(2016) 03 MAD CK 0214

In the Madras High Court

Case No : W.A. No. 1577 of 2014 and M.P. No. 1 of 2014

Commr. of Cus. (Sea Port-Import), Chennai APPELLANT

Vs

City Office Equipments RESPONDENT

Date of Decision : 22-03-2016

Acts Referred:

Citation : (2016) 336 ELT 19

Hon'ble Judges : Satish K. Agnihotri and M. Venugopal, JJ.

Bench : Division Bench

Advocate : V. Sundareswaran, Advocate, for the Appellant; A.R.L. Sundaresan, Senior Counsel for M/s. N. Viswanathan, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Satish K. Agnihotri, J.—The instant intra-court appeal arises from the order of the learned Single Judge dated 8th October, 2014 passed in W.P. No. 16288 of 2014 [2015 (316) E.L.T. 199 (Mad.)].

2. The writ petitioner/respondent herein filed the writ petition, seeking direction to the appellants herein to assess and permit clearance of 129 units of second hand Digital Multifunction print and copying machines, forming the subject matter, vide Bill of Entry No. 5602113, dated 26th May, 2014 upon the payment of applicable duties of customs on the assessable value as determined by the competent authorities.

3. The learned Single Judge, recording the fact that with effect from 28th February, 2013, by virtue of the amendment to Paragraph 2.17, vide Notification No. 35 (RE-2012)/2009-2014, the second hand Digital Multifunction Print and Copying Machines had been notified as restricted goods importable only as against authorisation held as under :

"34. As I have stated earlier, the Customs Act, 1962, provides for provisional release. Even the Foreign Trade (Regulation) Rules, 1993 allows redemption of confiscated goods under Rule 17(2). No proceedings have been initiated by an authority competent in terms of the Hazardous Wastes Rules for directing the petitioner to re-export the goods. Therefore, the petitioner, in my considered view, is entitled to the release of the goods provisionally.

35. In view of the above, the writ petition is allowed, directing the respondents to assess and permit the provisional release of 129 units of second hand Digital Multifunction Print and Copying Machines, which form the subject matter of Bill of Entry No. 5602113, dated 26-5-2014, upon payment of applicable duties of customs, subject however to the eventual adjudication. The respondents shall release the goods, after assessing and collecting the customs duty and other charges, provisionally, within a period of four weeks from the date of receipt of a copy of this order. However, the proceedings in pursuance of the show cause notice can go on. No costs. Consequently, connected M.P. is closed."

Thus, this appeal by the Commissioner of Customs (Sea Port-Import), Chennai.

4. The gravamen of challenge is the notification, dated 28th February, 2013, where under the second hand digital multifunction print and copying machines are made as restricted goods importable only under authorisation. Indisputably, the respondent herein has not obtained any authorisation.

5. The question as to whether restricted goods, which are imported without authorisation, can be released on payment of customs duty pending adjudication before the Customs authorities, came up for consideration before a Division Bench of the Bombay High Court in Commissioner of Customs (AP), Mumbai v. Alfred Menezes, 2009 (242) E.L.T. 334 (Bom.) and it was held as under :

"4. It is, therefore, clear that insofar as the prohibited goods are concerned, there is discretion in the officer to release the confiscated goods in terms as set out therein. Insofar as other goods are concerned, the officer is bound to release the goods. In the instant case, we are concerned with prohibited goods. The officer has exercised his discretion. The Tribunal [2009 (236) E.L.T. 587 (Tri.-Mum.)] has upheld the order of the adjudicating officer."

6. A Division Bench of this Court in Commissioner of Customs, Tuticorin v. City Office Equipment, 2014 (302) E.L.T. 212 (Mad.), had taken a similar stand and held as under :

"23. It is no doubt true that in exercise of the powers conferred under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992, read with paragraph 2.1 of the Foreign Trade Policy, 2009-2014, under Notification No. 35 (RE-2012)/2009-2014, dated 28-2-2013, the Government had amended Para 2.17 of the Foreign Trade Policy that under the Head of "second hand goods", in the category of "second hand capital goods", import of (i) personal computers/ laptops, including their refurbished/reconditioned spares; (ii) photocopier machines/Digital multifunction print and copying machines; (iii) Air conditioners; and (iv) Diesel generating sets can be imported only as against authorisation. Taking the said amendment further, rightly, the Hand Book of Procedures (Vol. 1) omitted Clause 2.33. The amendment to the policy has no relevance to the import under consideration.

