(2014) 08 KL CK 0086

In the High Court Of Kerala

Case No : WP(C). No. 21694 of 2014 (J)

Bella Imports APPELLANT

Vs

The Commissioner of Customs House RESPONDENT

Date of Decision : 28-08-2014

Acts Referred:
Customs Act, 1962 — Section 17, 18, 18(1)

Citation : (2014) 310 ELT 651

Hon'ble Judges : K. Vinod Chandran, J

Bench : Single Bench

Advocate : P. Radhakrishnan, Madhu Radhakrishnan, Nelson Joseph and M.D. Joseph, Advocate for the Appellant; Saiby Jose Kidangoor, Advocate and Thomas Mathew Nellimoottil, Standing Counsel, Advocate for the Respondent

Judgement

K. Vinod Chandran, J.—The petitioner is aggrieved with the retention of goods even after paying the admitted duty; which goods were admittedly imported by the petitioner. The goods were detained for reason of undervaluation. Customs Act, 1962, by Section 18, provides provisional assessment of duty where the "Proper Officer" deems it necessary to make further enquiry regarding import and also provides for provisional assessments with respect to the duty payable; again by the "Proper Officer". With respect to the release of goods, The Customs (Provisional Duty Assessment) Regulation 2011, by Regulations 2 and 4 prescribes the manner in which the provisional assessment has to be proceeded with and the security demanded, for release of the goods.

2. On a reading of the provisions, there is discernible an anomaly since the provision speaks of provisional duty as also the final duty imposed. It is not clear as to how the difference in provisional duty and final duty imposed would be discernible at the point of provisional assessment.

3. However, interpreting the provisions, a Division Bench of this Court has succinctly stated so in Mohammed Fariz And Co., Firdouz International Trading Company, Keeveeyem Company Supariwala (P) Ltd and Kay Kay Enterprises,

X/78a Vs. Commissioner of Customs and Assistant Commissioner (Imports), in paragraph 13:-

"What is clear from Section 18(1) read with the above Regulations is that the Officer could make provisional assessment and release goods under Section 18 of the Act pending final adjudication only after ensuring that the actual duty that could be levied later will be recoverable from the party. For this purpose, the provisions of the Act and the Regulations above referred provide for determination of duty based on available documents, evidence and claim made by the party and also estimation of duty which according to the Officer is likely to be levied finally. So much of the duty determined based on the documents and claim of the party is the admitted duty which the party has to straightly remit. The duty provisionally determined is nothing but the duty which the Officer estimates over the duty admitted by the party as payable based on his estimation on the value, classification or the rate applicable, which is essentially a matter to be determined by the Officer. Regulation 2 makes it clear that besides remittance of the admitted duty in terms of the claim of the importer/ exporter the officer can demand payment of duty up to 20% of the duty provisionally determined by him which is over and above the admitted duty payable in accordance with the claim of the party and assessed by the Officer. After remitting the duty in terms of the claim made by the party (admitted duty) and up to 20% of the provisional duty demanded by the Officer, the Officer is bound to collect security for the balance of the provisional duty which under Regulation 4 is through execution of bond supported by surety or security or both as the Officer deems fit".

4. On such interpretation, it has to be found that, what is indicated by provisional assessment is the determination of what the final assessment would be on a provisional basis for the purpose of release of goods alone. In fact, the Department is not restricted in imposing duty on final determination only on the value indicated in the provisional assessment. It is only as an interim measure, for facilitating release of the goods that such provisions have been introduced. In such circumstances, what has to be done by the Department is to assess the provisional value of the goods and compute the difference between the actual duty assessed provisionally and admitted by the assessee and demand 20% of the difference thereat, as also demand further security for the balance amount. The assessee, to obtain release of the goods, will have to pay the admitted duty and 20% of the differential duty as per the provisional assessment and furnish security for the balance 80%.

5. On the facts of the present case, the petitioner, was before this Court when the "Proper Officer" had initiated proceedings under Section 18. This Court by Ext. P3 judgment directed consideration of the petitioner''s representation, in accordance with law. The petitioner''s representation essentially sought for release of the goods on provisional assessment. Going by the provisions and the interpretation placed on it by the Division Bench of this Court, what has to be

done, in accordance with law, is to make a provisional assessment, if the officer is satisfied that an enquiry has to be conducted. The Department has, by Ext. P4, issued a communication in which the following conditions are indicated for release of the goods:-

1. Payment of duty on the declared Invoice Value;

2. Furnishing a Bank Guarantee from a nationalized bank or cash deposit at the Customs Treasury for Rs. 11,00,000/-; and

3. Executing a Bond for the provisional Assessable Value of Rs. 28,00,000/-

6. It has been held by this Court that the assessee is conferred with no right to seek a provisional assessment but that would be solely in the realm of the satisfaction of the ''Proper Officer''. Exhibit P4 reflects the satisfaction of the ''Proper Officer'' that a provisional assessment is to be made. But, it cannot be said that Ext. P4 is a provisional order issued as is contemplated under the Act and Rules.

7. The learned Standing Counsel appearing for the Department was directed to get instructions as to whether any provisional assessment order has been issued under the Act and the Rules. Hence, the matter which was heard on 27.08.2014 was posted to 28.08.2014. Today the learned Standing Counsel would contend that Ext. P4 is an offer and no provisional assessment has been made as yet. It is the contention that Ext. P4 could be accepted by the petitioner and amounts paid in accordance with the same upon which the release of goods would be effected.

8. It has to be noticed that such an offer made by the Officers of the Department is not one sanctioned by the Act or the Rules. The mere practice of such an offer having been extended over the years would not give it the sanctity it requires, under law, especially when the Act and the Rules contemplate the passing of a provisional assessment.

9. In any circumstance, it has to be noticed that even Ext. P2 judgment directed consideration of the representation in accordance with law. The Department ought to have then passed a final order under Section 17 or a provisional order under Section 18. The offer made by Exhibit P4, as was noticed indicates the satisfaction of the ''Proper Officer'', that the situation warrants an enquiry. The Department also does not feign ignorance about the binding Division Bench decision of this Court cited earlier, but relies on it [Mohammed Fariz and Co. (supra)].

10. The assessee projects hardship insofar as the assessee being mulcted with the demurrage on a daily basis, for retention of goods in the Customs Warehouse. Taking into consideration the totality of the circumstances, and on balancing the hardship of the assessee with the concern of revenue loss of the Department, it has to be found that the provisional assessable value as indicated in Ext. P4 is Rs. 28,00,000/-. The value admitted by the assessee as indicated in

the invoice as well as the bill of entry is slightly above Rs. 8,00,000/-.

11. The admitted duty on the value declared in the bill of entry would have to be satisfied by the assessee. The provisional assessable value of the goods being taken at Rs. 28,00,000/-, duty would have to be computed on the provisional assessable value and 20% of the provisionally assessed duty on the excess value provisionally determined shall be paid as cash deposit. The assessee shall also furnish security for the balance amounts, to the satisfaction of the ''Proper Officer'' or bank guarantee. Such order shall be issued to the petitioner on or before 02.09.2014. The assessee shall be permitted release of the goods immediately on satisfying the conditions as aforesaid.

Writ petition disposed of, without prejudice to the contentions of either parties, as to the actual duty leviable.