

(2014) 03 CAL CK 0068
In the Calcutta High Court
Case No : WP No. 951 of 2013

Ahsan Waris

APPELLANT

Vs

Commissioner of Customs (Preventive)

RESPONDENT

Date of Decision : 05-03-2014

Acts Referred:

Customs Act, 1962 — Section 11, 110, 126, 150, 23
Foreign Trade (Development and Regulation) Act, 1992 — Section 11(1), 3(3)

Citation : (2014) 305 ELT 78 : (2014) 45 GST 123

Hon'ble Judges : Harish Tandon, J

Bench : Single Bench

Advocate : A. Chakraborty, Advocate for the Appellant; A. Bharadwaj, Advocate for the Respondent

Judgement

Harish Tandon, J.—The Court: The point which evoked from the submissions of the respective counsels is whether the petitioner is entitled to a value of the goods assessed at the time of seizure or the value received by the respondent authorities from selling the said goods to a third party. The 4848.7 Mtrs. of Silk Fabrics of China Origin was seized u/s 110 of the Customs Act on May 4, 2001. The authorities reasonably believed that the said goods were brought within the country in violation of the provisions contained u/s 3(3) of Section 11(1) of the Foreign Trade (Development and Regulation) Act, 1992 read with para 15.2 of chapter 15 of Exim Policy 1997-2002 and section 11 of the Customs Act 1962.

2. The proceeding was initiated against the petitioner and the adjudicating authority did not pass a favourable order to the petitioner. The petitioner carried the said order before the appellate authority who affirms the said order subsequently, the order was further carried to the Customs Excise & Service Tax Appellate Tribunal (CESTAT) and the order of the adjudicating authority as well as the appellate authority was quashed and set aside. Between the period from the date of an order of the appellate tribunal and filing of an appeal before the CESTAT, the authorities sold the seized goods at a price of Rs. 2,28,010/-

although the competent officer at the time of seizure valued the said goods at Rs. 7,75,792/-. The department challenged the order passed by CESTAT before this Court. The writ petition was initially admitted but thereafter no step was taken by the respondent authorities as a consequence whereof the appeal stood dismissed for default. Subsequently, the respondent authorities forwarded a cheque for a sum of Rs. 2,28,010/- being the value of the goods sold by the authorities which was accepted without prejudice by the petitioner.

3. In this writ petition the petitioner says that the authorities are required to pay the value of the goods assessed at the time of seizure. The learned advocate for the petitioner further submits that the action of the respondent authorities in selling the seized goods before the expiration of the statutory period for preferring an appeal before the CESTAT is unreasonable, arbitrary and contrary to law. The petitioner relies upon a Division Bench judgment of the Delhi High Court in case of *Shilps Impex Vs. Union of India (UOI) and Another*, ; *Kailash Ribbon Factory Ltd. Vs. The Commr. of Customs and Central Excise and Another*, and *Commissioner of Customs v. Harinder Singh* 2008(221) ELT 203 (Punj. & Har.) in support of his contention that the authorities are bound to refund either the goods seized in exercise of the statutory power or the value assessed at the time of seizure and not the value which the respondent authorities received while selling the seized goods. By placing reliance upon the judgment of the Supreme Court in the case of *Northern Plastics Ltd. (Now Merged With Consolidated Photo and Finvest Ltd.) Vs. Collector of Customs and Central Excise*, , the petitioner submits that the moment an order of confiscation/seizure is declared illegal by a competent forum, the importer becomes entitled to the value of the goods as on the date and the time when the said goods ought to have been cleared by the customs authorities. Thus the petitioner submits that the authorities ought to have paid the amount valued at the time of the seizure and not the amount which the authorities fetched after selling the said goods. The petitioner further submits that section 150 of the Customs Act prescribed the procedure for sale of the goods after giving notice to the owner. He further submits that since no notice is given the sale has been conducted by the respondent authorities in gross violation of the statutory provisions.

4. The respondent, however, submits that section 150 of the Customs Act relates to selling of the non-confiscated goods and, therefore the said provision has no manner of applicability in the present context. By referring section 126 of the said Act, the respondent says that once the goods are confiscated, the ownership vests in the Central Government and, therefore, the sale cannot be said to be illegal and/or invalid for non-issuance of the notice upon the petitioner. He tried to contend that section 150 of the said Act has no manner of applicability in relation to a confiscated goods.

