102 (2)(a)(i) and (ii) of the Constitution of the People's Republic of Bangladesh, 1972

A N D

IN THE MATTER OF:

Gram Bangla Tubes Ltd.

... Petitioner

-Versus-

National Board of Revenue and others

... Respondents

Mr. Md. Anisul Hassan, Advocate

... For the Petitioner

Ms. Nasima K. Hakim, DAG with
Mr. Md. Hafizur Rahman, AAG
Mr. Elin Imon Saha, AAG
Mr. Ali Akbor Khan, AAG and
Mr. Ziaul Hakim, AAG

…For the Respondent No.2

Judgment on: 01.08.2024

Md. Riaz Uddin Khan, J:

Rule *nisi* was issued upon an application under Article 102(2)(a)(i)(ii) of the Constitution of the People's Republic of Bangladesh asking the respondents to show cause as to why a provisional assessment by the Respondent No. 5 on the goods of the petitioner imported vide LC No. 0000209222010022 dated 04.04.2022 corresponding to bill of entry No. C-785968 dated 26.04.2022 (Annexure-'A') compelling the Petitioner to furnish bank guarantee No. 04/2022 dated 20.06.2022 (Annexure-'A1') after completion of final assessment on 19.05.2022 shall not be declared to

have been done without any lawful authority and was of no legal effect and as to why the Respondents shall not be directed to return the bank guarantee No. 04/2022 dated 20.06.2022 issued by the Respondent No. 6 for an amount of Tk. 1,30,38,787.12 (Annexure-‘A1’) to the Petitioner and/or such other or further order or orders should not be passed as to this court may deem fit and appropriate.

At the time of issuance of rule the respondents were restrained from encashing the bank guarantee.

Succinct facts as stated by the petitioner for disposal of this rule are that the Petitioner imported the following hot rolled steel sheets- (1) Hot Rolled steel sheet in coil S/Q size: (i) 9,870 kgs of 1.43-2.97 MM * 600mm & Up "Coil (under HS Code 7208.39.20); (ii) 12,100 Kgs of 3.031- 4.03 MM 600mm & Up "Coil (under HS Code 7208.38.10); (iii) 9,05,950 Kgs of 4.876-9.627 MM 600mm & Up "Coil (under HS Code 7208.37.10); and (iv) 5,10,490 Kgs of 11.071-17.944 MM 600mm & Up "Coil (under HS Code 7208.36.10) from a company in Korea vide L/C No. 0000209222010022 dated 04.04.2022 ("Goods") under the Proforma Invoice dated 09.11.2020. The Commercial Invoice states the price of the Goods to be a total of USD 124,072.96. After arrival of the goods at Customs House, Chattogram, the Petitioner through its clearing and forwarding agent, submitted the bill of entry No. C-785968 dated 26.04.2022 and other relevant documents for releasing the Goods upon assessment of customs duty and the same was received by the Customs Authority. Pursuant to submission of all the documents the Respondent No. 5 made final assessment of the Goods on 19.05.2022 and assessed that the Petitioner is liable to make payment of Tk. 1,67,82,730.14 as taxes and the Petitioner was taking steps for releasing the goods upon paying the assessed duties. When the Petitioner was waiting to receive the adjudication order of final assessment the Respondent Nos. 2-5 issued the

impugned provisional assessment notice upon the Petitioner and told that unless a bank guarantee is submitted, the Goods will not be released. Finding no other alternatives and in dire need of the Goods in order to continue its production, the Petitioner submitted the Bank Guarantee to the Respondent No. 2 and resultantly the Respondent Nos. 2-5 released the Goods. Then in order to understand on what basis the Respondents conducted the provisional assessment of the Goods after completing the final assessment on 19.05.2022, the Petitioner contacted the office of the Respondent No. 2 and collected a photocopy of the memo no. 2119/AP/Section-8(A)/21-22, which is the office file of the Respondents in connection to the bill of entry No. C-785968 dated 26.04.2022 and found that the Respondents issued the impugned provisional assessment notice after completing the final assessment on 19.05.2022. Challenging those actions of the respondents, the petitioner filed this writ petition before this Court and obtained the rule *nisi* and order of stay as stated at the very outset.

The Respondent No. 2 entered appearance by filing Vokalatanama.

