

(2010) 02 BOM CK 0108
In the Bombay High Court
Case No : Customs Appeal No. 10 of 2005

Commissioner of Customs

APPELLANT

Vs

Viraj Impex Ltd.

RESPONDENT

Date of Decision : 01-02-2010

Acts Referred:

Citation : (2017) 346 ELT 188

Hon'ble Judges : V.C. Daga and K.K. Tated, JJ.

Bench : Division Bench

Advocate : Shri R.B. Pardeshi, Counsel, for the Appellant; Shri Madhur R. Baya, Counsel, for the Respondent

Final Decision : Dismissed

Judgement

1. Heard the learned counsel for the Appellant/Revenue and the learned counsel appearing for the respondent. Perused the appeal.

2. The Appellant/Commissioner of Customs seeks to challenge the validity of the order passed by the Tribunal dated 10-9-2004 [2004 (177) E.L.T. 960 (Tri. - Mum.)] whereby the appeal filed by the respondent was allowed and the order of the Commissioner directing confiscation of goods and imposing redemption fine, was set aside.

3. This appeal was admitted to consider the following substantial questions of law by an order dated 13th July, 2005 :-

"(a) Whether on the facts and circumstances of the case, the Tribunal was right in law in not holding that the violation of the condition of the Notification No. 34/(RE-98)/1997-2002, dated 10-12-1998 as amended by Notification No. 38(RE-98)/1997-2002, dated 22-1-1999 in turn rendered the impugned goods prohibited for importation and liable for confiscation under Section 111(d) of the Customs Act, 1962?

(b) Whether on the facts and circumstances of the case, the Tribunal was right in

law in setting aside the Order-in-Original dated 11-3-1999?"

The Facts :

4. The Respondent - M/s. Viraj Impex Limited imported Defective/Secondary Hot Rolled Coils of thickness 1.50-12 mm and of width 700-1950 mm ("the goods" for short) from South Africa @ US\$ 180 PMT and filed 8 Bs/E Nos. 779, 783, 785, 789, 792, 797, 799 and 808 all dated 4-3-1999 as freely importable item under Export-Import Policy 1997-2002.

5. The Ministry of Commerce, Government of India vide Notification No. 34/(RE-98)/1997-2002, dated 10-12-1998 as amended by Notification No. 38(RE-98)/1997-2002, dated 22-1-1999, restricted the import of secondary/defective H.R. Coil below the floor price of US\$ 232 PMT by amending Import Licencing Note 3 to Chapter 72 of ITC (HS) showing classification of Export-Import items under Export-Import Policy 1997-2002.

6. The goods, in the instant case, were imported by the respondent below the floor price fixed by the Ministry of Commerce, as such, import was alleged to be in contravention of the Section 111(d) of the Customs Act, 1962 ("The Act" for short). As a consequence of this contravention, the respondents were sought to be held liable to penal action under Section 112(a) of the Act.

7. The respondent vide its letter dated 6-3-1999 addressed to the Department and informed that they, in usual course of business, had entered into a contract No. 9817, dated 1-12-1998 with M/s. A.R. INT'L Ltd., Hong Kong for import of 25,000 MTS of Defective/Secondary H.R. Coils from South Africa @ US\$ 180 PMT CIF for shipment in January/February/March, 1999 and that later on, the Ministry of Commerce has restricted the import of Secondary/Defective H.R. Coil below the floor price of US\$ 232 PMT CIF. It was also informed that the identical goods had been imported by them earlier from South Africa @ US\$ 165 PMT, which were assessed by in Group since the Bill of Lading was dated 4-12-1998 i.e. prior to the issuance of Notification No. 34/98, dated 10-12-1998 and their contracts were on DA basis (i.e. documents on acceptance basis), as such, the respondent was not required to open a Letter of Credit. The respondent had already entered into a contract with their overseas suppliers and it could not be cancelled because the same would have lead to damages and claims from their supplier. The requirement set out in paragraph No. 1.5 of the Export-Import Policy 1997-2002 to the effect that a confirmed Letter of Credit constitutes critical event which determines whether a transaction falls under the ambit of notification or not must ex facie have application only to those transaction which contemplates the opening of Letter of Credit as a mode of payment and can have no application to this transaction. The respondent had entered into more than 20 contracts with their overseas supplier M/s. A.R. INT'L Ltd. in the last two years for supply of more than 40,000 MTS on DA basis.

8. The respondent also submitted that the price, at which the goods have been imported by them is a correct international price; that the Metal Bulletin as on

the date of contract reflects the value of Price HR Coil from US\$ 140 PMT to US\$ 160 PMT which is a FOB price; that the floor price of US\$ 232 PMT fixed by the Notification No. 34/98, dated 10-12-1998 is against the international price prevailing in the market.

