(2011) 12 CAL CK 0023

In the Calcutta High Court

Case No : GA No. 2617 of 2011 and CUSTA No. 5 of 2011

AL Saif International APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 23-12-2011

Acts Referred:
Customs Act, 1962 — Section 111(d), 112, 124, 125, 126

Citation : (2012) 281 ELT 72

Hon'ble Judges : K.J. Sengupta, J;Joymalya Bagchi, J

Bench : Division Bench

Advocate : Shibdas Banerjee, for the Appellant; Bhargav, for the Respondent

Final Decision : Allowed

Judgement

1. This is the second bout of litigation between the parties before this Court The appellant/importer has challenged the order dated 28th June 2011 passed by the Tribunal in Misc. Application Case No. 16/11 in Customs Appeal No. C-353/09 on remand pursuant to direction given by this Court in order dated 11-8-2010 in Customs Appeal No. 14 of 2009 [A.L. Saif International Vs. Union of India (UOI), The appellant/importer had sought clearance of import consignment, which was declared as "old and used worn clothing completely fumigated." The said consignment was subjected to physical examination and in the course of adjudication, the Adjudicating Authority found that the goods were misdeclared in respect of weight as well as value and that the same had been imported in violation of the import policy/ inasmuch as, the appellant/importer did not have the requisite restriction for importation. As a result the Adjudicating Authority by order dated 8-9-2008 directed confiscation of the said goods u/s 111(d) and (m) of the Customs Act with an option to the importer to redeem the goods on payment of redemption fine of Rs. 1,70,000/- also imposed penalty of Rs. 58,000/- on the importer u/s 112 of the Customs Act. The said order was accepted by the importer and on the next day the redemption fine and penalty was paid by the importer. Thereafter, on 11-9-2008, Directorate of Revenue

Intelligence, informed the Commissioner about the intelligence received by them that the goods declaration under Bill of Entry had been assessed on the basis of Fraudulent information furnished by the importer and the examination of the goods by the departmental officer at the time of assessment was not adequate to unearth such misdeclaration.

2. Immediately the Commissioner called for the file and after perusing the same passed it to DRI for further investigation. It appears that DRI subjected the imported goods to a more intensive investigation by bursting the bales and allegedly unearthed misdeclaration of the said goods on the part of the importer resulting in a much higher duty liability in comparison to what had been imposed by the earlier order of assessment. It is apposite to mention that on the basis of new facts discovered in the course of enquiry by DRI a show cause notice u/s 28 of the Customs Act has been issued upon the appellant/importer and the same is pending consideration. Subsequently, the file was sent back to the Adjudicating Authority and the Adjudicating Authority appears to have passed a speaking order of assessment on 16-2-2009 which is claimed to have been communicated to the Commissioner on 24-2-2009. Thereafter, the Commissioner sought to exercise his powers u/s 129D of the Customs Act and by order dated 20-5-2009 passed an order authorizing appropriate officer to apply for review the aforesaid order of assessment dated 8-9-2008.

3. Pursuant to such order, a review application was filed on behalf of the Customs Authorities before the Commissioner (Appeals) on 27-5-2009. The Commissioner (Appeals) by order dated 28-7-2009 set aside the order of assessment and allowed the review application filed on behalf of the Customs Department. The appellant/importer appealed against such order passed by the Commissioner (Appeals) before the Tribunal and the same was disposed of by the tribunal on 9-11-2009 by a non-speaking order. This came to be challenged before this Court in Customs Appeal No. 14 of 2009 whereby the matter was remanded to the tribunal to decide the issue of limitation first and thereafter to decide on other points.

4. Pursuant to such order of remand, the Tribunal has passed the impugned order dismissing the appeal of the appellant/importer.

5. Being aggrieved by such order of dismissal, the appellant/importer has preferred the instant appeal. This Court admitted the appeal on the following substantial questions of law :

(1) Whether the learned Tribunal below committed substantial error of law in holding that the initiation of review proceedings in terms of Section 129D of the Customs Act was not barred by limitation by relying upon Section 28 of the Act.

(2) Whether the learned Tribunal below committed substantial error of law in holding that the question of limitation became inconsequential because of fraud practiced by the appellant notwithstanding the fact that such allegation of fraud was never made at the time of initiation of review proceedings or even

subsequently at the appellate stage.

