(2005) 09 KAR CK 0029

In the Karnataka High Court

Case No : Writ Petition No. 1392 of 2002

Asset Engineering APPELLANT

Vs

Mysore Sales International Ltd. RESPONDENT

Date of Decision : 08-09-2005

Acts Referred:
Customs Act, 1962 — Section 150, 153, 45, 46, 47

Citation : (2005) 128 ECR 485 : (2006) 1 KarLJ 202 : (2006) 1 KCCR 46 SN

Hon'ble Judges : D.V. Shylendra Kumar, J

Bench : Single Bench

Advocate : B.N. Gururaj and K.S. Ravishankar, for the Appellant; Rajesh Chander Kumar, for R-1 and N. Devhadass, ASG for R-2, for the Respondent

Judgement

D.V. Shylendra Kumar, J.—Writ petition is by Proprietary Engineering concern, who had occasion to import consignment known as "CNC Controller Package" from Siemens AG, Postfach 3180, Eriangen, Germany. The consignment it appears had arrived in India from Lufthansa Airlines and was disembarked on 26.12.2000 and found shelter in the premises of 1st respondent - M/s. Mysore Sales International Limited, acting as a custodian in terms of the provisions of Section 45 of the Customs Act, 1962. The goods imported are meant for domestic consumption and can be cleared on payment of proper duty in terms of the provisions of Sections 46 and 47 of the Act. The complaint is not so much about the clearance, but of the non-clearance.

2. Grievance of the petitioner is that in spite of paying duty as has been assessed by the customs authority as on 26.3.2001, when the petitioner went for inspection and clearance of the goods, the petitioner was stumped by the action on the part of the custodian in delivering the goods to a person, who it was indicated had purchased the goods in an auction sale held on 23.3.2001 and the goods in fact was being delivered on 27.3.2001 to such an auction purchaser. The net result is that the petitioner was not able to clear the goods imported and being pre-empted of his efforts to recover the goods, the entire exercise of

importing the goods, paying the value of the goods to the exporter through the Bank and even after paying the duty effort to clear the imported goods, as the custodian pleaded that proving futile it was unable to deliver the goods that had already been auctioned and being aggrieved by the non-delivery of goods has approached this Court seeking for suitable relief.

3. It is averred in the writ petition that the custodian, the 1st respondent and the officials of the Customs Department functioning under the 2nd respondent have both acted in an illegal manner; that their action is totally arbitrary and mala fide, that the petitioner who had become the owner of the goods on payment of the price to the exporter through the Bank had been deprived of the very goods and though the duty part had been subsequently refunded, the petitioner is left high and dry as even after paying the price of the goods he is unable to get the goods in view of such rash, pre-emptive, mindless action on the part of the respondents.

4. It appeals the petitioner had in this regard issued the legal notice dated 14.5.2001, copy at Annexure B-1 to the writ petition, to the respondents and having received an untenable reply which was not to the liking of the petitioner, petitioner has approached this Court invoking the writ jurisdiction seeking relief such as to direct the respondent to pay the cost of the goods i.e. Rs. 3,84,036/- in terms of the "Bill of Entry for Home Consumption" and for such other consequential relief as also the direction to be issued to the Commissioner of Customs not only to show-cause as to why was there violation on the part of the officials of the Customs Department but also to activate them to ensure prevention of such incidents recurring in the Department and if necessary, after holding a proper investigation in this regard, particularly as to the hurried manner in which the auction sale had been held in respect of the goods imported by the petitioner and the manner in which it was disposed of also.

5. On issue of notice to the respondents, respondents have entered appearance through their counsel. 1st respondent is represented by learned Counsel - Sri. Rajesh Chander Kumar and 2nd respondent through Sri. N. Devadass, ASG.

