
(2010) 02 KAR CK 0104

In the Karnataka High Court

Case No : Writ Petition No. 10710 of 2003 (CESTAT)

Commissioner of Customs, Bangalore

APPELLANT

Vs

Satyanarayana Silk Koti

RESPONDENT

Date of Decision : 05-02-2010

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Customs Act, 1962 — Section 123, 130

Citation : (2011) 264 ELT 56

Hon'ble Judges : N. Ananda, J;D.V. Shylendra Kumar, J

Bench : Division Bench

Advocate : Y. Hariprasad, CGSC, for the Appellant; Laxminarayan for Kiran S. Javali, for the Respondent

Final Decision : Allowed

Judgement

D.V. Shylendra Kumar, J.—Writ petition by the revenue under Articles 226 and 227 of the Constitution of India, directed against the order passed by the Customs, Excise and Gold (Control) Appellate Tribunal (for short, "the tribunal")/ South Zonal Bench at Bangalore, in Appeal No. C/39/2002 dated 11-10-2002 (copy produced at Annexure-A).

2. Under the impugned order, the Tribunal has reversed in totality the order of adjudication passed by the Additional Commissioner of Customs, Bangalore, dated 20-10-2000 (copy produced at Annexure-C) and in part the appellate order passed by the appellate Commissioner of Customs (copy produced at Annexure-D) dated 25-1-2002, to grant full relief to the respondent-assessee, in the sense that the claim of the assessee in respect of nine bales of mulberry raw silk of foreign origin and three bales of dupion silk yarn, which the assessee had admitted to be part of imports made by it from China is a valid import, supported by material indicating a valid import and therefore, the importer should not be subjected to any penalty nor to confiscation order.

3. While the version of the assessee that nine bales of mulberry raw silk of

foreign origin and three bales of dupion silk yarn, which had been seized by the customs authority on 29-12-1999 at the shop-cum-godown of the respondent-assessee on certain definite information that they had stored illicit goods and further action in the form of a show cause notice dated 27-6-2000 (copy produced at Annexure-B) on the premise it was illicitly imported goods of foreign origin is wrong and incorrect as commensurate duty had been paid and the goods cleared at customs port and had also asserted this position, version of the Customs Department on the other hand is that the supporting documents were not shown to the search officer at the time of search and seizure of the goods in question.

4. In response to the show cause notice dated 27-6-2000 issued as a follow-up action of the search, had proposed confiscation and levy of duty and penalty etc it is the further version of the assessee that a detailed reply had been given on 4-7-2000.

5. A personal hearing had also been extended and the Additional Commissioner of Customs, after hearing the learned counsel for the respondent held in terms of his order dated 20-10-2000 (copy at Annexure-C) for confiscation of the goods as the goods were not imported legally and also levied commensurate duty for the goods in question and has also levied personal penalty of Rs. 2.00 lakh on the owner of the importer M/s. Sathya Narayana Silk Koti.

6. Aggrieved by this order, the assessee had appealed to the Appellate Commissioner. The Appellate Commissioner while on perusal of the facts and material that was available and on hearing the learned counsel for the appellant-assessee, affirmed the findings of the adjudicating authority with regard to the illicit importation and also the justification for ordering confiscation nevertheless was of the view that as the goods were not prohibited goods, the assessee is entitled to claim restoration of the goods on payment of redemption fine and fixed redemption fine at Rs. 1.00 lakh in respect of 12 bales of silk yarn that had been seized and had been confiscated as an option to the assessee, to claim for possession, subject to the payment of this redemption fine and also reduced the personal penalty from Rs. 2.00 lakhs to Rs. 1.00 lakh in terms of the order dated 25-1-2000 at Annexure-D. Thereafter, the assessee appealed further to the Tribunal.

7. The Appellate Tribunal in its turn held in terms of this order dated 11-12-2002 copy at Annexure-A held that there was no duty liability or any penalty leviable on the assessee and has recorded its findings as under :-

5 After hearing both sides and considering the matter, it is found :

(a) Silk yarn is not notified u/s 123 of the Customs Act, 1962.

Therefore relying upon and following : -

(i) Shri Rajat Gupta & Others (2001 (75) ECC 773 (Tri-Bgl))

(ii) Motiur Rahman & Ors. (2001 (47) RLT 353 (CEGAT-Kol))

(iii) 2001 (130) ELT 921)

And other catena of decisions on this subject, mere failure to show legal acquisition of such yarn would not prove the department's case for confiscation and penalty. The same as imposed are required to be set aside.

(b) The mere fact of sale and purchase without bills only raise a question about legal nature of acquisition. That would not by itself be enough to establish smuggled non-duty paid nature of the goods as held in 2000 (71) ECC 810). We follow the same to determine that there is no case made out for confiscation and or penalty or duty.

8. The effect of the order of the Appellate Tribunal is that the assessee would become not only entitled to seek restoration of the seized goods which had been confiscated by the adjudicating officer and affirmed by the Appellate Tribunal but also is not liable to pay any duty or penalty.