24. The Foreign Trade Policy and the procedure relevant to us is the one laid down in the policy covering the period 2009-2014. The amended Para 2.17 of the Policy and Hand Book of Procedures (Vol. 1) are relevant only for the period post 28-2-2013. Hence, by no stretch of imagination, the amendment under Notification No. 35 (RE-2012)/2009-2014, dated 28-2-2013 could be taken as having any relevance for the import made prior to 28-2-2013. Even though learned Assistant Solicitor General placed strong reliance on Notification No. 35 (RE-2012)/2009-2014, dated 28-2-2013 that it is a clarificatory amendment and hence will have relevance to the case on hand and that it is given under the hand of the Director General of Foreign Trade who has effected this notification, we fail to gather any such indication to read it so, particularly in the context of the powers conferred under Section 5 of the Foreign Trade (Development and Regulation) Act on the Government to make amendment to the policy. A comparative study of Notification No. 35 (RE-2012)/2009-2014, dated 28-2-2013 amending Para 2.17 of the Foreign Trade Policy and the provision that existed prior to 28-2-2013, show that the amended notification made the import policy regime as subject to an authorisation for import as against the original requirements viz., allowed to be imported only as per provisions of FTP, ITC (HS), HBP v1, Public Notice or an Authorisation issued for import of the specified second hand item. In the light of the amendment and the clear provision, we do not find any justifiable ground to accept the case of the appellants to interfere with the order of the learned single Judge. We have already held that there is no conflict between the policy and the procedure laid down. Read in the context of the choice laid down for compliance by an importer as spoken to in Para 2.17 of the policy, we have no hesitation in dismissing the appeal filed by the Director General of Foreign Trade."

and permitted the writ petitioners to take goods on furnishing a bond for the penalty.

7. It is also submitted that the Commissioners of other areas are permitting the release of goods on furnishing of bank guarantee and also payment of penalty on determination.

8. The learned Senior Counsel appearing for the respondent/writ petitioner has produced an order dated 21st May, 2015 passed in case of M/s. Skylark Office Machines, Chennai-600 006, wherein the old and used digital multifunction devices with standard accessories and attachments were imported without authorisation. The Joint Commissioner of Customs, Appraising Group V, Customs House, Kolkata, ordered as under :

"As the importer has no import license or authorisation for the clearance of the imported goods, I confiscate the goods valued at Rs. 23,83,359.00 under section 111(d) of the Customs Act, 1962. I however give the importer an option to redeem the said goods on payment of a fine under section 125 of Customs Act, 1962 of Rs. 4,10,000.00 (Rupees : Four Lakh Ten Thousand Only). I also impose a penalty of Rs. 1,80,000.00 (Rupees : One Lakh Eighty Thousand Only) on the importers under section 112(a) ibid on the offending goods as this is the 13th offence of the importer. Differential duty, fine and penalty to be paid forthwith."

9. Considering the facts from all angles, we do not find any infirmity in the order rendered by the learned Single Judge, wherein the appellants herein were directed to assess and permit the provisional release of 129 units of second hand digital multifunction print and copying machines, which form the subject matter of Bill of Entry No. 5602113, dated 26th May, 2014, upon payment of applicable duties of customs, however, the said release will be subject to final adjudication. The respondent is hereby further directed to furnish a bond, undertaking to pay the penalty as and if determined on proper adjudication. A show cause notice has been issued under Section 124 of the Customs Act, 1962 on 27th June, 2014. The respondent is granted two weeks time to furnish reply and participate in the consequential adjudication.

10. The Commissioners of different regions, namely, Kolkata, Mumbai, Delhi and Chennai are exercising their discretions inconsistently. Mumbai and Kolkata Commissioners are releasing the goods on deposit of customs duty and also on payment of fine under Section 125 of the Customs Act, 1962 in the identical facts, wherein the old and used digital multifunction devices with standard accessories and attachments are imported without authorisation. On the other hand, the Commissioner, Chennai is taking a contrary stand. Thus the inconsistent views while exercising discretion have led to indiscretion at the hands of the Commissioners, resulting in divergent orders being passed. It is well settled that exercise of discretion dehors proper guidelines may create sometimes discrimination and arbitrariness. As a sequitur, we are of the considered view that the Central authorities may consider issuance of proper guidelines to all Commissioners, dealing with the goods, which are imported without authorisation in respect of release of goods, subject to adjudication as contemplated under the provisions of law.

11. Resultantly, the writ appeal stands dismissed, upholding the order of the learned Single Judge. However, we direct that the respondent herein shall furnish a bond for making penalty, if any found imposable on adjudication along with the customs duty. No costs. Consequently connected miscellaneous petition is closed.