6. Mr. Shibdas Banerjee, Senior Advocate appearing for the appellant/importer submitted that the order of assessment was passed on 8-9-2008 and the same was communicated to all concerned electronically and otherwise. In fact, in due compliance of such order, his client deposited the redemption fine and penalty. He further submitted that the purported issuance of the subsequent reasoned order of assessment passed on 16-2-2009 is contrary to law and in that practice and procedure of the department cannot override the clear provisions of law. He submitted it is evident that non-speaking order dated 8-9-2008 was duly communicated to the Commissioner and the starting point of limitation for the purpose of sub-section (3) of Section 129D of the Customs Act would be from that date and not on any subsequent date when the Adjudicating Authority chose to supply reasons to such order and communicate the same.

7. Drawing the attention of this Court to Section 17(5) of the Act he submitted that ordinarily there was no necessity in law to pass a speaking order until and unless the order of assessment is disputed by the assessee and even then such order has to be passed within 15 days form the date of assessment. He strenuously submitted that the belated issuance of the purported reasoned order is nothing but a substitute to avoid the statutory provisions of limitation and the same ought not to be permitted.

8. He further submitted that the order of confiscation having become final the title to the goods in question vested in the State and further proceedings could not be initiated against his client.

9. In support of his contention he referred to a decision of the Larger Bench of the Tribunal reported in 2003 (87) ECC 823

10. Per contra, Ms. Bhargav, learned advocate appearing for the Customs Department submitted that it was the prevailing practice that the order of assessment is followed by a more elaborate and speaking order and the date of communication of such speaking order is the starting point of limitation for the purpose of sub-section (3) of Section 129D of the Customs Act.

11. Learned counsel further submitted that the initial assessment was made on the basis of the fraudulent misdeclaration made by the appellant/importer which was subsequently discovered when the goods were subjected to more intensive scrutiny by bursting the bales by the DRI officers. She further contended that in view of the new facts discovered in the course the subsequent inquiry by DRI fresh show cause notice for levying additional duty and penalty has been imposed upon the appellant/importer u/s 28 of the Customs Act. A writ petition (W.P. No. 2736 (W) of 2009) was moved by the appellant/importer before this Hon''ble Court challenging the action of the Customs Authorities in withholding goods in question and an interim order was passed therein permitting the appellant/importer to clear the goods upon furnishing sufficient security but the appellant/importer has not complied with such order. She further submitted that

the order to review was lawfully passed by the Commissioner and the impugned order passed by the Tribunal does not form any illegality.

12. In support of her contention she has relied upon a case reported in Union of India and others Vs. Jain Shudh Vanaspati Ltd. and another, and another case reported in Union of India and ors Vs. R.C. Fabrics (P) Ltd. and anr,

13. In order to substantiate her contention that the order dated 8-9-2008 had not been communicated to the Commissioner prior to the passing of the subsequent reasoned order dated 16-2-2009 we gave an opportunity to Ms. Bhargava to produce records of the instant case from the Customs Department.

14. In spite of such opportunity, the instant case was not produced before us and therefore we were constrained to proceed on the basis of the materials of record.

15. The core issue to be decided in this appeal is when does the period of limitation for passing the order to review u/s 129D of the Customs Act commence ?

16. Section 129D of the Customs Act provides that the Committee of Chief Commissioners of Customs or Commissioner of Customs may of its own motion call for records of any proceeding in which the Adjudicating Authority subordinating to him has passed any decision or order for the purpose of satisfying himself as to the legality of propriety of such decision or order and may by order direct the appropriate authority to apply to the Commissioner (Appeals) for determination of such points that may arise out of the said decision or order. Subsection 3 of the said Section provides that an order to review u/s 129D shall be made within three months from the date of communication of the decision or order of the Adjudicating Authority.

17. Hence a plain reading of the aforesaid provisions would show that the period of limitation for passing an order by the Commissioner Section 129D of the Customs Act is within three months from the date of communication of the decision or order of the Adjudicating Authority.

