

(2014) 06 CAL CK 0016
In the Calcutta High Court

Case No : G.A. No. 6 of 2014 and A.P.O.T. No. 598 of 2013

Commissioner of Customs (Port)

APPELLANT

Vs

AKS Minerals Pvt. Ltd.

RESPONDENT

Date of Decision : 18-06-2014

Acts Referred:

Customs Act, 1962 — Section 128, 153, 154, 17, 17(4)

Citation : (2015) 316 ELT 459

Hon'ble Judges : Sudip Ahluwalia, J;G.C. Gupta, J

Bench : Division Bench

Advocate : S.B. Saraf and K.K. Maiti, Advocates for the Appellant; R.K. Choudhury and Pratyush Chatterjee, Advocates for the Respondent

Judgement

1. The subject matter of challenge in this appeal is a judgment and order dated 26th September, 2013 allowing the writ petition. Aggrieved by the order, the Commissioner of Customs has come up in appeal. The facts and circumstances of the case briefly stated are as follows:

On 22nd June, 2011 Export Duty with respect to iron ores intended to be exported by the writ petitioner was assessed. The duty so assessed was duly paid on 23rd June, 2011 and thereafter the goods were promptly exported. The writ petitioner, by letters inter alia dated 23rd May, 2012, sought to assail the assessment alleging that-

"In the present case Department did not accept the contracted price of US\$ 155 CFR (US\$ 126 DMT per FOB) and neither did they accept the DMT weight of 15165 metric tons or for the purpose of levy of Export Duty in terms of Customs notification. The Department took the WMT weight of 16850 mts for the purpose of calculation of duty arbitrarily at the back of the exporter without assigning any reasons and without giving any opportunity to the exporter for explaining the matter. On account of this wrong calculation, which is in complete violation of the exemption notification No. 27/2011-Cus., dated 1-3-2011 we were forced to pay extra duty amounting to Rs. 27,56,146 (Rs. 26,22,559 for S/B. No. 013125,

dated 22-6-2011, Rs. 1,33,587 for S/B. No. 013126, dated 22-6-2011."

On the aforesaid basis, the writ petitioner prayed for the following reliefs:

"In view of the above we humbly pray to your goodself to consider our case and allow the post-amendment of the Shipping Bill for the purpose of regularization of the export documents as we have already finalized our export transaction with our bank. We also request your goodself to issue a speaking order of assessment immediately in terms of Section 17(5) of Customs Act, 1962 or to amend the Shipping Bill in terms of Section 154 of Customs Act, 1962 and sanction the refund of the excess amount of duty of Rs. 27,56,146.00 realized by the Department without any authority of law."

2. The writ petition which culminated in the order under challenge was filed on or about 13th December, 2012 praying for the following reliefs:

"(a) A writ of and/or in the nature of Mandamus directing and commanding the respondents and each of them, their subordinates and officers to henceforth discharge their decision function under Section 153 of the Customs Act, 1962 by serving the speaking orders either by tendering the same to the petitioner by and/or send the same to the petitioner by registered post in respect of Shipping Bill Nos. 013125 and 123126 both dated June 22, 2011, Shipping Bill No. 5882632, dated October 18, 2011 and Shipping Bills No. 5923831 and 5923832 both dated October 20, 2011 in such time and manner as may be permitted by the said Hon"ble Court;

(b) A writ of and/or in the nature of Certiorari directing and commanding the respondents to transmit all records to the said Hon"ble Court after certifying the same so that conscionable justice may be administered on the basis thereof;"

3. The learned Trial Court disposed of the writ petition ex parte by the following order dated 26th September, 2013 which is under challenge:

"Even at the second call, none appears for the respondents. Nevertheless, I have gone through their affidavit. I find that there is not much of a defence to the case of the writ petitioner. The only point attempted to be raised is that the writ petitioner could have availed of an alternative remedy of filing a departmental appeal. That is no ground at all. This principle is well known and reiterated in the Whirlpool case that lack of jurisdiction of an administrative or judicial authority is a ground for invoking the writ jurisdiction and not invoking any departmental remedy that may be available.