9. It is aggrieved by this order passed by the Appellate Tribunal, rather strangely, the Commissioner of Customs has approached this Court by filing the present writ petition though he could have lightly approached this Court invoking the provisions of Section 130 of Customs Act. It is because of this reason Sri Laxminarayan, learned counsel for the respondent-assessee has raised preliminary objections with regard to the maintainability of present petition and has urged that this Court should not entertain a Writ Petition when there is a avenue of the Appellate Tribunal provided for by way of an appeal to this Court against the order and the legal position in this regard is well settled and such is the law as declared by the Supreme Court in terms of the judgement reported in Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, .

10. In response, Sri Hariprasad, learned Central Government Standing Counsel has submitted that the writ petition is both under Articles 226 and 227 of the Constitution of India and it is not as though the High Court does not have jurisdiction to entertain a writ petition of this nature at all, but as a sound principle of procedure, this court seldom entertains a writ petition when there is a statutory remedy of appeal provided to this very court under any enactment and in so far as the Judgment of the Supreme Court is concerned, it was only an order passed dismissing the SLP directed against the order passed by the High Court which had declined to entertain the writ jurisdiction for similar circumstances and therefore cannot either be termed as a precedent binding on the High Court or even as equivalent to law declared in terms of Article 141 of the Constitution of India.

11. We are quite aware, this Court seldom entertains a writ petition in a situation where the petitioner has the statutory right of appeal to this court, howsoever narrow or circumscribed the scope of such appeal is. Scope of a statutory appeal which is in the nature of an appeal is to allow examination of all aspects of the

matter as an appellate authority, whereas in a writ petition, the jurisdiction is confined to judicial review of administrative actions or even of quasi judicial action/orders by Tribunals.

12. It is in this background, Sri Hariprasad, learned Central Government Standing Counsel has submitted that this Court even if is not inclined to exercise jurisdiction under Article 226 of the Constitution of India, is always entitled to look into the manner of functioning of a Tribunal in the exercise of its supervisory jurisdiction under Article 227 of the Constitution of India and if something is palpably wrong or which is shocking the conscience of the court is pointed out, this court will not sit on the platform of technicalities not to entertain a writ petition but should examine the position within the parameters of such a petition under Article 227; that while the Commissioner of Customs no doubt could have chosen to prefer an appeal, but at the relevant point of time the Commissioner was more inspired by the Budget Speech in the Parliament wherein the Finance Minister had indicated that a petition under Article 226 of the Constitution of India is a possible remedy to the department in a situation where it has come across such orders, being passed by the statutory Tribunal and therefore urges that the petition should be ordered on merits.

13. Be that as it may, the information the Commissioner has with him or he being inspired by the Budget Speech of the Finance Minister, are not very germane in deciding whether the writ petition is tenable or otherwise.

14. In so far as the exercise of jurisdiction under Articles 226 and 227 of the Constitution of India is concerned, we have no doubt in our minds that it is an extraordinary/discretionary jurisdiction and at the discretion of the High Court. The discretion is not to be exercised by any other court, but only by the High Court and if the High Court is satisfied that the matter warrants examination, while the discretion can be exercised, the scope of examination of a writ petition does not get enlarged and at any rate does not assume the proportions of an appeal, if even otherwise an appeal is provided to this court under an enactment. Examination remains within the scope of judicial review of administrative action if it is one attributable to the supervisory jurisdiction of the Constitution of India either under Article 226 or Article 227 of the Constitution of India.

15. Mr. Hariprasad, learned Central Government Standing Counsel would submit that even if relief under Article 226 of the Constitution of India is to be denied, there is no reason to deny relief under Article 227 of the Constitution of India.

16. In our considered view, this is a submission which perhaps merits acceptance as it is the appellant who is foregoing a right which is otherwise available and so far as the present writ petition is concerned, while we do examine the writ petition on merits, writ petition having already been admitted for examination on 1-3-2004 passed by the learned single Judge of this court which we can infer by the following order:

Post for hearing in the first week of April 2004 along with IA No. 1/03

and this court had granted interim order even at the very beginning on 26-3-2003 and that order having remained in force all along, we are inclined to reject the preliminary objection raised with regard to the maintainability of the present writ petition and hold that there is absolutely no impediment for the examination of the writ petition, in the sense, in the absence of an express embargo either under the Constitution or in terms of the legislation as enabled under the Constitution, the question of entertaining or not to entertain the writ petition being within the exclusive discretion of the High Court and on the present set of facts and circumstances, we are, on the other hand inclined to entertain the writ petition to look into the merits of the petition, but however, confine it to the limits of jurisdiction under Article 227 of the Constitution of India.