18. It has been undisputedly held by the Tribunal that the order of assessment was passed by the Adjudicating Authority on 8-9-2008 and on the next date was acted upon by the appellant/importer after the same was communicated to him. It has further been held by the Tribunal, as follows :

...On 11-9-2008, that is after passing of the order and before clearance of goods from the warehouse, the Directorate of Revenue Intelligence (DRI) informed the Commissioner about information received by them that the goods declared under the Bill of Entry were assessed on the basis of fraudulent information furnished by the importer and the examination of goods conducted by the departmental officers was not adequate to unearth the fraud. The Commissioner called for the file and passed it on to DRI for further investigation. DRI conducted very detailed examination of the goods and unearthed fraudulent declaration of the goods.

19. The aforesaid observation in Tribunal order makes it clear that the file containing the order dated 8-9-2008 had been called for by the Commissioner and the same was placed before him and after perusing the same he passed it on to DRI for further investigation. Such finding of fact by the Tribunal has not been challenged before us. This makes it evidently clear that upon receipt of intimation from DRI on 11-9-2008, the Commissioner immediately on his own motion called for the file and perused the order or assessment dated 8-9-2008 and passed it on to DRI for further investigation. If that be so, then there is no room for controversy that the order dated 8-9-2008 was communicated to the Commissioner promptly on or about 11-9-2008 and not at the belated stage when reasons in support of the order of assessment were communicated to him. The submission of the learned counsel of the Department that the Commissioner was not communicated the order of assessment prior to the issuance of the subsequent reasoned order on 24-2-2009 is therefore contrary to the factual findings in the impugned order itself. Furthermore the submission that it is the prevalent practice in the Department to pass a subsequent reasoned order on a later date and that the starting point of limitation for the purpose of Section 129D of the Customs Act merits outright rejection.

20. It is a settled principle that when the law requires a thing to be done in a particular manner it must be done in that manner alone or not at all (see Nazir Ahmed v. King Emperor reported in AIR 1936 PC 253). In the instant case, the order of assessment was made on 8-9-2008. From the finding of the fact by the Tribunal it appears that the file containing such order was placed before the Commissioner on or about 11-9-2008 who perused the same (affirmed information nor production of original) before passing it on to D.R.I. If that be so, then the order of adjudication has to be held to have been communicated to the Commissioner on or about 11-9-2008 and not on 24-2-2009 when the subsequent reasoned order was sought to be communicated. The necessity to give a reasoned order in respect of adjudication is also not the requirement of law. Section 17(5) of the Customs Act provides that a reasoned order of assessment is required to be passed when an assessment is done contrary to the claim of the importer and where the importer does not confirm is acceptance of the said assessment in writing. In such cases too, the speaking order of assessment is required to be made within 15 days from the date of assessment.

21. In the instance case, not only has the importer accepted the assessment but the purported speaking order has been passed more than 5 months from the date of assessment. We are constrained to hold that purported speaking order passed after 5 months from the date of assessment is unwarranted under provision of Section 17(5) of the said Act. We are of the opinion that since the earlier order dated 8-9-2008 had already been placed before the Commissioner and the Commissioner had acted upon it, it cannot be said that the subsequent communication of reasons in support of such order should be taken to be the starting point for the period of limitation.

22. The Tribunal has held that the order was procured by fraud and hence the period of limitation would not operate in this case. We are unable to accept such contention of the tribunal, that the order was passed on the ground of fraud. We are of the view that the alleged plea of fraud is not countenanced as the appellant placed everything before the authority. Even the authority verified the market price, and without accepting the valuation by the appellant in the bill of entry, the concerned official has fixed his own valuation. Hence, question of practice of fraud as to the valuation of the goods did not and cold not arise. We failed to understand how the fraud could be said to have been practiced in this matter.

23. Furthermore, there is no provision in Section 129D of the Customs Act, which provides for enlargement of the period of limitation in respect of fraud. In this respect one may make a comparative analysis of Section 28 of the Customs Act and that of Section 129D of the said Act.

24. While Section 28 of the Customs Act provides for an enlarged period of limitation for issuance of a show cause notice for recovery of duty/additional duty in cases of collusion, willful misstatement or suppression of fact of an order, no such legislative latitude is provided in Section 129D of the said Act. If the legislative so intended, it would have made similar provisions in Section 129D of the Customs Act as in Section 28 of the said Act. Further the Customs Act being a fiscal statute we are inclined to give a strict interpretation to the provisions of Section 129D of the Act and not read into the said provision things which the legislative did not specifically provide (See Commissioner of Sales Tax, Uttar Pradesh Vs. The Modi Sugar Mills Ltd.,). We are of the opinion that the period of limitation in Section 129D of the Act cannot be enlarged in cases of fraud since there is no such provision as in Section 28 of the Customs Act.