Applying that principle, I allow this writ application by directing the second respondent to immediately furnish or cause to be furnished to the writ petitioner speaking order on the above reassessment within four weeks from the date of communication of this order."

4. Mr. Choudhury, learned Advocate appearing for the writ petitioner, submitted that-

"(a) By a circular dated 17th December, 2012, the Department has issued the following guidelines with respect to assessment of duty in respect of iron ores:

"2. Hon"ble Supreme Court in the matter of Civil Appeal No. 7539 of 1995 in case of Union of India (UOI) and Others Vs. Gangadhar Narsingdas Aggarwal and Another, in order to arrive at the Iron (Fe) contents out of Iron Ore, had held that--

"that is because the duty is relatable to weight and, therefore, once the iron content is determined keeping in mind the total weight, the percentage can be determined separating the iron contents from the rest of the impurities inclusive of moisture and thereafter ascertain in which category the lumpy iron would fall for the purpose of charging duty...."

3. In light of the observation by the Apex Court that Export Duty is chargeable according to Fe contents, and to maintain uniformity all over the Custom houses, it is clarified that for the purpose of charging of Export Duty the assessment of Iron Ore for determination of Fe contents shall be made on Wet Metric Ton (WMT) basis which in other words mean deducting the weight of impurities (inclusive of moisture) out of the total weight/gross weight to arrive at Net Fe contents.

4. In case of any difficulty in arriving at the net Fe content, assessment may be based on test result which directly determines the Fe contents.

5. Pending assessments on the issue, if any, should be finalized accordingly.

6. Difficulties, if any, faced in the implementation of this circular, may be immediately brought to the notice of the Board."

(b) The self-assessment in this case made by the assessee both with regard to rate and the weight was not accepted by the Department and they proceeded to make reassessment under sub-section (4) of Section 17 of the Customs Act, 1962. In doing so, the Department enhanced the liability on account of duty payable by the writ petitioner without assigning any reasons. He contended that law enjoins the authority to pass a speaking order on such reassessment unless the importer or exporter, as the case may be, confirms his acceptance of the order in writing. No such confirmation in writing was ever issued by the writ petitioner. Therefore, the liability on the part of the Department to pass a speaking order, continued to remain which they failed to discharge. The learned Trial Court has merely directed the authorities to furnish a speaking order for the reassessment. In support of his submission he drew our attention to a judgment of this Court in the case of Kothari Metals Ltd. v. Union of India reported in 2011 (274) E.L.T. 488 (Cal.) wherein the following views were taken:

"17. Thus, the Assistant Commissioner of Customs refused to exercise jurisdiction vested in him by law by not passing any speaking order in terms of sub-section (5) of Section 17 of the Act and so long that order was not passed, no question of acceptance of the order of assessment arose.

18. Therefore, the Tribunal below committed substantial error of law in holding that the appellant had accepted the order of assessment and the same had attained finality. We have already pointed out that in spite of specific protest lodged by the appellant within 15 days from the date of assessment of the bill of entry, no order in terms of sub-section (5) of Section 17 of the Act has been passed and as such, the Tribunal erred in law in rejecting the claim of refund.

19. In such circumstances, we are of the view that it is a fit case where the orders passed by all the authorities below should be set aside and the Assistant Commissioner of Customs should be asked to pass specific order on the basis of complaint lodged by the appellant in terms of sub-section (5) of Section 17 of the Act within one month from the date of communication of this order giving an opportunity of hearing to the appellant. If the Assessing Officer finds substance in the protest lodged by the appellant, he will pass necessary order in favour of the appellant and in that event, the application for refund already filed by the appellant should be considered in accordance with law."

5. Mr. Saraf, learned Advocate appearing for the appellant submitted that his client was not represented when the writ petition was taken up for hearing by the learned Trial Court, though an affidavit-in-opposition had duly been filed. The learned Trial Court does not appear to have considered the contents of the affidavit-in-opposition filed on behalf of the appellant. He contended that two points have specifically been taken : (a) that the order of assessment has become final and (b) the letters dated 23rd May, 2012 seeking to assail the assessment were written by way of an afterthought. He contended that the writ petitioner not only accepted the order of assessment, but also acted upon the same by promptly paying the duty and exporting the goods. It cannot, therefore, be said that the order of assessment passed on 23rd June, 2011 was not accepted in writing by the writ petitioner.

