**(2007) 11 DEL CK 0001**

**In the Delhi High Court**

**Case No :** Writ Petition (C) No''s. 7995 of 2005 and CM No. 5775 of 2005

Associated Container Terminals Ltd. APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

**Date of Decision :** 28-11-2007

**Acts Referred:**

**Citation :** (2007) 99 DRJ 702 : (2008) 150 ECR 68 : (2008) 226 ELT 169

**Hon'ble Judges :** Madan B. Lokur, J;Dr. S. Muralidhar, J

**Bench :** Division Bench

**Advocate :** Sunil Kumar, for the Appellant; Mukesh Anand and Shailesh Tiwari, for the Respondent

## Judgement

S. Muralidhar, J.—The Petitioner has a warehouse in Faridabad, Haryana. On 1st March, 2001 certain garments imported by M/s. Kushang Apparels were warehoused in the petitioner''s warehouse. Despite the warehouse period, in terms of Section 61 of the Customs Act, 1962 (''the Act''), expiring on 28th February, 2002 the customs authorities did not initiate action u/s 72 of the Act requiring the owner to pay the customs duty failing which the goods could be sold to recover the customs duty. Meanwhile, the petitioner, acting u/s 63(2) of the Act, sought to put the goods to sale by way of auction. After four failed attempts at getting the minimum value price fixed by the customs authorities, the goods were finally sold by auction with the consent of the customs authorities on 31st August, 2004. The amount recovered by way of auction was Rs. 41,44,555/-. According to the petitioner, he spent an amount of Rs. 2,05,329/- on the auction and this was deducted by him from the sum recovered in the auction.

2. On the basis that M/s. Kushang Apparels had imported CTV kits valued at Rs. 1,23,63,259/- (CIF) and filed 6 inward bills of entry on 9th February, 2001, the customs authorities determined the customs duty payable at Rs. 67,17,916/-. The said goods were warehoused after execution of the necessary bonds on 1st March, 2001. The goods were not however cleared by M/s. Kushang Apparels

 

within the warehousing period and nor was any extension sought. The customs department issued notices to M/s. Kushang Apparels on 16th April, 2004 u/s 72(1) of the Act calling upon it to pay the customs duty. A reminder was sent on 25th May, 2004.

3. Meanwhile, the petitioner wrote to the customs department seeking permission for clearance of the goods that had to be delivered to M/s. Reliable Overseas who had successfully bid for the goods put to auction by the petitioner in terms of Section 63(2) of the Act. However, the customs authorities insisted that, u/s 150 of the Act, the entire auction proceeds had to be first adjusted towards the customs duty. Accordingly, on 27th October, 2004 the customs authorities wrote to the petitioner asking him to first deposit the appropriate customs duty and then approach the Assistant Commissioner, ICD, Faridabad for a no objection certificate for giving delivery of the goods to M/s. Reliable Overseas.

4. The petitioner replied on 3rd November, 2004 contending that appropriate duty worked out to Rs. 16,64,073/- as per tariff rules and M/s. Reliable Overseas should be permitted to take delivery of the goods on payment of this amount. This was contested by the customs department. Meanwhile, the warehousing charges kept mounting. The charges as on 10th September, 2004 were Rs. 13,84,434/-. In a letter dated 29th December, 2004 to the customs authorities the petitioner pointed out that the auction sale for recovery of the warehousing charges had taken place with the approval of the customs authorities and that the outstanding charges were adjusted against the auction proceeds. In a further letter dated 28th January, 2005 the Petitioner contended that it was ready to pay the entire customs duty as calculated and furnish a bank guarantee for the remaining amount.

5. The Assistant Commissioner, ICD, Faridabad wrote to the petitioner on 2nd/4th February, 2005 affirming that the petitioner''s proposal to release the goods to the successful bidder M/s. Reliable Overseas provisionally on furnishing a bank guarantee had been accepted by the department. The petitioner was asked to deposit an amount of Rs. 11,92,080/- towards duty after deducting Rs. 2,05,329/- towards expenses. For the balance amount of Rs. 27,47,146/-, the petitioner was asked to furnish a bank guarantee so that the auctioned goods could be cleared by M/s. Reliable Overseas.

6. By its letter dated 7th February, 2005 to the customs department, the petitioner informed that they were paying Rs. 11,92,080/- towards the customs duty and that they were also furnishing a bank guarantee of Rs. 27,47,146/- to facilitate the clearance of the goods. Thereafter the CBEC by the impugned letter dated 17th February, 2005 rejected the Petitioner''s contention in its letter dated 29th December, 2004 in view of the judgment of the Supreme Court in Kesoram Rayon v. Collector of Customs (1996) ELT 464 (SC). This is the first impugned letter.