Mr. Md. Anisul Hassan, the learned Advocate of the petitioner submits that the goods in question imported by the Petitioner under Bill of Entry No. C-785968 dated 26.04.2022 was assessed on 19.05.2022 under the provision of section 80 of the Customs Act, 1969 and pursuant to such final assessment, the Petitioner was taking steps for releasing the goods upon paying the assessed duties. But the respondents in a most illegal and arbitrary manner restrained the petitioner’s agent from releasing the goods without notifying the Petitioner about anything. In such a situation, the Petitioner was incurring a huge port demurrages and transport charges. In these circumstances, the Petitioner contacted the office of the Respondents and the Respondents under duress compelled the Petitioner to

file an application for releasing the goods on the basis of provisional assessment upon furnishing bank guarantee.

The learned advocate then submits that the respondents have no legal authority to carry out provisional assessment and obtained bank guaranty after final assessment under section 80 of Custom Act, 1969. Once the goods were finally assessed there is no scope to re-open that file under section 81 of the Act, 1969 for making provisional assessment and obtain the bank guarantee under duress. The learned advocate next submits that after the final assessment of the goods the respondents have the jurisdiction only under section 32 or 83A of the Act, 1969 to re-open the file and make an adjudication on the issues raised under the said provisions of law and there is no scope of assessment provisionally under section 81 of the Act, 1969 and hence the impugned actions taken by the respondents are fully without jurisdiction, arbitrary and illegal. The learned advocate finally submits that it is evident from the circumstantial situation that the petitioner was compelled to make an application in order to avoid further delay and port demurrage in releasing the goods affecting his right of conducting lawful trade and business but such application does not supersede the statutory obligation of the respondents to proceed with the matter either under section 32 or 83A of the Act and as such the petitioner cannot be barred by applying the principle of waiver and *estoppel* against the statutory and constitutional right to be treated in accordance with law. In support of his submissions the learned advocate cited some decisions reported in 65 DLR (AD) 253, [2023]27 ALR (AD) 23, 73 DLR 446 and 3 CLR (HCD)(2015) 161.

Ms. Nasima K. Hakim, the learned Deputy Attorney General along with Mr. Ali Akbor Khan, the learned Assistant Attorney General submits that since the consignment was not selected for physical examination, the

Customs authority on the basis of the documents submitted by the petitioner made the assessment and after making the assessment subsequently got information of mis-declaration by the petitioner in respect of description of the goods and accordingly physical examination was made in presence of the C&F agent and found that the goods are not Secondary Quality rather "Prime Quality" and for collecting the actual government revenue, the concern officials proposed to re-assess the goods under the provision of section 80(2) and also initiated proceeding under section 32 of the Customs Act, 1969 for mis-declaration. The petitioner by filing an application requested the Commissioner to release the goods on provisional assessment after accepting a continuing Bank Guarantee for the differential amount of Customs duties and other taxes and the Commissioner considering the request of the petitioner released the goods on provisional assessment and accepting a Bank Guarantee furnished by the petitioner retaining the sample and sent the same for examination. The Commissioner did everything on good faith and betterment of a citizen for running its business smoothly and the Commissioner did not violate any express provision of the Customs Act, 1969. Hence, there was no cause of action to file the instant writ petition. The learned DAG further submits that the writ petitioner raised irrelevant and unnecessary contention only to achieve illegal gain and to make delay of final assessment and the government legitimate revenue. The Bank Guarantee will be adjusted at the time of final assessment as per law based on the report of BUET. So, before making final assessment there is no scope to release the Bank Guarantee. The writ petition is premature and not maintainable for which the Rule is liable to be discharged.

The learned DAG next submits that the petitioner did not come before this Court in clean hand as it is evident that he had a mis-declaration. Since the petitioner did not

come in clean hand he is not entitled to get an equitable relief under Article 102 of the Constitution of the People's Republic of Bangladesh. On the basis of the documents filed by the petitioner the goods were assessed finally but got information that he has given a mis-declaration and then the respondents communicated with the petitioner and the petitioner came before the customs authority and by filing application asked for provisional assessment accepting a bank guarantee being 04/2022 dated 20.06.2022 issued by the Respondent No. 6 for an amount of Tk. 1,30,38,787.12. So, the respondents acted on the request of the petitioner for which the petitioner cannot take any benefit of his wrong-doing. As it is long settled principle that no one is entitled to get benefit of his own wrong. The learned DAG lastly submits that on the basis of laches or some technicalities of law the petitioner is not entitled to get any relief. Since it is a fiscal matter and no one should get benefit in such a way that a floodgate can be opened and revenue of the government is stopped. In support of her submissions the learned DAG cited some decisions reported in 1981 BLD (AD) 91, 25 BLC 115, 25 BLC 375 and LEX/BDHC/0650/2024.