6. In any case, the more important question, according to him, is whether a fresh speaking order can be directed to be passed when the order of assessment already passed is operative and has also attained finality. According to him, the impugned order directing the appellant to furnish a speaking order is clearly erroneous.

7. The order of assessment was passed on 22nd June, 2011. Time to prefer an appeal under Section 128 of the Customs Act, 1962 is 60 days from the date of communication of the order. Since the duty was paid by the writ petitioner on 23rd June, 2011, there can be little doubt that the order was communicated on 22nd June, 2011 or at any rate on 23rd June, 2011. The period of limitation for an appeal commenced on 23rd June, 2011.

8. The writ petitioner could have availed himself of the benefit of the proviso to sub-section (1) of Section 128 of the Customs Act, 1962 for the purpose of obtaining an extension of 30 days. By 23rd September, 2011 the right to prefer an appeal came to an end. The order thus attained finality. The order was

assailed for the first time by letters dated 23rd May, 2012. The writ petition was thereafter filed. He contended that so long as the order dated 22nd June, 2011 is not set aside, there can be no question of passing a second assessment order, speaking or otherwise.

9. The judgment, cited by Mr. Choudhury, learned Advocate appearing for the writ petitioner, in the case of Kothari Metals Ltd. v. Union of India - 2011 (274) E.L.T. 488 (Cal.) has no application to the facts and circumstances of the instant case. What had happened in that case was that the assessment was made on 12th December, 2007 in respect of the goods imported, payment of the assessed duty was made on 20th December, 2007 and protest was lodged on 27th December, 2007. On 31st December, 2007 an application for refund of duty was made. That application was rejected by the Assistant Commissioner of Customs on the ground that there were defects in the application. The appellate authority opined that the application for refund should be heard on merits. The Appellate Tribunal, however, reversed the order of the appellate authority on the ground that the order of assessment having not been challenged, no question of refund arose. It is this order of the Appellate Tribunal, which was under challenge before this Court. This Court held that the application for refund has to be heard on merits.

10. Mr. Sarai: contended that the prayer for refund in that case was made within 20 days or less than 20 days from the date of the order of assessment. In other words, the challenge to the order of assessment was thrown well within the period of limitation of an appeal, whereas in the case before us, the challenge to the order has been thrown almost a year after the order was passed. Therefore, the facts of these two cases are different and the judgment in that case cannot be applied to this case. He added that the views expressed by the Division Bench in Paragraph 17 of the judgment, quoted above, were not really required for the purpose of disposal of that appeal, nor did any question with regard to exercise of power under Section 17(5) of the Act arise before the Division Bench for consideration. Therefore, the views expressed are mere obiter and have no binding effect.

11. We have carefully considered the submissions advanced by the learned Advocates appearing for the parties.

12. According to us, we have to construe sub-section (5) of Section 17 of the Customs Act, 1962 in conjunction with sub-section (4) of Section 17. For convenience, sub-sections (4) and (5) of Section 17 are set out hereinbelow:

"Section 17. Assessment of duty.

(4) Where it is found on verification, examination or testing of the goods or otherwise that the self-assessment is not done correctly, the proper officer may, without prejudice to any other action which may be taken under this Act, reassess the duty leviable on such goods.

(5) Where any reassessment done under sub-section (4) is contrary to the self-assessment done by the importer or exporter regarding valuation of goods, classification, exemption or concessions of duty availed consequent to any notification issued therefor under this Act and in cases other than those where the importer or exporter, as the case may be, confirms his acceptance of the said reassessment in writing, the proper officer shall pass a speaking order on the reassessment within fifteen days from the date of reassessment of the bill of entry or the shipping bill, as the case may be."