5. The core issue is whether the petitioner is entitled to receive the value of the goods assessed at the time of the seizure or the value which the respondent authorities received from the sale. In this regard the reference can be made to

the judgment of the Delhi High Court in the case of Shilp Impex (supra) wherein it is held that the importer is entitled to receive the value of the goods fixed by the department and not what the customs authorities received upon sale of the said goods. The aforesaid proposition is reiterated in the case of Kailash Ribbon Factory Ltd. (supra) in these words:--

7. Therefore, according to the submission of the learned Counsel for the petitioner after confiscation, the goods became the property of the Central Government. During the pendency of the petitioner's appeal, without any permission of the court, the confiscated goods were auctioned in a clandestine manner by the respondents. The respondents are obviously under an obligation to compensate the petitioner for the grave loss which has been caused to him. The goods were evaluated by the petitioner at Rs. 19,11,930.00 and Rs. 7,16,974.00 the total amount worked out to be Rs. 26,28,904.00. This is the declaration of the petitioner though the respondents have evaluated the value of confiscated goods at Rs. 33.04 lakhs. While granting the order we deem it proper to take the value of goods declared by the petitioner otherwise it would be a case of unjust enrichment. The petitioner has placed reliance on Northern Plastics Ltd. (Now Merged With Consolidated Photo and Finvest Ltd.) Vs. Collector of Customs and Central Excise, and Shilps Impex Vs. Union of India, . In Shilps" case (supra) their Lordships of the Hon"ble Supreme Court observed that the petitioner became entitled to get back what he has paid. In Northern Plastics" case (supra) the Hon"ble Supreme Court observed:

It was contended by Mr. Dave that the applicants are not liable to pay any duty as the goods were not cleared by the respondent and they were subsequently confiscated and sold by the respondent and, therefore, the applicants cannot be said to have imported the goods. On the other hand, it was contended by Mr. C.S. Vaidyanathan, learned Additional Solicitor General that the import of the goods was by the applicants and as soon as the said goods landed on the land mass of India proper amount of duty, became payable thereon. In our opinion, Mr. Vaidyanathan, is right in his submission particularly, when full impact has to be given to the order passed by us declaring retention and confiscation of the goods to be illegal. Mr. C.S. Vaidyanathan, learned Additional Solicitor General, however, further submitted that value of the goods as shown in the import documents was only Rs. 33.04 lakhs and as the duty and the Warehousing charges payable are more than the said amount, the applicant is not entitled to recover anything from the respondent. What is over-looked by the learned Counsel is the consequence of setting aside the order of confiscation on the ground that it was illegal. The applicant has become entitled to the value of the goods as on the date or time when the goods ought to have been cleared by the respondent for home consumption. If the value of the goods in India after importation and payment of duty in January, 1989 was Rs. 33.04 lakhs only then the applicant, and for that matter any sensible person, would not have imported the goods at all. It would be reasonable to presume that an importer would have imported the goods of the value of Rs. 33.04 lakhs if its value in Indian market at

the relevant time was more than CIS value of the goods plus the duty payable thereon (Rs. 33.04 lakhs + 47.07 lakhs = Rs. 80.11 lakhs) It is also not the stand of the respondent that such goods were available in the Indian market at that time at a lesser price. Therefore it is now the obligation of the respondent to return at least Rs. 80.11 lakhs-47.07 lakhs the amount of duty payable thereon. As the applicant has been deprived of the use of the goods worth Rs. 33.04 lakhs the respondent is under a legal obligation now to refund that amount to the applicant. The respondent cannot now be permitted to take the advantage of his own wrong and contend that the value of the goods should be determined only at Rs. 48.50 lakhs inclusive of its value and the amount of duty payable thereon because they could be sold at that price only. We also cannot accept the contention of the learned Counsel for the respondent that if the applicant has suffered any loss as a result of the wrongful act of the respondent then he should file an action in tort and this Court cannot order payment of any amount in these applications. No doubt it would be open to the applicant to initiate such an action if it feels that the loss suffered by it is more than Rs. 33.04 lakhs. Merely because it is open to the applicant to initiate such an action it would not be just and proper to refuse the claim made in these applicants as in any case the applicant is entitled to return the money value of the goods which were illegally confiscated by the respondent. Even though the applicant has claimed interest @ 21% we do not think it proper to award interest at such a high rate and considering the facts and circumstances of the case it would be in the interest of justice if the respondent is directed to return the amount of Rs. 33.04 lakhs with interest at the rate of 12% from 1-2-1989 till the date of payment as the Collector by its order dated 31-1-1989 had held that the goods were properly described and the import was legal.

