(2016) 03 DEL CK 0294

In the Delhi High Court

Case No : Writ Petition (C) No. 1735 of 2016 and C.M. No. 7433 of 2016

Gillette India Ltd. APPELLANT

Vs

Commissioner of Customs RESPONDENT

Date of Decision : 09-03-2016

Acts Referred:

Citation : (2016) 338 ELT 711

Hon'ble Judges : S. Muralidhar and Vibhu Bakhru, JJ.

Bench : Division Bench

Advocate : Shri Jayant Mehta and Ms. Nattasha Garg, Advocates, for the Petitioner; Shri Satish Kumar, SSC, for the Respondent

Final Decision : Disposed Off

Judgement

1. The petitioner, Gillette India Ltd. (''GIL''), is before this Court aggrieved by the auction process initiated by the Department of Customs (''Department'') in respect of the goods imported by GIL under three Bills of Entry (''B/Es'').

2. GIL imported 1008 Power Tooth Brushes under B/E No. 5980646 (hereafter ''B/E No. 1''), dated 13th February, 2012 in a single consignment and warehoused the said consignment in a public bonded warehouse by executing a Warehousing Bond under Section 59 of the Customs Act, 1962 (''Act'').

3. GIL imported 300 Power Tooth Brushes under B/E No. 6029833, dated 17th February, 2012 (hereafter ''B/E No. 2'') and executed a warehousing bond in respect thereof under Section 59 of the Act.

4. The third consignment comprising (a) 76,800 units of Gillette Mach 3 Cartridges (b) 1,02,400 units of Gillette Mach 3 (c) 2,68,800 units of Gillette Mach 3 Cartridges (d) 30,720 units of Gillette Fusion Cartridges was imported by Bill of Entry No. 6568999 (hereafter ''B/E No. 3''), dated 17th April, 2012. This was warehoused in the public bonded warehouse for which a Warehousing Bond was executed by GIL under Section 59 of the Act. It is stated that a substantial portion of the said consignment was removed during the warehousing period.

However, one portion thereof containing 7680 pieces remained in the warehouse.

5. A request was made by the petitioner for extending the warehousing period under Section 61(1) of the Act in respect of the aforementioned B/Es. A personal hearing was granted to the petitioner on 20th December, 2013 by the Deputy Commissioner of Customs (''DC'') (Bond) in respect of BE Nos. 1 and 2.

6. An Order-in-Original dated 31st December, 2013 was passed in respect of B/E No. 1 confiscating the goods under Section 111 read with Section 111(d), (j) and (o) thereof. However, an option was given to GIL to redeem the goods confiscated by paying redemption fine of Rs. 25,000/- in terms of Section 125(1) of the Act within 30 days of the said order. The order made it clear that "in case the redemption fine is not paid within time, ownership of the goods will vest with the Central Government in terms of Section 126 of the Customs Act, 1962." It was further stated that after redemption of the goods, GIL would be allowed a one-time clearance of the goods, within 30 days of the receipt of the order, on payment of duty and interest at the applicable rates under Section 61(2) of the Act read with Section 72(b) of the Act thereof. Additionally, a penalty of Rs. 10,000/- was imposed under Section 112 of the Act.

7. As far as B/E No. 2 is concerned, a separate order of the same date was passed confiscating the goods and giving an option to GIL to redeem the goods on paying a redemption fine of Rs. 10,000/- under Section 125 of the Act within 30 days. A penalty of Rs. 5,000/- was levied under Section 112 of the Act.

8. It is not in dispute that the aforementioned two Orders-in-Original dated 31st December, 2013 were not challenged by the petitioner.

9. As far as B/E No. 3 is concerned, on 30th December, 2014 the DC (Bond) passed an order confiscating the goods, giving an option to GIL to redeem them on payment of redemption fine of Rs. 50,000/- within 30 days. It was further directed that after redemption of the goods, GIL would pay the customs duty amounting to Rs. 1,58,454/- assessed on the goods lying uncleared and interest thereon at the applicable rates under Section 61(2) read with Section 72(b) of the Act. A penalty of Rs. 15,000/- under Section 112 of the Act was also levied.

10. It is stated by GIL that the aforementioned order has been appealed against by GIL before the Commissioner of Customs (Appeals) (''CCA''). A copy of the memorandum of appeal along with an application for stay filed by the petitioner on 4th March, 2015 has been placed on record.

11. Mr. Satish Kumar, learned Senior Standing Counsel for the Department, states that the Department is yet to receive notice in the aforementioned appeal. Mr. Jayant Mehta, learned counsel for the petitioner, on the other hand states that he has no information as such on status of the appeal except to the extent that it is still pending before the CCA.

12. GIL states that in respect of the order passed with reference to B/E No. 1 it made payment of the duty, penalty, interest and redemption fine by a challan

dated 15th April, 2014 with a delay of 74 days from the expiry of last date of payment. It is however contended that if the period is calculated from the date that GIL received a copy of the said order, the delay in making payment worked out to 25 days.

13. GIL states that in respect of the order passed with reference to B/E No. 2 it made payment of the duty, penalty, interest and redemption fine by a challan dated 12th May, 2014 with a delay of 100 days, which if calculated from the date of receipt of the order worked out to 51 days.

14. On 25th July, 2014, GIL addressed a letter to the Commissioner of Customs seeking permission to clear the goods under B/E Nos. 1 and 2 in view of the aforementioned payments.

15. On 30th December, 2014, GIL addressed a letter to the DC (Bond) seeking permission for ex-bonding of the goods warehoused under B/E Nos. 1 and 2.

