(2016) 07 MAD CK 0081

In the Madras High Court

Case No : Writ Appeal No. 723 of 2015 and M.P. No. 1 of 2015

Binny Limited APPELLANT

Vs

Commissioner of Customs (Imports), Chennai RESPONDENT

Date of Decision : 27-07-2016

Acts Referred:

Citation : (2016) 340 ELT 162

Hon'ble Judges : Huluvadi G. Ramesh and M.V. Muralidaran, JJ.

Bench : Division Bench

Advocate : Shri Vijay Narayan, SC, for M/s. P. Saravana Sowmiyan, Advocate, for the Petitioner; Shri K. Mohanamurali, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Huluvadi G. Ramesh, J.—Being aggrieved over the order passed by the learned Single Judge of this Court [2015 (320) E.L.T. 750 (Mad.)], the writ petitioner has filed the present writ appeal.

2. The facts leading to filing of this writ appeal are as follows :

2.1. The appellant-Company, during the course of its business, imported textile machineries along with auxiliary equipments and spares consisting of 200 containers during the year 1996 from Germany. At that point of time, the Company was in great financial crunch and the machinery imported was also not immediately required for production. Hence, taking into consideration of both the factors, the appellant-Company decided to bond the imported goods as per the provisions of Customs Act, 1962, in Customs Bonded Warehouse without payment of duty pending clearance.

2.2. As the appellant-Company was put to several crisis, they were constrained to approach the Board for Industrial and Financial Reconstruction (BIFR) to declare it as a Sick Company under the Sick Industrial Companies (Special Provisions) Act, 1995. While the proceedings are pending before the BIFR, the appellant-Company could not make any arrangement for clearing the imported goods on payment of customs duty and interest. Thus, the goods imported continued to remain in the warehouse without being cleared. Thereafter, to overcome the financial crisis, the appellant-Company took strenuous efforts to re-export the imported goods.

2.3. On the basis of the Circular dated 14-1-2003 in F. No. 473/25/2002-LC of Government of India, Ministry of Finance and Company Affairs, Department of Revenue, the respondents granted permission to re-export the imported goods. Accordingly, out of 200 containers, 139 containers were re-exported in the year 2005. Thereafter, by order dated 28-5-2007, the warehouse licence was extended up to 24-3-2008.

2.4. While so, the second respondent issued a notice dated 25-3-2008 under Section 72(1) of the Customs Act, demanding payment of duty and interest on the warehoused goods. On the failure of the appellant-Company to discharge the demanded amount, notice under Section 72(2) of the Act came to be issued, thereby detaining the warehoused goods with a view to recovery of the duty and other charges. Pursuant to the same, the appellant-Company submitted a letter dated 2-6-2008 to the second respondent, requesting to drop all further proceedings on the ground that they would re-export the goods lying in the remaining containers, once they get clearance from the proceedings pending before the BIFR.

2.5. Thereafter, BIFR proceedings came to an end and the appellant-Company was declared as a Sick Industrial Undertaking. The appellant-Company has continuously taken efforts to find suitable buyer for exporting their goods, which have become obsolete. In the meanwhile, they came to know that the respondents were taking steps to auction the goods and hence, they filed a writ petition in WP. No. 736 of 2012, which was disposed of by order dated 11-1-2012 by permitting the appellant to submit a representation and thereafter, the same was directed to be disposed of by the third respondent therein.

2.6. Pursuant to the order of this Court, the third respondent by proceedings dated 25-1-2012, rejected the request of the appellant-Company to re-export the goods in balance containers. Challenging the same, the appellant-Company preferred W.P. No. 15103 of 2014, which was by order dated 4-3-2015, dismissed by the learned Single Judge. Hence, this writ appeal.

3. Learned senior counsel appearing for the appellant submits that the appellant made strenuous efforts to re-export the imported goods and out of 200 containers, 139 containers were re-exported in the year 2005 itself and thereafter, they have taken vigorous steps to re-export the goods lying in the balance containers and the same could not be achieved due to lack of permission from the respondents, despite having prospective buyers. Learned senior counsel further submits that the Circular dated 14-1-2003 issued by the Government of India squarely applies to the case of the appellant and entitles the appellant to re-export the goods imported. Learned senior counsel also submits that the highest

bidder for e-auction held on 23-12-2011 did not fulfil the terms and the sale proceedings were subsequently cancelled by the respondents and the goods were not put to auction. In such circumstances, the request of the appellant for re-export of the balance imported goods should be considered, in accordance with the Circular dated 14-1-2003. However, without considering those aspects, the learned Single Judge dismissed the writ petition filed by the appellant.

4. Per contra, learned counsel appearing for the respondents submits that more than fifteen years have lapsed from the date of issuance of bonding/warehousing permission, no tangible and legally acceptable action has been taken by the appellant with reference to the goods in question. Learned counsel further submits that the appellant has failed to discharge their duty due on the warehoused goods and has been delaying payment of Customs duty and other charges for the past 16 years. Learned counsel also submits that since the goods were sold in e-auction held on 23-12-2011, the learned Single Judge has rightly rejected the appellant''s request, by placing reliance on the decision of the Hon''ble Supreme Court reported in (2008) 4 SCC 496 : 2008 (223) E.L.T. 129 (S.C.) (Union of India v. Shakti LPG Ltd.), wherein, it has been held that the Circular dated 14-1-2003 would not apply to a situation, where the goods had already been put to auction.

