
(2011) 03 KAR CK 0238
In the Karnataka High Court
Case No : CSTA No. 10 of 2010

Changzhou Yongfa Corduroy Co. Ltd.

APPELLANT

Vs

Commr. of Cus., Bangalore

RESPONDENT

Date of Decision : 04-03-2011

Acts Referred:

Customs Act, 1962 — Section 11, 111 (1), 111 (d), 111 (m), 114 A

Citation : (2011) 269 ELT 218

Hon'ble Judges : Ravi Malimath, J;N. Kumar, J

Bench : Division Bench

Advocate : Subhas P. Dave and Sujay N. Kantawala, for the Appellant; C. Shashikantha, CGC, for the Respondent

Final Decision : Dismissed

Judgement

N. Kumar, J.—The appellant has filed the reframed substantial question of law.

2. Sri C. Shashikantha, learned Central Government Counsel has filed power for respondent. Therefore, office is directed to show his name as counsel appearing for the respondent.

3. This appeal is preferred by the Exporter challenging the order passed by the Tribunal rejecting his request for re-exporting the goods, which is rejected by the importer. M/s. Vimalachal Fashions, Bangalore filed four bills of entry all dated 3-8-2007 seeking clearance of 53927 sq. mtrs. of "Textile pieces of goods or Dyed cotton processed fabrics" classified under Chapter sub-heading 5208 32 90 of Customs Tariff claiming benefit of duty free import under Duty free replenishment (DFRC) Scheme. On examination of the consignments, it transpired that the description of the goods was misdeclared and that the goods under import were "cotton corduroy fabrics". DFRC benefit was available to "Textile pieces of goods or Dyed cotton processed fabrics". However, investigation revealed that the importer did not actually function from the premises declared in the bills of entry and the address was given in order to obtain IE code from

DGFT. During the course of investigation, the appellant-exporter sent a communication addressed to the Commissioner of Customs intimating that their staff had discharged a wrong consignment and sought permission to re-export all the goods. In the alternative, it was proposed to sell the goods under import under the four bills of entry to the importer at a discount. This message was received by the Commissioner of Customs on 6-8-2007. The Commissioner refused the permission sought by the appellant-exporter. Aggrieved by the same, the appellant preferred an appeal in the Tribunal. In the mean-while, the Commissioner has found that the Importer had misdeclared the description of the goods under declared quantity imported and contravened prohibitions of import. Therefore he confiscated the goods covered by four bills of entry dated 3-8-2007 and six other earlier bills of entry under Sections 111(d), 111(1) and 111(m) under the Customs Act, 1962. Therefore the Commissioner confirmed a demand of Rs. 2,19,47,657/- along with applicable interest on the demand value of the consignments under import, as well as past consignments and imposed a fine and penalty on the import. The Exporter was warned. The importer also preferred an appeal against the said order before the Tribunal.

4. While considering the application for waiver of pre-deposit in the appeal filed by the importer, it was held that the consignments in respect of each bills of entry filed on 3-8-2007 have been confiscated and are in the custody of the department as there was duty in respect of past consignment, prima facie they cannot accept the claim of the Department as the authorities themselves had examined and were satisfied about the correctness of the description of the goods confiscated and allowed the clearance of the same. However, it was confirmed that the importer is liable to pay penalty in respect of goods covered by four bills of entry which have been liable to confiscation u/s 114-A of the Act. Further, considering the fact that the goods are in the custody of the department, they ordered for waiver of duty adjudicated by the authority and stayed recovery thereafter pending decision in the appeal.

5. The hearing of the application was on 12-8-2009 and the order was passed on 22-10-2009, though in the cause-title, it is mentioned that the date of decision as 22-9-09. However, the appeal preferred by the exporter in Customs Appeal No. 379/09 was taken for consideration on merits. It was held that the goods imported are liable to be confiscated u/s 11 of the Act. The same could not be allowed for re-export as held in the case of Commissioner of Customs, Kolkatta Vs. Grand Prime Limited and Others,]. It is a fact that in Grand Prime Limited case, collusion was suspected between the importer and the supplier. However, this was not the reason on which the Hon'ble Supreme Court held that re-export could not be legally permitted. There was no provision for re-export in the facts of the case. Incidentally in the case on hand, the Commissioner found that the appellant had colluded with the importer in facilitating evasion of customs duty. This finding is fortified with the fact that several consignments had been imported by the same importer earlier falsely claiming DFRC benefit resorting to the same modus operandi with the collusion of the supplier. He refrained from

imposing penalty on the appellant-exporter but warned them considering the loss of goods it had suffered. In the circumstances, they held that the request of the appellant to re-export the consignment was rightly turned down by the Commissioner. Accordingly the appeal was rejected by order dated 23-9-2009.

5.1 This is a classic case of a court dealing with the same subject matter on two different dates without knowing what it held on the previous day. In the appeal filed by the importer where he made an application for waiver of pre-deposit, it is held *prima facie* they are satisfied that there is no collusion and the department has verified the consignment and collected the duty payable. There is no fraud. But in the same transaction while dealing with the appeal filed by the exporter a finding of fraud and collusion is recorded. It is difficult to sustain such inconsistent findings recorded on the same material on record, particularly in an order passed within a gap of 24 hours. On the very ground this order requires to be set-aside.

6. Learned counsel for the appellant submitted that there is a specific provision providing for re-export of rejected goods. The appeal Bench of the same Tribunal has held that such a course is permissible. The same has not been considered by the Tribunal. Therefore, it is also to be noticed that the appeal filed by the importer is still pending consideration. In the circumstances, we are of the view that it would be appropriate that the Tribunal hears both the appeals together, takes note of the Full Bench judgment of the Tribunal, as well as judgments of the Apex Court which is relied on in the impugned Judgment and then pass appropriate orders on merits and in accordance with law. That would meet the ends of justice. Hence we pass the following :

ORDER

7. The appeal is allowed. The impugned order passed by the Tribunal in Customs Appeal No. 379/2009 is set-aside. The appeal is remanded to the Tribunal to be heard along with the Customs appeal No. 411/2009 filed by the importer after taking note of the judgment of the Full Bench of the Tribunal as well as the judgments of the Apex Court in accordance with law. The Tribunal shall hear and dispose off the appeal on merits without in any way being influenced by any observations made by this court in this order as those observations are intended only to point out the inconsistent reasoning of the Tribunal in the order passed on two days within a gap of one day. Ordered accordingly.

8. All questions are kept open to be agitated by both the parties before the Tribunal. In the light of the aforesaid order, we do not think it appropriate to answer any one of the questions of law framed in this appeal and the said questions also now shall be decided by the Tribunal.

9. Application for direction is dismissed as having become infructuous as the appeal itself is disposed off on merits.