6. A detailed statement of objections has been filed on behalf of the 1st respondent - custodian. What is essentially averred is that the 1st respondent has not taken any independent action without the knowledge of the 2nd respondent or the officials of the Customs Department; that the entire process of putting to auction such of those goods which had not been cleared within the stipulated period of 30 days beginning from the date of landing, notifying the same to the persons, who were interested in the goods for clearance, grouping such goods in lots for the purpose of easy auction sale, the actual auction sale followed by it etc., are all actions carried in consonance with the provisions of the Act; that no pre-emptive action or concerted action has been taken in the disposal of the goods of the petitioner alone by the 1st respondent. The Action taken is defended as one justified in terms of the provisions of the Customs Act and assuming that there is a slight infraction here or there, it is not one which

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can have a bearing on the ultimate auction sale and the conduct of the respondent being bona fide and in consonance with the provisions of the Act. It is further averred that it was only the not so diligent action on the part of the petitioner which had contributed to this state of affairs and therefore, the petitioner cannot blame the respondent for the developments and as such the writ petition is to be dismissed.

7. Though a preliminary objection is sought to be raised about the maintainability of the writ petition, I am of the view that the 1st respondent also acting as a statutory functionary under the provisions of the Customs Act, action on the part of the 1st respondent is not beyond the scope of judicial review by this Court in spite of such objections. Ultimately the question may be only one of need or necessity to exercise the discretionary jurisdiction of this Court for interference or otherwise.

8. I have heard Sri. Gururaj, learned Counsel for the petitioner and Sri. Rajesh Chander, learned Counsel for the 1st respondent as also Sri. Devhadass, learned ASG for the 2nd respondent.

9. Submission of Sri. Gururaj, learned Counsel for the petitioner, by drawing attention to the provisions of Sections 46, 47 and 48 of the Act is that, the authorities even if are compelled to take action for non-clearance within the stipulated time, are bound to follow the procedure, particularly of apprising the importer and the proposed auction sale, due to non-clearance of the goods within the stipulated time; that the person should be given a proper opportunity so that the auction sale could be avoided; that in the present case the petitioner had not been given a notice as contemplated u/s 48 of the Act which alone is in accordance with law read with Section 153; that the manner of issue of a notice contemplated u/s 48 read with Section 153 of the Act is only by registered post; that in the present case admittedly that having not been complied with, it cannot be said that the notice is a valid notice in the eye of law; that therefore, the entire proceedings pursuant to the auction sale insofar as it relates to the petitioner and affects the interest of the petitioner is bad and as such requires to be quashed and as it is contended by the respondent that the goods sold in auction sale has already been delivered to the purchaser and even if there is no possibility of restoring the goods to the petitioners, the value of the goods as has been paid by the petitioner should be made good by the respondent and a direction be issued in this regard. Sections 48 and 153 of the Customs Act, 1962 reads as follows:

"Section 48: Procedure in case of goods not cleared, warehoused, or transhipped within (thirty days) after unloading - If any goods brought into India from a place outside India are not cleared for home consumption or warehoused or transhipped within (thirty days) from the date of the unloading thereof at a customs station or within such further time as the proper officer may allow or if the title to any imported goods is relinquished, such goods may, after notice to the importer and with the permission of the proper officer be sold by the person

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having the custody thereof;

Provided that -

a) animals, perishable goods and hazardous goods, may, with the permission of the proper officer, be sold at any time;

b) arms and ammunition may be sold at such time and place and in such manner as the Central Government may direct.

Explanation; In this section, "arms" and "ammunition" have the meanings respectively assigned to them in the Arms Act, 1959 (54 of 1959)"

"Section 153: Service of order, decision etc - Any order or decision passed or any summons or notice issued under this Act, shall be served -

(a) by tendering the order, decision, summons or notice or sending it by registered post to the person for whom it is intended or to his agent; or

(b) if the order, decisions, summons or notice cannot be served in the manner provided in Clause (a), by affixing it on the notice board of the customs house."

10. It is alternatively contended that apart from the non-compliance of the statutory requirement the very action of the respondent such as even when the petitioner had filed his bill of entry as early as on 20.12.2000 and even on following up the matter fey providing necessary answers and replies to the queries and even after obtaining the necessary data which was required to be provided for and the assessee going on with the assessment there was no need for the respondent to have included the goods that had been imported by the petitioner for auction sale as though it was goods which was left unattended to for clearance; that even when the process of clearance was in progress the goods should not have been included for auction sale, the action for including even such goods for auction sale is an action without due application of mind or in gross negligence of the duty of the respondent; that at any rate when the customs authorities themselves had followed, assessed and collected the data on the bill of entries as on 26.3.2000 they should not have delivered the goods to the auction purchaser the next day, but should have thought about the same, obtained necessary permission from the Commissioner for proper future course of action and that not having been resorted to by the 1st respondent, the entire auction sale insofar as the goods imported by the petitioner is vitiated and therefore in any view of the matter such action calls for interference by this Court.

