

(1994) 11 AP CK 0021

In the Andhra Pradesh High Court

Case No : Writ Petition No. 2691 of 1990

Amrutha Hotels (P) Ltd.

APPELLANT

Vs

Superintendent of Central Excise, Hyderabad

RESPONDENT

Date of Decision : 23-11-1994

Acts Referred:

Customs Act, 1962 — Section 110, 111, 112, 124, 129DA

Citation : (1995) 79 ELT 206

Hon'ble Judges : S.V. Maruthi, J;M.N. Rao, J

Bench : Division Bench

Judgement

S.V. Maruthi, J.—M/s. Amrutha Hotels (P) Ltd., is the petitioners. In this Writ Petition it is challenging a detention memo issued by Superintendent of Central Excise, Hyderabad, directing it not to part with the car bearing No. AP 9/ A-545 except with the previous permission of the Directorate of Revenue Intelligence, Zonal Unit, Construction House, 1st Floor, Walchand Hirachand Marg, Ballard Estate, Bombay - 400 038. The detention memo further states that on enquiries made by the Directorate of Revenue Intelligence, it was found that the said car was imported and cleared through the Customs by mis-declaring the Cubic Capacity at 1595 and paying Customs duty at the rate of 100% + 45% + CVD 35% + 1/8% M.V. Cess, whereas the correct Cubic Capacity of the car was 1781/1800 and Customs duty leviable was at the rate of 150% + 45% + CVD 35% + 1/8% M.V. Cess and that since the appropriate amount of Customs duty had not been paid on the said car, the said car was liable to be confiscated u/s 111(m) of the Customs Act, 1962 (in short "the Act") which constitutes smuggling as defined u/s 2(39) of the Act.

2. The facts, as stated in the affidavit are as follows :-

3. The petitioner purchased an imported car, namely Audi-80, bearing Maharashtra registration MH-01-575 from Sri Lawrence G. Karakoda, residing at F. 150 Veena Beena Apartments, A.D. Marg, Bombay - 500 015. An amount of Rs. 7,00,000/- was paid to the seller towards price of the car by a Demand Draft

dated 11-1-1990. The car was purchased for the purpose of meeting the requirements of the petitioner-Club. At the time of purchase the petitioner's representatives were specifically informed that the car was cleared from Customs about a month back after paying requisite import duty. The bill of entry was also shown to them. After getting the car to Hyderabad, the car was registered at Hyderabad with A.P. number, namely, AP 9/A-545. In the certificate of registration of the motor vehicle issued by the Maharashtra State authorities, the Cubic Capacity was shown as 1595 C.C. While so, on 2-2-1990 the impugned proceedings were issued. Challenging the above memo, the present Writ Petition was filed.

4. The case of the respondents in the counter-affidavit was that the original owner Mr. Lawrence G. Karakoda, imported an Audi car through the Bombay agent of M/s. Volkaswaggon, West Germany, who intimated by his letter dated 3-1-1990 that the car imported by him was sold to the petitioner through Volkaswaggon agent M/s. Ashiya Motors, Bombay and that he does not know the registration number. It was only from the undertaking given by the petitioner, after service of detention memo, the Department came to know that the registration number of Audi car was MH-01-575; that the importer in his statement dated 27-12-1989 stated that he imported the car for a profit of Rs. 80,000/- and given blank signed papers to M/s. Ashiya Motors, the agent of M/s. Volkaswaggon, West Germany; that all the work pertaining to the car, payment of Customs duty, clearance charges and other charges emanating for the clearance of registration was done by M/s. Ashiya Motors, Bombay; that the vehicle in question was cleared through the Customs by suppressing its correct Cubic Capacity resulting in evasion of Customs duty; that the Cubic Capacity of similar Audi car with the similar engine type "NE" has Cubic Capacity of 1800 C.C. as per test certificate dated 17-2-1990 issued in respect of Audi 80 car bearing registration No. BLF-7230 having engine No. NE-111 188 and from the micro film of the catalogue of Audi 80/90 cars of M/s. Volkaswaggon AG, it was found that the Cubic Capacity of Audi 80 cars with engine type "NE" and "RU" 1.8 litres (1800 C.C.) and not 1595 C.C. as declared in the bill of entry; that the importer declared in the Bill of Entry the Cubic Capacity as 1595 as against 1800 C.C., therefore the price declared in the bill of entry for Audi 80 car with 1595 Cubic Capacity does not represent the correct price and the importer suppressed the price of the Audi car 1800 C.C. and, therefore, there was mis-declaration; that the importer suppressed the actual Cubic Capacity and real value of the imported vehicle and that the investigations revealed that Sri Sadiq Fatehally, proprietor of M/s. Ashiya Motors was a partner and holding 21% shares of M/s. Futehally Ltd., 302 Bombay Building, Minami Hommachi, Cu-Ku, Osaka, Japan and that the letter of credit No. OSK/LC 40/ 219, dated 22-5-1989 was opened by M/s. Futehally Ltd., in Osaka, Japan for DM 1,21,000/- C & F with Bank of India, Osaka, Japan in favour of M/s. Volkaswaggon, AG, West Germany for the import of 5 Audi cars (including the instant Audi car in question). The average payment of car accordingly works out to DM 24,200 C & F; that the said payment was in