25. We further hold that the plea of existence of a departmental practice of subsequently passing a reasoned order and the claim that the subsequent communication of such reasoned order ought to be starring point of limitation in respect of Section 129D of the Customs Act is wholly untenable.

26. In the event such argument is to be accepted then we would have to rewrite the clear and ambiguous words of the statute where requires limitation to commence from the date on which the order or decision is communicated to the Commissioner and not the reasons thereof. In the instant case, as held earlier, the order dated 8-9-2008 was placed before the Commissioner on or about 11-9-2008 and therefore the same is held to have been communicated to him on such date. Subsequent communication of reasons and that too after more than 5 months in clear violation of the statutory mandate of Section 17(5) of the Act cannot enure to the benefit of the department to extend the period of limitation and thereby vest the Commissioner with necessary jurisdiction for passing the order for review.

27. In the case reported in Union of India and others Vs. Jain Shudh Vanaspati

Ltd. and another, the issue which fell for decision was whether the department had the power to issue a show cause notice u/s 28 or Section 124 of the Customs Act unless an order of clearance u/s 47 has been revised. In the instant case we are not concerned with the legality of the show cause notice issued upon the appellant/importer and the issue which falls for in the instant case is entirely different from what has been decided in the said case.

28. Similarly, in the case reported in Union of India and ors Vs. R.C. Fabrics (P) Ltd. and anr, it was held that principle of res judicata or constructive res judicata does not apply in respect of adjudication proceedings. We have no quarrel with such proposition of law. However this issue does not fall for decision in the instant case and the said judgement is also of no help to adjudicate the matter in issue.

29. We are unable to accept the contention of Mr. Banerjee that on confiscation of the goods the government becomes the owner of the property. It is true that by the provision of law it will appear once the confiscation is made by an express order then the property vests in the Central Government under the provision of Section 126 Customs Act, 1962. On fact there has been adjudication of confiscation but no confiscation, in fact, took place as in lieu of confiscation option for payment of redemption fine was offered by the official concerned and the same was availed of by the appellant forthwith. According to us, the ownership of the property vests in the Government when the confiscation is complete. In this case as because the option was exercised the ownership of the goods cannot be said to have been passed on to the Government. According to us, once the option is exercised, ownership of the same reverts to the importer (here). This would be clear from the careful and close reading of Section 125 of the said Act particularly from the Sections mentioned therein and we properly quote the following :

...shall in the case of any other goods, give to the owner of the goods (or, where such owner is not known, the person from whose possession or custody of such goods have been seized, an option to pay in lieu of confiscation such fine the said officer think.

30. We, therefore, answer the question no. 1 in the affirmative and hold that the Commissioner had exercised his power of limitation much after the expiration of the period specified in subsection (3) of Section 129D of the Customs Act and that such period of limitation could not be extended with reference to Section 28 of the said Act.

31. With regard to the question no. 2, we hold that, unlike Section 28 of the Customs Act, the allegations of fraud cannot alter the period of limitation specified in subsection (3) of Section 129D of the Customs Act and that question is also answered in the affirmative.

32. Before parting, we would like to record with much consternation and anguish that though the order passed by the Tribunal was pronounced on 28th June,

2011 the same appears to have been signed by one of the members on 17-6-2011. We fail to understand as to how such a situation is at all possible. The tribunal discharges a vital adjudicating function. One of the basic tenets of such function is fairness in procedure. No judicial or quasi judicial authority comprising of more than one member can pronounce a judgement on a particular day which has already been signed by a member thereof on an anterior date. We are surprised by the manner in which the Tribunal has conducted itself and record our disapproval in that regard. The appeal is allowed and the order passed by the Tribunal is set aside. The impugned order dated 2-7-2009 passed by the Commissioner (Appeals) and the order to review dated 20-5-2009 passed by the Commissioner of Customs are accordingly quashed. There shall be no order as to costs.