17. Submission of Sri Hariprasad, learned Central Government Standing Counsel appearing on behalf of the petitioner is that the order of the Tribunal is one without any rhyme or reason, not sustainable in law; that the Tribunal has not assigned any reason at all to reverse or set aside the order passed by the first two authorities in so far as it related to the question of confiscation and levy of penalty and redemption fine and therefore on the face of it the order being a non-speaking order is liable to be quashed and left at that and the order passed by the first appellate authority to remain in force.

18. On the other hand, Sri Lakshminarayan, learned counsel for the respondent has submitted that there was sufficient material before the authorities to conclude that the goods in question had been licitly imported; that the respondent-assessee had placed commensurate material to support this claim; that there is a bill of entry to support the claim of licit importation in the reply to the show cause notice; that the assessee had arranged its affairs based on such premise; that the actual imported goods which had been consumed while had been shown in the books of accounts and the remaining extent of bales of silk which remained unsold with the assessee during the year, also had been indicated in its books of accounts and maintained and produced before the sales tax authorities and in this view of the matter, if the Tribunal has recorded a finding to the effect that there is no justification for either confiscating the goods or for levying any penalty, that order is not only well reasoned but justified on the facts and circumstances and accordingly submits that the writ petition should be dismissed.

19. While production of the commensurate documents to support the licit importation has not been accepted by the adjudicating authority and the first appellate authority and in fact they have recorded a finding that the assessee has not cared to produce any supporting material, submission of Sri Hariprasad, learned Central Government Standing Counsel is also that nothing was placed on record either before the adjudicating authority or the first appellate authority to substantiate the claim of licit importation and it is only due to the absence of such supporting documents, the authorities were constrained to proceed to order for confiscation and also other consequential results followed.

20. We have bestowed our attention to the submissions made at the Bar and perused the orders passed by the authorities as also the Tribunal.

21. A perusal of the orders does indicate that the assessee, in fact, did not place any supporting documents before any authorities and the Tribunal which chose to reverse the finding of the adjudicating authority and the first appellate authority has not adverted to any material at all. On the other hand, the Tribunal proceeds at a tangent in referring to the provisions of Section 123 of the Act and referring to the case law said to have been relied upon by the learned counsel for the appellant before it which, in our opinion, are totally irrelevant as either the applicability of the provisions of Section 123 of the Act or the presumption arising under this provision are issues in the present case. The assessee had clearly admitted that the goods were of foreign origin and put forth further case of the goods having been licitly imported and if that is so and if the assessee did not produce commensurate documents to support its claim and on the other hand failed to produce the documents, it is obvious that the goods imported are not licitly or validly imported but it is only an illegal importation and therefore the consequence in respect of the goods not properly imported, inevitably visits such goods.

22. In so far as the order of absolute confiscation is concerned, it having been demonstrated and not in dispute that it was not prohibited goods, the confiscation could only be subject to allowing redemption on payment of fine and that has been done by the first appellate authority. There was absolutely no occasion for the Tribunal to have reversed this finding and the right conclusion of the first appellate authority.

23. The first appellate authority having taken a lenient view to reduce personal penalty on the assessee from Rs. 2 lakhs to Rs. 1 lakh and with the Tribunal not assigning any reasons as to under what circumstances it has modified the order, it is an order which suffers from the vice of non-speaking order, being one without assigning any reasons and it is not sustainable, in the examination of any jurisdiction by this court i.e., even the supervisory jurisdiction under Article 227 of the Constitution of India.

24. Sri Lakshminarayan, learned counsel for the respondent-assessee has made a passionate plea that the matter at least should be remanded to the appellate tribunal to have a re-look into the matter and to record the reasons for its conclusion and based on a reference to the relevant material.

25. Perhaps, we could have considered this submission if it had been demonstrated before us that there was some material before any of the authorities including the Tribunal, which was available for examination. On a thorough examination of the entire set of facts, orders etc., we find that no such material was made available before any authority at any point of time in terms of the record and therefore there was nothing for the Tribunal to examine. There is no question of remanding the matter for examination of non-existing material.

26. Though Sri Lakshminarayan, learned counsel for the respondent-assessee submits that the relevant material could now be placed before the Tribunal, we are afraid, it is too late in the day to entertain such requests and to remand a matter on a possible future production of material before the Tribunal in the form of some evidence which has to be referred to etc!. That is not to be directed in exercise of writ jurisdiction.

27. The fact that goods are still available is a redeeming feature for the respondent to claim back goods even at this point of time as at our instance the Department has produced the goods to convince us that it was still available for redemption.

28. If the assessee had failed in making good the bill of entry with reference to the goods that had been seized and ordered to be confiscated the mere fact cannot absolve the assessee of its failure in not making the claim that it was licitly imported.

29. Therefore while we allow this writ petition, set aside the order passed by the Tribunal, restore the order passed by the first appellate authority under which the confiscated goods are permitted to be redeemed as indicated by the appellate authority with consequential interest etc., in terms of the provisions of the Act, we direct the parties to bear their respective costs.

30. Writ petition allowed.