(2011) 01 MAD CK 0339

In the Madras High Court

Case No : Writ Petition (MD) No. 3135 of 2010

B.C. Hariharan APPELLANT

Vs

The Joint Commissioner of Customs and The Commissioner of Customs and Central Excise RESPONDENT

Date of Decision : 28-01-2011

Acts Referred:
Customs Act, 1962 — Section 110(1A), 112, 48
Foreign Trade (Development and Regulation) Act, 1992 — Section 3(3)

Citation : (2011) 267 ELT 595

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : R. Yashod Vardhan, S.C. for B. Satish Sundar, for the Appellant; B. Vijay Karthikeyan, for R1 and R2, for the Respondent

Final Decision : Dismissed

Judgement

K. Chandru, J.—The Petitioner has filed the present writ petition,seeking to challenge an order dated 01.12.2009 whereinand by which, the second Respondent held that his claimfor release of sale proceeds cannot be considered.

2. In the writ petition on behalf of theRespondents, Mr. B. Vijay Karthikeyan took notice and hadalso filed a counter affidavit on behalf of theRespondents dated 24.03.2010.

3. Heard the arguments of Mr. R. Yashod Vardhan,learned Senior Counsel appearing for Mr. B. Satish Sundar,learned Counsel for the Petitioner.

4. The facts leading to the filing of the case are as follows:

On 14.03.1993, the residential premises of thePetitioner was searched by the Officers of the CustomsPreventive Unit, Salem. From the kitchen of his house, 6gunny bags containing silver ingots were recovered andseized. It was recorded in a Mahazar. The Petitionerproduced two baggage receipts issued by Calicut Airportcovering those ingots. The officers nevertheless seized the ingots on the ground that the numbers and markingfound in the ingots did not tally with the numbers in thebaggage receipts. A show cause notice was issued to thePetitioner and also to one Kunjutty. A proposal forconfiscation of the silver ingots as well as the penaltywere also made on 24.08.1993. The Petitioner sent a replydated 15.09.1993. It was claimed by him that the silveringots were purchased from importers who have dulyimported it under the baggages on payment of duty. On10.11.1993, a further reply was submitted by thePetitioner through his consultant with evidence ofrequisite import duty. A personal hearing was held on05.08.1994. The cross examination of witnesses as well asofficers were also made.

5. On 19.12.1994, an Order-in-Original (O.I.C) waspassed by the second Respondent Commissioner of Customs. He made an absolute confiscation of the 6 silver barsunder Section 111(d) of the Customs Act 1962 r/w Section 3(3) of the Foreign Trade (Development and Regulation)Act, 1992. A penalty of Rs. 1 lakh was levied underSection 112 of the Customs Act.

6. The Petitioner filed an appeal to the Customs,Excise and Gold (Control) Appellate Tribunal (CEGAT), Madras vide his appeal dated 20.03.1995. The Tribunal on04.07.1995 directed the Petitioner to deposit a sum ofRs.25,000/-as a condition precedent in terms of 129(E)of the Customs Act. The Petitioner accordingly depositeda sum of Rs. 25,000/-on 22.08.1995. The Tribunal by itsorder dated 08.11.1996 confirmed the order ofconfiscation passed by the second Respondent but reducedthe penalty.

7. The Respondent informed the Petitioner that on25.03.1998 the silver bars under seizure were sent toChennai Customs House for disposal. On 20.05.1998, thereference application was also disposed of.

8. The Petitioner filed W.P. No. 14948 of 1998 beforethis Court challenging the order of the Tribunal. On25.10.2006, this Court directed the Respondents to extendthe option of redemption in respect of the seized silveringots if available with the department. The Petitioneron 02.03.2007 sent a letter to the second Respondent. Written submissions were also made on 14.09.2009 followedwith a letter dated 25.09.2009 through his counselseeking for a personal hearing. However the Respondenton 01.12.2009 rejected the Petitioner''s case.

9. The contentions raised by the Petitioner was thatthe Respondent should not have disposed of the silveringots especially when the matter was subjudice and theorder of absolute confiscation by the adjudicatingauthority was set aside by this Court in W.P. No. 14948 of1998 and that order had reached its finality. Therefore,there would have been no impediment on the part of theRespondent to allow redemption of the seized goods madeor in the alternative disburse the sale proceeds less thestatutory charges. The disposal of the silver ingotswithout intimation to the Petitioner was untenable andviolative of Section 48 of the Customs Act. Despite thedepartmental instructions, even during the pendency ofthe writ petition, it was sold in the year 1998. Therefore, the Respondents

should have returned the saleproceeds of the disbursed silver ingots which he islegally entitled to.

10. The sheet anchor of the Petitioner''s case wasbased on the order passed by this Court in W.P. No. 14948of 1998 dated 25.10.2006. In that case, in Paragraphs 3and 6 it was observed as follows:?

3. Learned Counsel for the Petitionerplaces reliance on the judgments ofvarious Tribunals in the cases of 1998 (59) ECC 206; 2003 (87) ECC 23 ;and 2003 (160) ELT 186 tocontend that in view of theliberalization policy of the CentralGovernment with regard to importationof gold and silver, the totalconfiscation is uncalled for. Theliberalization policy has beenadopted from the year 1992-93onwards. This is a case on which thePetitioner was found in possession ofthe ingots, which were recovered inthe year 1993. Hence, sametreatment, which has been given tothe Petitioners in the above referredto cases, has to be given to thisPetitioner as well.