addition to the amount of DM 25,262/- which was paid initially on behalf of Sri Lawrence G. Karkoda; that the total amount paid towards the Audi 80 car in question works out to DM 49,462/- C & F (i.e. DM 25,262/- plus DM 24,200/- equivalent to Rs. 4,20,238/-) (DM 11.77 = Rs. 100/- exchange rate as per the bill of entry) and not Rs. 1,59,705/- equivalent to DM 18.608.18 C & F plus Rs. 1,707/-. The fact of extra payment of DM 24,200/- in respect of the said Audi car and the relationship of M/s. Ashiya Motors, Bombay with M/s. Futehally Ltd., Osaka, Japan, who had made the said extra payment were not declared to the customs at the time of clearance of the said Audi Car; that the Audi car in question had other optional fittings fitted to the car and the prices of which were not declared in the relative bill of entry as a result whereof there was a total suppression of facts on the part of the importer regarding the actual value of the said Audi car; that the duty payable works out to Rs. 12,37,365/- whereas the duty actually paid on the bill of entry was only Rs. 3,60,556/- and the duty evaded was Rs. 8,76,809/-; that the importer further stated that he had not paid any money towards the cost of the car and that he had merely signed the documents as dictated by Sri S. Fatehally, proprietor of M/s. Ashiya Motors who were running the racket of clandestine import of Audi car in the guise of genuine imports by repatriates; that according to the statement of the importer he does not even know as to whom the car imported by him was sold. The sum and substance of the respondents' case is that the importer imported the Audi car with 1800 C.C. and failed to disclose the optional fittings fitted to the car and the prices of which were not declared in the bill of entry and paid the duty by declaring in the bill of entry the Cubic Capacity of the car at 1595. Therefore, the car is liable to be confiscated u/s 111 of the Act. Hence, the detention order.

5. The counsel appearing for the petitioner submitted that on the import of the car a bill of entry was filed declaring that the Cubic Capacity of the car was 1595 and the Customs authorities have assessed the duty u/s 17 of the Act and pursuant to which the duty was paid and, therefore, the order of assessment has become final and proper Officer having satisfied that the goods entered for home consumption are not prohibited goods and the importer had paid the import duty, permitted clearance of the goods for home consumption. Therefore, the authorities have no power to detain the car in exercise of the power u/s 110 of the Customs Act. The only remedy that is available to the department, assuming that there was any mis-declaration, is to initiate proceedings u/s 28 for short-levy or non-levy of duty either under Clause 1 or in the alternative, to take recourse to the procedure contemplated u/s 129DA, which empowers the Board or the Collector to call for and examine the record of any proceeding in which the Collector of Customs or Assistant Collector of Customs has passed any decision or order in the absence of which there is no power either to confiscate, seize or detain the vehicle.

6. The counsel submitted that the petitioner is a bona fide purchaser and on the basis of a representation made by the importers that the import duty was paid and that the Customer have cleared the vehicle for home consumption, neither

the car which is in his possession is liable for confiscation nor the petitioner is liable for any penalty under the Customs Act.

7. u/s 112 of the Customs Act any person, who does or omits to do any act which act or omission would render such goods liable to confiscation u/s 111 or any person who acquires possession of any goods which he knows or [has reason] to believe are liable to confiscation alone is liable for penalty and the petitioner being a bona fide purchase u/s 112, it is not liable to be penalised. Counsel also submits that Section 124 of the Act contemplates issue of notice to the owner of the goods or such person who has knowledge that the goods are liable for confiscation. The expression "owner" contemplated under Sections 124 and 112 is the importer or the person who has knowledge that the goods are liable for confiscation. The meaning cannot be extended to a bona fide purchaser without knowledge that the goods are liable for confiscation.

8. Counsel also submits that the expression "such person" in Section 124 of the Act should be read in conjunction with Section 111(m) of the Act. In other words, "such person" means the owner or importer who is responsible for the mis-declaration or mis-description of the goods imported and does not include a bona fide purchaser.

9. We have already referred to the contents of the counter-affidavit, according to which, the reason for the detention order is on account of the suppression of correct Cubic Capacity which resulted in the evasion of Customs duty. It is not disputed by the respondents that the original importer filed the bill of entry and the goods were assessed u/s 17 of the Act and the goods were also cleared for home consumption u/s 17. However, the contention of the Standing Counsel for the respondents is that since there was suppression of Cubic Capacity of the imported car, the order of assessment has not become final and, therefore, it is open to the authority to detain the goods u/s 110 of the Customs Act pending re-assessment. We may point out that before the goods are permitted for clearance for home consumption under the Customs Act, the Proper Officer should be satisfied that the goods entered for home consumption are not prohibited goods and that the importer paid the import duty, if any, assessed thereon and any charges paid under the Act in respect of the same [sic] paid it is only after application of mind and satisfaction, the proper Officer should make an order permitting clearance of goods for home consumption. Since u/s 47 of the Act, proper officer exercised the jurisdiction under the Act permitting the clearance of goods entered for home consumption after having satisfied that the goods are not prohibited and that the importer had paid import duty, the order of assessment had become final. The fact that subsequently on enquiries the authorities found that there was suppression of Cubic Capacity and other material resulting in evasion of duty does not take away the finality attached to an order, clearing the goods for home consumption on the satisfaction of the proper Officer that the importer has paid the relevant duty assessed and the goods are not prohibited. When once the order u/s 47 of the Act has become

final, the only remedy available either for short-levy or non-levy of the duty on account of the suppression of fact is by taking recourse to Section 28 of the Customs Act within six months from the relevant date in the normal circumstances and in cases where the short-levy or non-levy is by reason of collusion or willful mis-statement or suppression of fact by the importer within five years from the relevant date of the Collector of Customs. In the alternative to initiate proceedings u/s 129DA.

10. Since the notice u/s 124(a) of the Act was not issued within six months of the detention order, the order of detention is set aside. This does not preclude the respondents from initiating proceedings either u/s 28 or u/s 129DA of the Act, if so advised, in accordance with law against the importer and the petitioner. The undertaking given by the petitioner during the pendency of the Writ Petition that he would not alienate or otherwise part with the vehicle shall continue till such time the proceedings are initiated and concluded.

11. The Writ Petition is accordingly disposed of. No costs.