(2016) 01 CAL CK 0059

In the Calcutta High Court

Case No : M.A.T. No. 372 of 2015 and C.A.N. No. 2593 of 2015

Commissioner of Customs APPELLANT

Vs

Spectra Fashions RESPONDENT

Date of Decision : 11-01-2016

Acts Referred:
Customs Act, 1962 — Section 28, Section 28AA
Limitation Act, 1963 — Section 14

Citation : (2016) 332 ELT 772

Hon'ble Judges : G.C. Gupta and Asha Arora, JJ.

Bench : Division Bench

Advocate : S.B. Sarafand and K.M. Maiti, for the Appellant; Durga Prasad Dutta and Souvik Sen, for the Respondent

Final Decision : Disposed Off

Judgement

1. It is not in dispute that the writ petitioners availed the benefit of duty exemption/remission scheme, which appears to have been propounded in order to facilitate export of the finished fabrics, raw materials whereof might have been imported from abroad. The obligation of the importer is however to export the goods without changing their contents. In this case fabric was imported. The writ petitioners allegedly used that fabric for the purpose of making pants and thereafter exported the pants. The obligation was that the writ petitioner shall manufacture and export the pants of the same fabric which he had imported from abroad. The case of the revenue is that the imported fabric contained 52% of polyester, 45% cotton and 3% spandex. The sample of the pants exported was drawn. The test of the sample revealed that the pants contained 98% of cotton and 2% spandex yarn.

2. It is, therefore, amply clear that the goods imported were not utilised for the purpose of making those pants. The imported goods might have been utilised for the purpose of sale in the domestic market and some other goods purchased from the domestic market might have been utilised for the purpose of making

pants which were ultimately exported. The revenue in the circumstances, issued a notice dated 11th July, 2011 claiming and contending inter alia as follows:

"The importer submitted a bond at the time of importation and agreed with conditions mentioned in the said bond. They have failed to fulfill the conditions mentioned therein. Therefore, the duty concession amounting Rs. 20,21,378/- (Rupees twenty lakh twenty one thousand three hundred seventy eight only) for importation goods above at (i) and (ii) along with applicable interest thereon is recoverable under section 28 of the Customs Act, 1962."

3. The writ petitioner replied to the notice dated 11th July, 2011 stating as follows:

"In this connection we would like to confirm that the sample against shipping Bill No. 3450 dated 27-12-2002 has been drawn by you and the said shipping Bill has been finally assessed by your office as per photocopy attached.

Here we would like to point out that we have exported garments made out of the same fabric that we imported under the said advance license and the export obligation has been 100% fulfilled. We are enclosing a copy of the certificate issued by the Office of the joint DGFT confirming the same.

Under the above circumstances you are requested to kindly treat the matter as closed."

4. The certificate issued by the office of the Director General of Foreign Trade referred to by the writ petitioners reads as follows:

"With reference to your letter No. SF/AL-DIS/04/50 dated 14-01-2005 on the above-mentioned subject, I am directed to inform you that export obligation has been fulfilled against the subject Advance licence, in terms of para 4.26 of the Hand Book procedures (Vol.-I).

However, this shall not preclude the Customs Authority from taking any action against the licence holder for any misrepresentation/misdeclaration and default detected subsequently."

5. The authorities passed an order dated 24th February, 2014 confirming demand of a sum of Rs. 20,21,378/- and also interest under Section 28AA.

6. Challenging the aforesaid order, the writ petition was filed.

7. A challenge to the show cause notice dated 11th July, 2011 was also thrown in the writ petition. The learned Trial Court held as follows:

"The date of the last of the shipping bills relied upon by the petitioners is February 09, 2005.

If every benefit of doubt is given to the department, the samples should have been drawn latest by February 09, 2005 and the relevant date can also be reckoned to be February 09, 2005. The notice ought to have been issued within five years of February 09, 2005, but it appears that it took more than six years for the department to realise that the ladies'' garments exported by the first petitioner may not have been manufactured with the material that had been imported on the basis of the advance licence obtained.