We have heard the learned Advocates of both the parties, perused the applications and all the documents annexed there with. The only question raised by the petitioner is that the law does not permit the respondents to open the file for provisional assessment after final assessment. His point is that in the Customs Act, 1969 there is no scope of provisional assessment after the final assessment. For clear understanding the legal provision let us examine the relevant sections of the Customs Act, 1969 (hereinafter referred to as the Act).

Section 80 of the Act provides for the assessment of duty which reads as follows:

80. Assessment of duty.- (1) On the delivery or electronic transmission of such bill, the goods or such part thereof as may be necessary may, without under delay, be examined or tested in the presence of the owner or his agent, unless due to any exceptional circumstance such presence cannot be allowed and thereafter the goods shall be assessed to duty, if any, and the owner of such goods may then proceed to clear the same for home-consumption or warehouse them, subject to the provisions hereinafter contained.

(2) Notwithstanding anything contained in sub-section (1), imported goods prior to examination or testing thereof may be permitted by the appropriate officer to be assessed to duty on the basis of the statements made in the bill relating thereto and the information furnished under the rules and the documents produced under section 26; but if it is found subsequently on examination or testing of goods or otherwise that any statement in such bill or document or any information so furnished is not correct in respect of any matter relating to the assessment, the goods shall, without prejudice to any other action which may be taken under this Act, be re-assessed to duty.

(3) Subject to the guidelines, if any, given by the Board from time to time, the Commissioner of Customs or any other Customs officer authorised by him in this behalf may clear any goods or class of goods imported

by an importer or a class of importers without examination and testing of the goods, wholly or partly under sub-section (1).

(4) Upon delivery or transmission of the bill of entry for the goods cleared or to be cleared under sub-section (3) the duty shall be deemed to have been duly assessed for the purpose of this section:

Provided that where the appropriate officer has reason to believe that in case of any bill of entry re-assessment is necessary, he may, by recording reasons in writing re-assess he duty payable for the goods and take such other actions as he may deem fit under this Act.

From reading the above provision it appears that under this section the customs authority make final assessment of duty of the goods. Under sub-section (1) the customs authority finally assess the duty of the imported goods by examining or testing. Sub-section (2) states that notwithstanding anything contained in sub-section (1) the custom authority may assess the duty of goods prior to examination or testing on the basis of statements made in the bill and other information furnished; but if it is found subsequently on examination or testing of the goods or otherwise that the statements or documents is not correct, can re-assess the duty of goods without prejudice to any other action which may be taken under this Act. Which means, under this sub-section the customs authority is empowered to re-assess the goods for duty if subsequently revealed that the earlier assessment was made on incorrect statements in bill or document or information.

Now let us see how and when the provisional assessment is made. Section 81 of the Act provides for provisional assessment of duty which runs as under:

> **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 the rank of Assistant Commissioner of Customs may order that the duty payable on such goods be assessed provisionally:
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> Provided that the importer (save 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.
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> (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 by 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:
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> Provided that the Board may, under exceptional circumstances recorded in writing, extend the period of final assessment specified under this sub-section.

From the above provision it transpires from sub-section (1) that when it is not possible immediately to assess the customs-duty for the reason that the goods require chemical or other test or further inquiry etc, an officer not below the rank of Assistant Commissioner, may make provisional assessment. Provided the importer pays such additional amount as security or furnishes Bank Guarantee for the payment thereof. Sub-section (2) provides for limitation period of final assessment after such provisional assessment.

We have further examined the other relevant sections of the Act, 1969. Section 83A provides for amendment of assessment which is quoted below:-

> **83A. Amendment of assessment.**- (1) An officer of Customs not below the rank of an Assistant commissioner of Customs may from time to time make or cause to be made such amendments to an assessment of duty or to the value taken for the purpose of assessment of duty as he thinks necessary in order to ensure the correctness of the

> assessment even though the goods to which the value or the duty relates have already passed out of Customs control or the duty originally assessed has been paid.
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> (2) If the amendment has the effect of imposing a fresh liability or enhancing an existing liability, a demand notice in writing shall be given by the officer of Customs to the person liable for the duty.
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> (3) Unless otherwise specified in this Act, the due date for payment against the aforesaid demand notice shall be thirty working days from the date of issue of such a written demand notice by the officer of Customs.