13. From a plain reading of sub-sections (4) and (5), it appears that reassessment simply means an assessment where the self-assessment made by the assessee is not accepted by the proper officer. The proper officer is obliged to pass a speaking order in cases other than those where the importer or exporter, as the case may be, has confirmed his acceptance of the reassessment in writing. It is, as such, open to the proper officer to pass an order of assessment without reasons. The proper officer has, however, to take care that he has reasons for the order which may be passed in exercise of power under sub-section (4) of Section 17. He is required to disclose the reasons unless the importer or exporter, as the case may be, confirms his acceptance of the reassessment in writing within a period of fifteen days. When the statute permits the proper officer to pass a non-speaking order at the first instance, it is difficult to accept the contention that the statute contemplates passing of a fresh speaking order after initially passing a non-speaking order. The intention is that the non-speaking order passed under Section 17(4) of the Act has to be followed by a judgment disclosing the reasons for the order. An appeal lies against an order not against the judgment. In assailing an order what would naturally fall for consideration is the validity of the reasons appearing for the judgment.

14. Mr. Choudhury submits that in the absence of confirmation in writing of the order of reassessment passed by the proper officer, he has to pass a fresh speaking order which shall furnish a fresh cause of action for an appeal. We are unable to accept this contention.

15. Mr. Saraf appears to be right in his contention that there can, in the circumstances, be no occasion for a fresh order. Order has already been passed. Only the judgment containing reasons has not been delivered. If the exporter or the importer wants the proper officer to deliver his judgment, all that the exporter or the importer has to do is to refrain from issuing his formal acceptance of the order passed under sub-section (4) of Section 17. In that case, the proper officer is obliged to deliver his judgment. The question of passing a fresh order would never arise. Any construction, as submitted by Mr. Choudhury, is likely to give rise to absurd results. For instance, in this case on the basis of reassessment made under sub-section (4) of Section 17 on 22nd June, 2011, duty was paid on 23rd June, 2011. In case a fresh order is to be passed, the duty paid on 23rd June, 2011; acceptance of such payment and the consequent export are all without authority of law. The object of Legislature, we are inclined

to think, was to provide adequate checks and balance so that the proper officer, entrusted with the function of assessment of duty, does not act capriciously or arbitrarily. He shall always have at the back of his mind that the order to be passed by him in exercise of power under sub-section (4) of Section 17 must be backed by judgment disclosing reasons at a later point of time which is a safeguard against a capricious exercise of power. When the Legislature provided for a speaking order in sub-section (5), it did not mean anything more than that the proper officer shall deliver his judgment disclosing reasons in support of his order, which he already has passed. When the order, passed by the proper officer reassessing duty under sub-section (4) of Section 17, has been accepted and acted upon, and no appeal has been preferred within the prescribed period, there can be little doubt that the order attained finality. Even in such a case, the proper officer is still under a duty to deliver his judgment as indicated above. This is all that the Legislature intended while providing for a speaking order. We are supported in our view by a decision of the Apex Court in the case of *Vidyacharan Shukla Vs. Khubchand Baghel and Others*, wherein Their Lordships opined that:

"It is open to it (Election Tribunal) to issue two documents - one embodying the reasons for the decision and the other, the formal expression of its decision : the former will be its judgment and the latter, its order. It may issue both in the same document in which case the judgment as well as the order is embodied in the same document."

16. The judgment in the case of *Kothari Metals Ltd. (supra)* has no manner of application as rightly contended by Mr. Saraf. The question for consideration in that case was whether the application for refund made within 20 days of the reassessment under sub-section (4) of Section 17 should be heard on merits. The Division Bench directed that the application should be heard. The questions which arise for determination before us were not before the Division Bench in the case of *Kothari Metals Ltd. (supra)*. Therefore, any observation made in that judgment is of no use for the purpose of deciding the issue in this appeal.

17. For the aforesaid reasons, the order under challenge is set aside.

18. We, however, direct the proper officer to deliver the judgment within four weeks disclosing reasons for the order of reassessment passed under Sub-section (4) of Section 17 on 22nd June, 2011 and other similar orders in connection with five other or concerned shipping bills. Both the appeal and application are, thus, disposed of.