9. The respondents were heard before the Commissioner of Customs (Import), Mumbai and they submitted that there was no wilful or mala fide intent on their part. The respondents have entered into a contract with the supplier on 1-12-1998 and after the aforesaid notification dated 10-12-1998, they wrote a letter to the supplier on 19-12-1998 for cancellation of the contract. However, the supplier replied that the contract would not be cancelled and the shipment would be effected as per the terms of the contract. However, the submissions made by the respondents did not find favour with the Commissioner of Customs (Import), Mumbai. In the result, an order of confiscation was passed by the Commissioner of Customs (Import), Mumbai confiscating the goods and an option was given to the respondent to redeem the goods under Section 125 of the Customs Act, 1962 on payment of fine of Rs. 1.10 crores.

10. Being aggrieved by the aforesaid order passed by the Commissioner, the respondent preferred the appeal before the Appellate Tribunal.

11. The Tribunal after hearing both the parties, recorded a categorical finding that there was no mala fides on the part of respondent and that the respondent had actually entered into contract in good faith at the time when the import of subject goods was permissible. That the respondent had no reason or to foresee the restrictive changes in policy. Considering the fact that the respondent tried to revoke the contract but finding its revocation resulting in heavy losses, the contract was not cancelled and goods were allowed to be shipped. On these factual matrix, clearance of such import was allowed by the Tribunal holding it to be bona fide transaction and the order to the extent imposing redemption fine was set aside.

12. Being aggrieved by the aforesaid findings of the Tribunal, the Appellant/ Revenue has invoked the appellate jurisdiction of this Court raising questions of law mentioned in the opening part of the order.

Submissions :

13. Mr. Pardeshi, the learned counsel appearing for the Revenue submits that the import was clearly in violation of the restriction imposed by ITC notification for the year 1997-2002. He submits that as per the said policy the period of validity means the period for shipment of the goods covered under the licence. He further urged that the validity of an import licence is decided with reference to the date of shipment of the goods from the supplying country as given in paragraph No. 15.14 of the Handbook for import/export. He submits that in this case admittedly shipment is subsequent to the notification dated 10-12-1998 as amended by another notification dated 22-1-1999. He further submits that the shipment was on 22-2-1999 whereas the vessel actually arrived on 8-3-1999.

He, thus, submits that in the teeth of notifications holding the field, the imported goods were totally prohibited and were liable for confiscation under Section 111(d) of the Customs Act, 1962.

14. Per contra, Mr. Baya, the learned counsel for the respondent submits that the submission made by the Revenue cannot hold water in view of the fact that the finding of fact was recorded by the Commissioner in the order-in-original that the contract was entered into before the restrictive changes in the policy were made and that the Respondent/Importer had attempted to cancel that contract but the supplier did not accept cancellation thereof and went to the extent of threatening the respondent with damages. He further submits that prior to the present consignment, there were more than 20 imports made by the respondent on DA basis. He, thus, submits that the entire facts and circumstances go to show that there was bona fide contract without prior knowledge of the change in import policy. He further submits that the findings of fact recorded by the Tribunal having been accepted by the Revenue, the order-in-original has become final and conclusive. In the present appeal, those findings of facts cannot be gone into or disturbed.

15. Mr. Baya further relied on the judgment of this Court in case of *Matraco (India) Ltd. v. Union of India* - 2003 (162) E.L.T. 1192 (Bom.) and urged that this judgment helps the respondent to the extent that the examination of question of genuineness of the contract entered into prior to the restrictive notification is always open for the judicial scrutiny. As against this, the learned counsel for the Revenue submits that the judgment takes into account the date of shipment for reaching the conclusion that the transaction was real and genuine.

With the above rival contentions, the questions need to be answered.

Consideration :

16. Having heard both the parties, it is not in dispute that in the order-in-original, a categorical finding is recorded by the Commissioner of Customs (Import) that the contract entered into by the respondent on 1-12-1998 was genuine, real and bona fide notwithstanding the fact that no letter of credit was opened and that the date of shipment is after change in import policy. On the face of this finding given by the Commissioner, in order-in-original, the Tribunal could not have reached to the contrary conclusion that the goods imported were liable to be confiscated under Section 111(d) of the Customs Act, 1962 because of the restrictive import policy vide notification dated 10-12-1998.

17. Since the findings recorded by the Commissioner in order-in-original were contradictory, the respondent was better advised to challenge the same before the Tribunal. The Tribunal finding contradiction in the order was pleased to set aside the contradictory part of the order and recorded a positive finding that if the contract was genuine and bona fide the goods could not have been subjected to the confiscation and redemption fine.

18. The Revenue did not challenge the order-in-original. As a matter of fact, part of the original order was in favour of the Revenue and part was in favour of the respondent. The Revenue was expected to challenge the order to the extent it held that the contract entered into by the respondent was bona fide, genuine and real. The moment adverse finding became final and conclusive, the Tribunal could not have held that the contract was not real, genuine and bona fide. If that be so, no fault can be found with the view taken by the Tribunal that the goods could not have been subjected to the confiscation and redemption fine. Thus, having examined the rival legal submissions advanced and the view taken by the Tribunal, we answer the questions in favour of the respondent and against the Revenue. The appeal is, thus, dismissed. No order as to costs.