11. One another submission by Sri. Gururaj, learned Counsel for the petitioner, is that even in terms of the provisions of Section 150 of the Customs Act, after effecting the sale of goods which were not cleared or for any reason required to be sold by the Customs Department the proceeds after being applied towards the expenses incurred for suction sale etc., and the balance should be necessarily restored to the owner of the goods and the Customs Department having not

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even done so, it shows it is a dear instance of failure of duty in terms of the statutory provisions which is proof enough of the careless and negligent manner in which the respondents have conducted the auction and such conduct not only calls for issue of necessary writ by this Court, but also the need to compensate the petitioner commensurately.

12. Submission of Sri. Rajesh Chander Kumar, learned Counsel for the 1st respondent, reiterating the averments in the statement of objections, is that so far as the 1st respondent is concerned neither any illegal nor any mala fide action can be attributed to the respondents; that action taken by the 1st respondent was in the normal course of events; that in fact the goods that were put to auction was not of the petitioners alone but all such goods which had not been cleared within the stipulated time and as per the dictates of the statute; that the 1st respondent has not acted independently at any point of time without taking into confidence the officials of the Customs Department; that the 1st respondent has acted only as part of the Customs Department not apart from other customs officials that it was not to the knowledge of 1st respondent as to whether the process of clearing the goods was in progress or whether the goods were assessed as on 26.3.2001 or not; that in this view of the matter there was nothing lacking in effort or even non-compliance in adhering to the requirement of law or the procedure on the part of the 1st respondent and therefore there is no question of interfering in the matter for issue of any writ as against the 1st respondent.

13. Even with regard to the averments and claim of the petitioner that the imported goods being not available as of now and therefore, the petitioner is required to be compensated, learned Counsel for the 1st respondent submits that this is a matter not within the knowledge of the 1st respondent at any point of time and at any rate the petitioner did not place any material before the 1st respondent to indicate the factum of having acquired ownership of goods nor had sought for release of the goods in the manner provided for under the Act itself and if that is so, the action for putting the particular goods to auction sale cannot be questioned nor can any claim be put forth as against the 1st respondent for compensation etc. Learned Counsel also submits that if at all it is only the inaction and negligence on the part of the petitioner, which has possibly led to the developments of the present nature that if the petitioner did not clear the goods within the stipulated time he could always apply to the customs department praying for extension of time and if it had not done so and had not acted in a proper and diligent manner at the relevant point of time, no blame can be made on the attempts of the 1st respondent in carrying out its functions in accordance with the provisions of the Customs Act, which provides for necessary action in such situations.

14. Sri. Devhadass, learned ASG appearing for the 2nd respondent has submitted that the entire proceedings have taken place in the normal course of functioning of the respondents and that there is no concerted or special action

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against the petitioner alone; that action was taken only when it was noticed that many goods had not been cleared within the stipulated time and with the year coming to a close was required to be properly dealt with in accordance with the statutory provisions and had been directed to be cleared by the Officials of the Department and a custodian was required to take steps for such auction sale and such action had been taken. Therefore, no exception can be taken to auction sale.

15. Learned ASG also submits that the petitioner if at all could have avoided further developments in the matter if had taken the right and corrective measures or steps at a time when the goods were still available and if had approached or had brought it to the notice of the higher officials, but the petitioner having not taken such action, cannot seek relief in writ jurisdiction before this Court.

16. The question is as to whether this Court can examine the merits of the matter particularly at this point of time for giving relief to the petitioner, for issuing a direction for payment of the amount which the petitioner claims is the one which he had paid to the importer. The amount if at all is to be paid is by way of compensation for the loss suffered by the petitioner in respect of goods purchased by it and it will be in the nature of damages awarded.