There are only two scenarios possible: that the first petitioner had duly exported the goods and had complied with the conditions of the advance licence; or, the first petitioner had acted in derogation of the conditions appended to the licence and, as such, was liable to refund the duty exemption obtained. In the second case, it was mandatory for the department to issue a notice to the petitioner within five years of the date by which the export obligation ought to have been completed or within five years of the actual export of the last consignment.

Since it is evident that no notice was issued by the department to the first petitioner within five years of February, 2005, the steps taken by the respondent authorities to recover the duty exemption afforded to the first petitioner cannot be permitted to continue. The show-cause notice dated July, 11, 2011, a copy whereof appears as Annexure P-8 to the petition at page 60 thereof, is set aside as being without jurisdiction. As a consequence, all steps taken pursuant to the show-cause notice, including the order-in-original dated February 26, 2014, are also set aside.

W.P. 12999 (W) of 2014 is allowed but without any order as to costs.

The Registrar (Judicial) of this Court will forward a copy of this order to the secretary in the Ministry of Finance for the matter to be referred to the Central Vigilance Commission for an inquiry as to whether the issuance of the notice was deliberately delayed for extraneous considerations. It is difficult to accept that the results of the tests conducted on the samples drawn in the year 2005 came to be available with Customs authorities only in the year 2011."

8. Challenging the aforesaid order the revenue has come up in appeal.

9. Mr. Saraf, learned advocate, appearing in support of the appeal submitted that the show cause notice dated 11th July, 2011 shall make it clear that the sum of Rs. 20,21,378/- has been claimed by the revenue by reason of forfeiture of bond on the ground that the importer had failed to comply with the terms and conditions thereon. Only the interest was claimed pursuant to section 28 of the Customs Act. He contended that the amount receivable upon forfeiture of the bond is not subject to any period of limitation. He added that in any case limitation is a mixed question of law and fact which the learned writ court should not have entertained regard being had to the fact that it was not disputed by the writ petitioners that he had misrepresented that the goods imported had in fact been exported and the truth came out after the test report was received. The correctness of the test report was not even disputed in the reply to the show-cause notice which is a pointer according to him to show that the revenue was defrauded of the sum of Rs. 20,21,378/-. There can be according to him an issue as to whether the claim for interest is tenable but as regards the tenability of the

claim for Rs. 20,21,378/- by virtue of forfeiture of the bond is concerned there can be no contention. The learned Judge did not realise this fact and passed the order under challenge which according to him, is totally bad in law. The learned Trial Judge should have left the parties to avail their remedies before the statutory forum rather than admitting and allowing the writ petition. He added further that the writ petitioners after having submitted to the jurisdiction of the authority by disclosing their defence on merits could not have invoked the writ jurisdiction for the purpose of challenging the show-cause notice. He submitted that the order is patently bad and should be set aside.

10. Mr. Dutta, learned advocate, appearing for the writ petitioners/respondents, submitted that the shipping bill is backed by a certificate issued by the DGFT which we have quoted above. According to him, DGFT gave him a certificate that the goods imported had been exported. Therefore, matter came to an end. Any further enquiry with regard to that was not permissible in law. He added that the notice to show cause dated 11th July, 2011 is under Section 28 of the Customs Act, which is subject to the limitation provided therein. Therefore, it cannot be said that only the claim on account of interest may be hit by Section 28. According to him, the entire claim is hit by limitation provided under Section 28 of the Customs Act.

11. We have considered the rival submissions advanced by the learned advocates. We are of the opinion that there appears to be at least prima facie some substance in the submission advanced by Mr. Saraf that the claim for Rs. 20,21,378/- arose out of forfeiture of the bond.

12. Therefore, the order under challenge cannot be sustained. Whether the claim is barred by limitation? Whether the importer in fact made any misrepresentation? Whether the goods exported contained 98% of cotton are questions of fact which should better be left with the appellate authority provided under the statute. The views expressed herein are for the purpose of dismissal of this appeal. They shall not stand in the way of disposal of the appeal in accordance with law. To be more specific the view expressed herein by us shall not preclude the appellate authority from taking a contrary view if they are so advised.

13. The order under challenge is set aside. It will be open to the writ petitioners to prefer an appeal in accordance with law. The period during which the writ petitioners pursued the writ petition and the consequent appeal shall be excluded under section 14 of the Limitation Act. The appeal and the application are both allowed.