From the reading of section 83A it is clear that in order to ensure the correctness of the assessment, even though the goods to which the value or the duty relates have already passed out of customs control or the duty originally assessed has been paid, if there is any need of amendment of the assessment of duty or value taken for the purpose of assessment as the custom officer thinks necessary may make such amendments. As per this section a demand notice is to be served if the amendment has the effect of imposing a fresh liability or enhancing an existing liability asking for payment within 30 working days subject to other provisions specified in this Act.

Now, the question is if anyone in connection with any matter of customs make any untrue statement, error etc then what steps the customs authority is to follow? We have already noticed that in such case the customs authority may proceed in accordance with the provisions provided under section 80(2) and/or section 83A of the Act. Moreover, certain such acts (untrue document or statement in material

particular) have been made offence under section 32 of the Act. Section 32 of the Act is reproduced below-

> "32. **Untrue statement, error, etc.** (1) If any person, in connection with any matter of customs,-
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> (a) makes or signs or causes to be made or signed, or delivers or causes to be delivered to an officer of Customs any declaration, notice, certificate or other document whatsoever, or
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> (b) makes any statement in answer to any question put to him by an officer of Customs which he is required by or under this Act to answer,
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> (c) transmits any statement, document, information or record through electronic device or produces soft copy thereof,
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> and such document or statement is untrue in any material particular, he shall be guilty of an offence under this section.
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> (2) Where, by reason of any such document or statement as aforesaid or by reason of some collusion, any duty or charge has not been levied or has been short-levied or has been erroneously refunded, the person liable to pay any amount on that account shall be served with a notice requiring him to show cause why he should not pay the amount specified in the notice.
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> (3) Where, by reason of any inadvertence, error misconstruction or in any other way, any duty or charge amounting

to not less than one thousand taka has not been levied or has been short-levied or has been erroneously refunded the person liable to pay any amount on that account shall be served with a notice within three years of the relevant date requiring him to show cause why he should not pay the amount specified in the notice.

(4) The appropriate officer, after considering the representation, if any, of such person as is referred to in sub-section (2) of sub-section (3) shall determine the amount of duty payable by him which shall in no case exceed the amount specified in the notice, and such person shall pay the amount so determined.

Provided that where the amount so determined is less than one thousand Taka, the person concerned shall not be required to make the payment.

(5) For the purposes of this section, the expression "relevant date" means-

(a) in any case where duty is not levied, the date on which an order for the clearance of goods is made;

(b) in a case where duty is provisionally assessed under section 81, the date of adjustment of duty after its final assessment;

(c) in a case where duty has been erroneously refunded, the date of its refund;

(d) in any other case, the date of

payment of duty or charge."

So, from the reading of the Section 32 it is crystal clear that if there is any untrue statement or mis-declaration by any person relating to customs in material particular which is revealed subsequently the customs authority can take recourse of Section 32 of the Act.

In the present case the petitioner claimed that he imported the goods and for customs clearance and releasing the goods his C & F agent submitted bill of entry and other relevant documents before the customs authority who being satisfied of the same made final assessment of the goods for customs duty on 19.05.2022 and was taking steps for releasing the same after paying the taxes as finally assessed. When the Petitioner was waiting to receive the adjudication order of final assessment the Respondent Nos. 2-5 issued the impugned provisional assessment notice upon the Petitioner and told that unless a bank guarantee is submitted, the Goods will not be released. Finding no other alternatives and in dire need of the Goods in order to continue its production and to avoid incurring a huge port demurrages and transport charges, the Petitioner submitted the Bank Guarantee to the Respondent No. 2 and resultantly the Respondent Nos. 2-5 released the Goods. Then the Petitioner contacted the office of the Respondent No. 2 and collected a photocopy of the memo no. 2119/AP/Section-8(A)/21-22 and found that the Respondents issued the impugned provisional assessment notice after completing the final assessment on 19.05.2022. On the other hand the respondents replied that at first they assessed the goods as secondary quality on the basis of documents submitted by the petitioner but subsequently came to know that the goods were prime quality. They informed the matter to the petitioner who by filing an application asked for provisional assessment and urged to release the goods on Bank Guarantee upon which the respondents acted in good

faith. So, the petitioner cannot get benefit of his own wrong-doing as he is barred by the principle of *estoppel*.