17. An answer to such a question and even quantification of the amount etc., necessarily involves investigation of the facts as to when the petitioner became the owner of the goods, what is the implication of it etc., and what could be the proper compensation in the circumstances if the petitioner is entitled to for any compensation.

18. The action taken by the respondent for auctioning the goods if can bind any person and even a true owner also the petitioner cannot stand on any better footing particularly as the petitioner got ownership of the goods even as per his own pleading at some point of time subsequent to the goods landing in the custody of customs. It is also not clear whether the petitioner had acquired ownership to the goods within 30 days before which the goods should be cleared from the custody of the customs department though through the 1st respondent who is acting as a custodian in terms of the statutory provisions. Even if a true owner of the goods cannot get the entire value of the goods if such action for auction sale is already carried out and if at all is entitled only to receive the balance after defraying costs incurred by the authorities for such auction sale and after deducting such other statutory dues, the question of issuing direction in writ jurisdiction to direct the respondent to pay the landed cost of the goods to the petitioner is a little far fetched.

19. However, Sri. Gururaj, learned Counsel for the petitioner, is fully justified in pointing out that even in terms of the provisions of Section 150 of the Act, if the petitioner is able to make good that the petitioner had acquired ownership of the goods then petitioner is definitely entitled to receive the balance payment after the respondent deducts the expenses for such auction which they had incurred

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for effecting auction sale etc from the value realised for the goods in the sale by the custodian.

20. Sri. Rajesh Chander Kumar, learned Counsel for the 1st respondent fairly submits that the petitioner is entitled for such amount and as the amount has not been quantified so far nor the petitioner had put forth a claim for having acquired ownership of the goods sometime in the interregnum and such action for refunding the balance had also not been initiated and if the petitioner should put forth such a claim the authorities will definitely act in accordance with law and refund such amount.

21. In the circumstances, I am of the view that while a writ of mandamus cannot be issued to direct the respondents to pay the sums as claimed by the petitioner as a writ cannot be issued for payment of a particular sum of money, when the entitlement for the amount and the sum is not determined and as this Court cannot examine such aspects which are necessary for a proper determination for which the petitioner can lay a separate claim, a writ in the nature of mandamus can definitely be issued to direct the respondents to refund the amount which is due to the petitioner u/s 150 of the Customs Act, and accordingly direct the respondents to take action for the same expeditiously.

22. However, insofar as the claim of the petitioner is concerned it may not be necessary to express any view on the merits of the matter and the petitioner if so desires, it is open to the petitioner to make good its claim before the Civil Court and in any other manner known to law and lay a claim for such amount. Liberty is reserved to lay a claim in accordance with law.

23. However, it is necessary to observe that though no definite finding is recorded for the present either as to any mala fide action or pre-emptive action on the part of the respondents itself. I cannot help observing that the conduct and actions on the part of the respondents definitely calls for improvement, particularly the manner in which the goods was sought to be sold as even according to the submission of the learned Counsel for the petitioner, the value of the goods was about Rs. 7,55,975.91 paise, whereas the value which the goods itself fetched on auction sale was Rs. 1.61 lakhs or around that.

24. In a situation where the importer is keen on having the goods released for his bona fide use; that he has also evinced keenness by paying the duty as assessed, the matter requites a little proper and careful consideration by the authorities and not to auction such goods also without due application of mind. It is necessary that the 2nd respondent - Commissioner of Customs should cause an investigation as to whether such auction purchases are being conducted in a proper and bona fide manner and to ensure that unnecessary hardship or harassment is not caused to bona fide importers as ultimately, the auction sale is only to ensure loss of revenue to the State and not to become a tool in the hands of the officials to harass or victimize bona tide importers. Minimum required on the part of the Commissioner is he should ensure such things do not happen in

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the customs department which can bring discredit not only to the Department but can diminish the confidence of the people and the Society in the manner of functioning of public authorities. The 2nd respondent to ensure that an enquiry is held and to ensure that necessary corrective measures are taken if things are not really alright as of now, as it appears on the face of it.

25. Registry is directed to send a copy of this order to the 2nd respondent - Commissioner of Customs.

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