7. The Petitioner wrote to the Commissioner of Customs on 18th February, 2005 informing her that the cargo had been delivered to M/s. Reliable Overseas and that the Petitioner was awaiting the final decision in the matter. The Petitioner wrote a reminder to the customs department on 24th February, 2005 requesting that the customs department should pass a speaking order to enable the Petitioner to avail the remedy by way of an appeal. The customs department by its letter dated 4th March, 2005 reiterated that the auction sale held by the Petitioner pursuant to Section 63 of the Act was not acceptable. Accordingly, the Petitioner was once again asked to deposit the remaining amount of Rs. 27,47,146/-. It was further pointed out that if the amount was not so deposited forthwith the bank guarantee furnished would be encased without any further notice. A further reminder was sent by the Department to the Petitioner on 16th March, 2005.

8. On 19th April, 2005 the Additional Commissioner (CCU) informed the petitioner that its representation made on 18th March, 2005 could not be entertained since the Chief Commissioner was of the view that the matter stood settled with the Board''s clarification of 17th February, 2005 and the Commissioner was required to recover the outstanding arrears of customs duty in accordance with the law. This is the second impugned letter.

9. On 29th April, 2005 the customs authorities enforced the bank guarantee given by the petitioner and encased the sum of Rs. 27,47,146/-.

10. It is at this stage that the petitioner filed the present writ petition in this Court seeking inter alias a direction to quash the letter dated 17th February, 2005 of Central Board of Excise & Customs (''CBEC'') and the letter dated 19th April, 2005 of the Chief Commissioner, Central Excise. A writ of mandamus was also sought for directing the respondent to return to the petitioner a sum of Rs. 11,92,080/- together with interest thereon. The petitioner also sought a direction to the respondent to revoke the bank guarantee for Rs. 27,47,146/-.

11. The stand taken by the respondents in the short counter affidavit is that the respondents had never demanded customs duty from the petitioner but had only required the petitioner to deposit the balance amount of the auction sale proceeds. It is contended that since the customs duty to be recovered from the importer was more than the sale proceeds, the customs department was entitled to treat the sale proceeds towards customs duty only. It is disputed that the goods were auctioned in terms of Section 63 of the Act. A reference is made to Section 150 of the Act which indicates the manner in which the sale proceeds have to be appropriated.

12. The first question to be examined is whether the petitioner was entitled to invoke the powers u/s 63(2) of the Act to recover the warehousing charges or whether the customs authorities were justified, in terms of Section 72 of the Act, in demanding the entire customs duty and appropriating the entire sale proceeds in the auction sale towards customs duty payable.

 

13. The sequence of events narrated above shows that it was the petitioner who had been pursuing the matter of non-payment of customs duty to the department or warehousing charges to it by the importer M/s. Kushang Apparels. It is also not disputed that the petitioner initiated proceedings to have the goods sold by way of auction u/s 63(2) of the Act in order to first appropriate the warehousing charges from the sale proceeds. Section 63 reads as under:

Section 63

Payment of rent and warehouse charges:

(1) The owner of any warehoused goods shall pay to the warehouse-keeper rent and warehouse charges at the rates fixed under any law for the time being in force or where no rates are so fixed, at such rates as may be fixed by the Commissioner of Customs.

(2) If any rent or warehouse charges are not paid within ten days from the date when they became due, the warehouse keeper may, after notice to the owner of the warehoused goods and with the permission of the proper officer cause to be sold (any transfer of the warehoused goods notwithstanding) such sufficient portion of the goods as the warehouse-keeper may select.

14. It appears that between March 2002 to December 2003 three auctions and one tender sale were attempted but the bid amount was less than the minimum price fixed by the customs authorities. Therefore, the sale by way of auction could not take place. It was in the second round in the sale held in August 2004 in which M/s. Reliable Overseas was the highest bidder at Rs. 41,44,555/-.

15. The relevant provisions of the Act indicate that clearing of the warehoused goods for home consumption has to be done by the importer of such warehoused goods in terms of Section 68 thereof. Section 68 reads as under:

Section 68

Clearance of warehoused goods for home consumption-

The importer of any warehoused goods may clear them for home consumption, if -

(a) A bill of entry for home consumption in respect of such goods has been presented in the prescribed form;

(b) the import duty livable on such goods and all penalties, rent, interest and other charges payable in respect of such goods have been paid; and

(c) an order for clearance of such goods for home consumption has been made by the proper officer.

Provided that the owner of any warehoused goods may, at any time before an order for clearance of goods home consumption has been made in respect of such goods, relinquish his title to the goods upon payment of rent, interest, other charges and penalties that may be payable in respect of the goods and upon such relinquishment, he shall not be liable to pay duty thereon.

Provided further that the owner of any such warehoused goods shall not be allowed to relinquish has title to such goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force.

The other relevant provision is Section 72 which reads as under:

Section 72

Goods improperly removed from warehouse, etc.