Now the question is, does the law permits the respondents to make any provisional assessment after it was once finally assessed? From the above reading of the Act, 1969 we are unable to find any such provision. The respondents could take recourse of sub-section (2) of section 80 or section 83A of the Act. The respondents in a fit case even can take recourse of section 32 of the Act. But can the respondents act beyond the law on the pretext of request? The answer is no. Because, the respondents are not authorized to do anything beyond the law and the doctrine of *estoppel* will not be in any help of the respondents. *Estoppel* is a doctrine which prevents a party from denying the existence of a fact which he represented as existing and upon such representation another party has been induced to act to his detriment [16 BLD (AD) 67]. But the power and authority of the government and public authorities are circumscribed by the constitution and the laws and none can be allowed to exercise extra-constitutional or extra-legal authority. Mahmudul Islam in his Constitutional law of Bangladesh opined that if the officials can bind the government by their acts, even though such acts are not clearly within the scope of their authority, there is a danger that the officials will exercise power and discretion not conferred on them, knowing that the government will not be able to disallow their acts. The doctrine of *estoppel* would be used to validate *ultra vires* and illegal acts. In the words of Lord Greene- "The power given to an authority under a statute is limited to the four corners of the power given. It would entirely destroy the doctrine of *ultra vires* if it were possible for the donee of a statutory power to extend his power by creating an *estoppel*." By now, it is well established in our country that there can be no application

of *estoppel* to prevent performance of duty enjoined by law or the constitution. In the case of Khondker Delwar Hossain Vs. Italian Marble Works reported in 62 DLR (AD) 298 the Appellate Division held that *estoppel* cannot be pleaded against or in respect of statute, much less against the constitution. So, from the above decisions it is clear that in the present case the respondent acted beyond the provision of law. Being a public authority the respondents cannot act beyond the law even on the request or application of the petitioner. The respondents claimed that the petitioner did not come before the Court in clean hand as they made a mis-declaration regarding the quality of the goods. But the petitioner claimed that they did not make any mis-declaration rather imported secondary quality goods. This question is to be resolved in accordance with the law as provided in the Customs Act, 1969 and it is not before us whether the goods are of prime quality or secondary quality and/or how much the petitioner is to pay customs duty and taxes. However, if the respondents find that there is any mis-declaration and the goods were in prime quality the law is not silent. The goods might be re-assessed as provided under section 80(2) of the Act or amendment of assessment might be made under section 83A of the Act. Moreover, for mis-declaration in material particular there is specific provision in section 32 of the Customs Act under which the respondents can proceed if think it fit. In each case, whether fiscal or other matters, the government or public authority has to follow the law. We have already noticed that after final assessment the authority was not releasing the goods. The petitioner, in dire need of the Goods in order to continue its production and to avoid incurring a huge port demurrages and transport charges, filed an application for releasing the goods (Annexure-G) and submitted the Bank Guarantee to the Respondent No. 2 and resultantly the

Respondent Nos. 2-5 released the Goods. In any way, the respondents cannot act beyond their jurisdiction as provided by or under law. So, the points raised by the respondents have no legs to stand.

In the facts and circumstances of the case and the position of law as discussed above, we find merits in the Rule, hence the Rule is made **absolute**.

The impugned provisional assessment by the Respondent No. 5 on the goods of the petitioner imported vide LC No. 0000209222010022 dated 04.04.2022 corresponding to bill of entry No. C-785968 dated 26.04.2022 (Annexure-'A') compelling the Petitioner to furnish bank guarantee No. 04/2022 dated 20.06.2022 (Annexure-'A1') issued by the Respondent No. 5 after completion of final assessment on 19.05.2022 is hereby declared to have been done without any lawful authority and was of no legal effect and the Respondents are directed to return the Bank Guarantee No. 04/2022 dated 20.06.2022 issued by the Respondent No. 6 for an amount of Tk. 1,30,38,787.12 to the Petitioner.

However, the respondents are at liberty to proceed with the matter in accordance with law, if so advised.

Communicate the judgment and order at once.

Md. Iqbal Kabir, J:

I agree.

Ziaul Karim
Bench Officer