5. We have heard the rival submissions made on either side and perused the entire materials placed before this Court.

6. The facts made available herein would reveal that the appellant-Company had imported textile machineries along with auxiliary equipments consisting of 200 containers in the year 1996. Due to severe financial crisis, they have bonded the said containers in Customs Bonded Warehouse. However, they have taken strenuous steps to clear the imported goods. In the meanwhile, they have initiated proceedings before the BIFR seeking to declare it as a Sick Company. Pending the same, on the basis of the Circular dated 14-1-2003, issued by the Government of India, Ministry of Finance and Company Affairs, Department of Revenue, the respondents granted permission to re-export the imported goods. Accordingly, out of 200 containers, 139 containers were re-exported by the appellant and the remaining containers could not be re-exported for want of buyers. Thereafter, the appellant sought for permission to re-export the goods lying in the remaining containers, which was rejected. In the meanwhile, the respondents conducted e-auction on 23-12-2011 with respect to the goods in question, but the same could not be materialized and hence, the sale proceedings were cancelled. In this regard, the highest bidders have initiated other proceedings, which culminated in dismissal. Be that as it may, questioning the rejection of the appellant''s request to re-export the goods in question, W.P. No. 15103 of 2014 came to be filed, which was dismissed by the impugned order dated 4-3-2015.

7. On a perusal of the order impugned herein, we find that the learned Single Judge has rejected the appellant''s request on the following grounds : (i) the

appellant has belatedly approached the respondents seeking permission to re-export the goods in question; and (ii) placing reliance on the decision of the Hon''ble Supreme Court in Union of India v. Shakti LPG Ltd., (2008) 4 SCC 496, it has been held that the applicability of the so-called Circular, dated 14-1-2003 was ruled out in the circumstances, where the goods were already put on for sale by way of e-auction.

8. Regarding the first ground, we are of the view that the appellant has taken continuous steps to find out the suitable buyers for re-exporting their goods in question and they have also made several representations to the respondents seeking permission for clearing the remaining warehoused goods, in order to stabilize their financial position, whereas, the respondents have not duly considered the same.

9. Insofar as the second ground is concerned, the Hon''ble Apex Court in the decision relied on by the learned Single Judge, has held that the Circular dated 14-1-2003 would not apply to a situation where the goods had already been put to auction, whereas, in the present case, e-auction was conducted on 23-12-2011 with respect to the goods in question and one Sri Shiva Impex was declared as a highest bidder. However, the same was cancelled due to non-payment of post-bid EMD/Security Deposit. Thereafter, the first respondent appears to have called for a fresh e-auction on 17-2-2012, which compelled the said Sri Shiva Impex to file WP. Nos. 3765 and 3766/2012. Subsequently, both the writ petitions were dismissed by an order dated 9-12-2014. When such being the position, the goods in question were not put to auction and the observation of the Supreme Court cannot be applicable to the present case.

10. At this juncture, it is noteworthy to refer the Circular No. 3/2003-Cus., dated 14-1-2003 issued by the Government of India and the contents of the same, for better appreciation, are reproduced hereunder :

"2. The matter has been examined in the Board. It has been decided that in case an importer makes a request to permit re-export of the goods under Section 69 of the Customs Act, 1962, such a request may be allowed even if the permitted period for bonding has expired and demand notice has been issued or it has been decided to put the goods under auction. Before permitting re-export in each such case, however, it will be necessary to extend the period of warehousing under Section 61 of the Customs Act to enable the importer to export the goods within the permitted period of warehousing.

3. Chief Commissioners are, therefore, requested to consider/decide such requests from the importers keeping in view the aforesaid guidelines of the Board and also taking into consideration all the relevant rules/regulations for export."

Reading of the Circular as extracted above would make it clear that if a request is made seeking permission to re-export the goods imported, the same may be allowed, even if the permitted period for bonding has expired and demand notice has been issued or it has been decided to put the goods under auction. However, while doing so, it is necessary to extend the period of warehousing under Section 61 of the Customs Act, to enable the importer to export the goods within the permitted period of warehousing.

11. For the discussions held in the foregoing paragraphs, we are of the view that the order impugned herein is liable to be set aside and to meet the ends of justice, an opportunity be given to the appellant to re-export the goods in question, so as to reduce the burden cast on them.

12. Accordingly, the writ appeal is allowed by setting aside the order passed by the learned Single Judge. Consequently, the appellant is permitted to make a representation to the respondents seeking permission to re-export the goods lying in the balance containers. On making such representation, the respondents shall consider the same and pass necessary orders, on merits and in accordance with law and also in the light of the Circular dated 14-1-2003. The time-limit for clearing the goods in question by the appellant is one year, failing which, the appellant shall abide by the decision to be taken by the respondents. No costs. Consequently, connected miscellaneous petition is closed.