(1) In any of the following cases, that is to say, -

(a) where any warehoused goods are removed from a warehouse in contravention of Section 71;

(b) where any warehoused goods have not been removed from a warehouse at the expiration of the period during which such goods are permitted u/s 61 to remain in a warehouse;

(c) where any warehoused goods have been taken u/s 64 as samples without payment of duty;

(d) where any goods in respect of which a bond has been executed u/s 49 and which have not been cleared for home consumption or exportation are not duly accounted for to the satisfaction of the proper officer,

the proper officer may demand, and the owner of such goods shall forthwith pay, the full amount of duly chargeable on account of such goods together with all penalties, rent, interest and other charges payable in respect of such goods.

(2) If an owner fails to pay any amount demanded under Sub-section (1), the proper officer may, without prejudice to any other remedy, cause to be detained and sold, after notice to the owner (any transfer of the goods notwithstanding) such sufficient portion of his goods, if any, in the warehouse, as the said officer may select.

Section 72 comes into play when goods are sought to be improperly removed from the warehouse. In the event of such improper removal the owner of the goods can be asked to forthwith pay, the full amount of duty chargeable on account of such goods together with all penalties, rent, interest and other charges payable in respect of such goods.

16. It appears that on the facts of the present case the occasion to invoke Section 72(1)(d) would arise only if the goods in respect of which a bond has been executed has not been cleared for home consumption. In such event, the owner of the goods can be asked to pay the entire duty. This obviously does not apply to the warehouse-keeper like the petitioner and no demand of payment for

 

customs duty can be made against the petitioner.

17. Learned Counsel for the Revenue has sought to justify the demand raised against the Petitioner in the impugned letters by referring to Section 150 of the Act which reads as under:

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 provision 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.

18. The reference to Section 150 concerning the application of sale proceeds in an auction cannot really help the Revenue in the instant case. Section 63 is a specific provision concerning warehousing charges. It may be recalled that the auction took place for the purposes of recovering the warehousing duties and not for the purpose of recovering the customs duty in terms of Section 72 of the Act. It is also not possible to read Section 150(2)(b) as permitting appropriation of the sale proceeds towards the outstanding customs duty after meeting the expenses of the sale. The words "and other charges, if any, payable in respect of the sale goods to the carrier, if the notice of such charges has been given to the person having custody of the goods" makes it clear that this does not pertain to customs duty. Section 150(2)(d) of the Act which talks of "payment of the charges in respect of the goods sold due to the person having custody of the goods" is referable to payment of warehousing charges and it takes precedence over recovery of customs duty which is relatable to Section 150(2)(e) of the Act. Viewed from this angle, the right of the petitioner here to recover the warehousing charges from the sale proceeds appears superior to the right of the Revenue to recover customs duty.

19. The reliance placed by learned Counsel for the Revenue on the judgment of the Supreme Court in Kesoram Rayon is misplaced. There was no discussion in

the said judgment about the recovery of the warehousing charges. The issue involved the liability of the importer in terms of Section 72 of the Act. It was held by the Supreme Court as under: (para 13 pg 471)

13. Goods which are not removed from a warehouse within the permissible period are treated as goods improperly removed from the warehouse. Such improper removal takes place when the goods remain in the warehouse beyond the permitted period or its permitted extension. The importer of the goods may be called upon to pay customs duty on them and, necessarily, it would be payable at the rate applicable on the date of their deemed removal from the warehouse, that is, the date on which the permitted period or its permitted extension came to an end.

The above passage does not support the proposition, as suggested by the Revenue, that the warehouse-keeper "can be asked to first appropriate the auction proceeds only towards the customs duty.

20. We Therefore hold that the Petitioner was justified in recovering the warehousing charges due to it from the auction sale proceeds in terms of Section 63(2) of the Act. The balance amount deposited with the Government Treasury can be adjusted by the customs department towards part payment of customs duty as computed by it.

21. There does not appear to be any legal justification for the Respondent encashing the bank guarantee in the sum of Rs. 27,47,146/-. The Petitioner cannot be saddled with the liability to pay the customs duty which is recoverable from the importer M/s. Kushang Apparels particularly when it is not the case of the Respondents that the Petitioner and M/s. Kushang Apparels have any commonality of business interests or are related entities.

22. For the above reasons, this Court holds that the demands raised against the Petitioner in the impugned letters dated 17th February, 2005 issued by the Respondent No. 2 and dated 19th April, 2005 issued by the Respondent No. 3 are without the authority of law and quashes them accordingly. Consequently, the following directions are issued:

(i) The Respondents will refund to the petitioner a sum of Rs. 27,47,146/- together interest @ 12% per annum till the date of payment. The sum will be paid to the Petitioner within four weeks from today and in any event not later than 15th January, 2008.

(ii) Any delay in making the payment beyond the above stipulated period, will result in the respondents, apart from being liable for contempt of court, paying to the petitioner penal interest @ 18% per annum for the period of delay;

(iii) The Respondents will pay to the Petitioner costs of Rs. 5,000/- within a period of four weeks from today and in any event not later than 15th January, 2008.

 

23. The writ petition is accordingly allowed with the aforesaid directions. The pending applications also stand disposed of.

24. List for compliance on 17th January, 2008.

 