6. Having regard to the abovedisputed fact and also the judgmentsrelied on by the learned Counsel forthe Petitioner, I am of the view thatthe same view which has been taken bythe Kolkata Tribunal in 2003 (87) ECC 23 , can be taken inthis case also, in view of the policyof the Central Government onliberalization of importation ofsilver and gold ingots, but having regard to the submission that thesilver ingots confiscated from thePetitioner are not available, whichfact is disputed by the learnedcounsel for the Petitioner, I am ofthe view that this writ petition canbe disposed of by directing theRespondents to consider the case ofthe Petitioner for imposition ofredemption find in lieu of totalconfiscation, if the silver ingotsseized from the Petitioner are stillavailable with the Department, in thesense that the order of the authorities has been confirmed, but modified to the extent that in respect of total confiscation, the Petitioner''s case can be considered.

(Emphasis added)

11. Opposing the request of the Petitioner, in thecounter affidavit, it was stated that the case of thePetitioner cannot be countenanced. The order passed bythe second Respondent was confirmed by the CEGAT, Madrasand the Tribunal only reduced the penalty from Rs. 1 lakhto Rs. 50,000/-. This Court had merely directed theconsideration of the case of the Petitioner forimposition of fine in lieu of total confiscation if thesilver ingots seized from the Petitioner are still available with the department in the sense that in lieuof total confiscation the department can consider levyingredemption fine in addition to penalty imposed andconfirmed. Hence, the order of this Court cannot beconsidered as a direction to return either the seizedingots or to pay the amount in lieu of the seized goods.

12. u/s 110(1A) of the Customs Act, 1962the notified goods seized by the department can bedisposed of by the department immediately after theseizure and the silver bars are the notified commodityunder Section 110(1A) of the Act. Having regard to theconstraint involved in storage of high valued goods

andconsidering the liquidity to exchequer, the silver ingotswere disposed of. The order of this Court for release ofthe impugned goods on redemption fine was subject toavailability of the goods. Since the imported goods arenot available with the Department, the question ofexercising the option as directed by this Court will notarise. Hence the department is not in a position torelease the sale proceeds since the CEGOT had upheld thefinal order passed by the Department on 8.11.1996 and theTribunal''s order was not set aside. It was pointed outthat this Court while passing order relied upon thejudgment of Kolkatta Tribunal in the case of HiralalBhagat v. Commissioner of Customs. There the Tribunal held since the seized goods were not available and due toliberalization such goods are not barred from beingbrought in, permission was granted to the aggrieved partyto redeem the same on payment of redemption fine andduty.

13. Reliance was placed by the Petitioner upon thejudgment of the Supreme Court in Hargovind Das K. Joshi v. Collector of Customs reported in 1992 (61)E.L.T.172(S.C.), where it was held that that the option ofredemption fine should have been given by theauthorities. The Respondents have not done so.

14. The learned Senior Counsel further relied upon ajudgment of the Supreme Court in Northern Plastics Ltd. v. Collector of Customs and Central Excise reported in1999 (113) E.L.T.3 (S.C.) as well as this Court in thecase of Collector of Customs, Madras v. Meena A. Bharwanireported in 2006 (194) E.L.T. 273 (Mad.). After referringto those judgments, he contended that in the absence of availability of silver ingots, the Respondents are dutybound to disburse the sale proceeds of the seized silveringots or the market value of the goods.

15. In Paragraph 7 of the Northern Plastics Ltd''s case (cited supra), the Supreme Court observed as follows:

7. As the order of confiscation ofgoods was held to be bad the goodswere required to be returned to theowner thereof. As the order ofconfiscation was declared as illegalby this Court on the ground thatthere was mis-declaration of thegoods and that the applicant wasentitled to import those goods on theO.G.L., the confiscated goods, ifthey had not been disposed of, wouldhave been required to be released infavour of the applicant and theapplicant could have claimed damagesfor the damage to the goods and losscaused to it as a result of illegalretention of the goods by theRespondent. We have referred to abovehow the applicant was prevented bythe Respondent and the HindustanPhoto Films from redeeming/obtainingthose goods. The goods having beensold away the Respondent is now notin a position to return the goods tothe applicant. As this situation hasbeen brought about by the Respondentby his own acts he cannot now escapefrom the liability of returning tothe applicant the money value of the said goods. If without challengingthe first order passed on 31.1.1989and the interim order passed by theGujarat High Court in favour of theapplicant on 27.04.1989 theRespondent had returned the goods onthe terms and conditions imposed bythe Gujarat High Court then he wouldnot have landed himself in thissituation. It should have beenrealised by the Respondent whilechallenging the

said orders andretaining the goods in his possessionthat the goods were of perishablenature and that they required airconditioned accommodation. Havingmade all attempts to prevent therelease of goods in favour of theapplicant the Respondent cannot nowcontend that the applicant and not hewas really responsible fordeterioration of the goods and theconsequent less realisation of price.

16. There is no quarrel with the proposition of law laid down by the Supreme Court in that judgment. But in the present case, the Petitioner had lost his case before the CEGAT, Chennai and even this Court had only made a direction subject to the availability of the goods.Therefore, the prayer made by the Petitioner cannot be countenanced by this Court. Hence, the writ petition stands dismissed. No costs.