8. We are of the considered opinion that during the pendency of the appeal confiscated goods could not have been auctioned without the prior permission of the appellate court.

9. From various judicial orders we gather that this lapse is being repeated in a large number of cases, therefore, we are constrained to observe that the respondents have not been diligent in discharging their duties. The respondents are directed to issue an official circular within four weeks to all the concerned officials that the confiscated goods which are the subject matter of appeal before any Tribunal or Court shall not be auctioned or disposed of without prior written permission or order from the concerned Tribunal or the court.

10. After obtaining necessary permission if the authorities decide to auction the goods, then individual notice to the concerned parties is imperative. We are clearly of the opinion that the respondents have committed a serious blunder by auctioning the goods which were subject matter of appeal without prior permission of the concerned appellate court. The petitioner has to be compensated for this serious lapse of the respondents causing immense financial loss to the petitioner.

11. We accordingly direct the respondents to refund the amount of Rs. 26,28,904.00 declared as the value of the confiscated goods to the petitioner forthwith. The respondents are directed to return the said amount with interest at the rate of nine per cent per annum from the date of unauthorised auction of the confiscated goods, i.e., 21-5-1998.

6. By relying upon the judgment of the Shilps Impex (supra), the Punjab & Harianna High Court in the case of Harinder Singh (supra) accepted and applied the ration and directed the authorities to pay the value of the goods assessed at the time of seizure. It appears from the judgment rendered by the Punjab & Haryana High Court in the case of Harinder Singh (supra) that the judgment rendered in Shilps Impex (supra) of Delhi High Court tested before the Supreme Court and the Supreme Court declined to interfere with the said order which is aptly quoted as under:--

6. Sections 23(2) and 150 of the Act on which great emphasis is laid by the counsel for the respondent read as under:--

Section 23. Remission of duty on lost, destroyed or abandoned goods.

(1)*** (2) The owner of any imported goods may, at any time before an order for clearance of goods for home consumption u/s 47 or an order for permitting the deposit of goods in a warehousing u/s 60 has been made, relinquish his title to the goods and thereupon he shall not be liable to pay the duty thereon.

Section 150. Procedure for sale of goods and application of sale proceeds.-(1) Where any goods not being confiscated goods are to be sold under any provisions of this Act, they shall after notice to the owner thereof be sold by public auction or by tender or with the consent of the owner in any other manner

(2) The proceeds of any such sale shall be applied-

(a) firstly to the payment of the expenses of the sale.

(b) next to the payment of the freight and other charges, if any, payable in respect of the goods sold to the carrier, if notice of such charges has been given to the person having custody of the goods.

(c) next to the payment of the duty, if any, on the goods sold.

(d) next to the payment of the charges in respect of the goods sold due to the person having the custody of the goods.

(e) Next to the payment of any amount due from the owner of the goods to the Central Government under the provisions of this Act or any other law relating to customs, and the balance, if any, shall be paid to the owner of the goods.

7. This Court must record that the respondent authorities should not have proceeded in haste to sell the said goods. If the record correctly depicts, the seizure was made on 4th May, 2001 and the sale was conducted in the year 2004. If the authorities could wait for nearly three years it is inconceivable that

before the expiration of the statutory period for preferring an appeal before CESTAT the authorities sold the said goods at a value which is most below the value determined at the time of seizure. This Court does not accept the explanation offered by the respondent authorities that the goods were of perishable nature and unless the sale is made the value would have diminished further. As already indicated the respondent authorities waited for nearly three years and it is still unexplained as to what urgency and or exigency arose before the expiration of the statutory period provided for an appeal before the CESTAT.

8. Since the sale has already been effected it is too late for a day to say that the same was conducted contrary to the provisions or without any reasonable explanation or not. The respondent authorities have not disputed that at the time of seizure the competent authority assessed the value of the goods at Rs. 7,75,792/- and refunded a sum of Rs. 2,28,010/-. By applying the ratio as laid down in the above noted reports the respondent authorities are bound to pay the value of the goods assessed at the time of the seizure and not the value which it fetched from the sale of the said goods after the seizure is declared to be illegal by the CESTAT. The authorities are thus directed to pay the petitioner the differential amount within eight weeks from the date of the communication of this order. With these observations the writ petition is thus disposed of. No costs.