16. However on 11th February, 2016 an Internal Auction Catalogue was issued offering the goods confiscated under B/E Nos. 1, 2 and 3 for auction on 16th February, 2016. On 12th February, 2016, GIL addressed a letter to the DC (Bond) requesting that the said goods be withdrawn from the auction process. Not receiving a response to the said letter, the present writ petition was filed.

17. At the hearing on 29th February, 2016, the Court required Mr. Satish Kumar to inform the Court about the current status and in particular whether the goods in question have already been auctioned.

18. Today Mr. Satish Kumar produced before the Court a communication dated 8th March, 2016 addressed to him by the DC (Legal) stating that the goods confiscated under B/E Nos. 1, 2 and 3 were already been sold to the auction purchaser. However, it is clarified that the demand draft (DD) received from the auction purchaser is yet to be encashed and the goods are still lying with the Department. The above mentioned letter sets out in a tabular form, in respect of each of the B/Es, the duty, redemption fine, penalty and the interest as well as the amount for which the goods have been sold. It is clarified by Mr. Satish Kumar that the amount collected from the auction purchaser includes the duty, the redemption fine, penalty and interest as well as the amount for which the goods have been sold.

19. The principal contention of Mr. Jayant Mehta is that although the goods confiscated may have vested with the Central Government under Section 126 of the Act, that provision has to be read with Section 125 of the Act which gives the Department the right to recover such fine as the officer in charge of adjudging may think fit in lieu of confiscation of goods. It is contended that the Department cannot appropriate the goods and if the importer has already made payment of the duty, interest, penalty and redemption fine (although belatedly but prior to the date of auction), the Department cannot insist on recovering anything more by way of auction sale. He submits that as far as B/E Nos. 1 and 2 are concerned

even if an auction sale of the goods imported thereunder has taken place, the amount recovered by the Department, in excess of the duty, interest, penalty and redemption fine will have to be handed over to the importer. In support of this submission reliance is placed by Mr. Mehta on the decision of the Division Bench of this Court in MMTC v. Surjit Singh Kanda - 196 (2013) DLT 725 (DB) : 2016 (344) E.L.T. 55 (Del.).

20. As far as B/E No. 3 is concerned, it is submitted by Mr. Mehta that there is a Circular No. 711/4/2006, dated 14th February, 2006 issued by the Central Board of Excise and Customs (C.B.E. & C.) which mandates that where an appeal has been filed against an order of confiscation of goods and when such appeal is pending, the goods confiscated cannot be sold by public auction or in any other manner unless notice is issued to the owner of the goods. Further a reference is made to the decision in Kailash Ribbon Factory Ltd. v. Commissioner of Customs & Central Excise - 2002 (143) E.L.T. 60 (Del.), which mandates that confiscated goods which are the subject matter of an appeal before the Tribunal or Court "shall not be auctioned or disposed of without prior written permission or order from the concerned Tribunal or the Court." Therefore, as far as B/E No. 3 is concerned, it is urged that the auction held by the Department should be held to be invalid.

21. Having heard the learned counsel for the parties and having examined the judgment of this Court in MMTC v. Surjit Singh Kanda (supra), the Court is of the view that the position regarding the vesting of the confiscated goods in the Central Government under Section 126 of the Act, the constitutional validity of which is not challenged, requires detailed examination. The Court is of the view that the present factual situation where the importer has failed to make payment of the redemption fine, duty, interest and penalty within the time stipulated in the Order-in-Original, with such Order-in-Original not being challenged, was not present before the Court in MMTC v. Surjit Singh (supra).

22. The question that arises, therefore, is whether notwithstanding that an importer may not have made the payment of the redemption fine, duty, interest and penalty within the time stipulated in the order of confiscation of imported goods passed under Section 125 read with Section 126 of the Act, and which order has attained finality, but makes such payment belatedly and prior to the date of auction, the Central Government can recover, through the process of auction of such goods, only such amount as was due to it, viz., the customs duty, interest, penalty and redemption fine and any excess amount recovered by the Central Government has to be paid to the importer of the goods? This would in turn require an interpretation of the expression "vest in the Central Government" occurring in Section 126(1) of the Act. The Court is of the view that the decision of the coordinate Bench in MMTC v. Surjit Singh (supra), cannot be construed as an authoritative pronouncement on the above issue. Yet, since the said decision is being relied upon by GIL, the Court is of the view that the above issue and incidentally the correctness of the decision of this Court in MMTC v. Surjit Singh

(supra) would have to be considered by a Larger Bench.

23. It is stated that the decision of this Court in MMTC v. Surjit Singh (supra) is the subject matter of an appeal before the Supreme Court, being CA Nos. 165-166 of 2015. The Court has been shown a copy of the order dated 6th January, 2015 in SLP (C) Nos. 35999-36000 of 2013 by which leave was granted giving rise to the aforementioned appeals. By the said order and the interim relief granted earlier was directed to continue.

24. Consequently, as far as B/E Nos. 1 and 2 are concerned, the Court permits the Department to encash the DD deposited by the auction purchaser, release the goods imported thereunder to the auction purchaser and issue the requisite sale confirmation. This is subject to the Department abiding by the further directions that may be issued by the Court at the time of disposal of this petition. It is made clear that GIL would have no right to seek the return of the aforementioned goods that are handed over to the auction purchaser. The question whether the Department is required to pay GIL the amount recovered in excess of the duty, interest, penalty and redemption fine will be considered, and appropriate directions issued in that regard, by the Larger Bench while disposing of the petition.

25. As far as B/E No. 3 is concerned, the appeal preferred by GIL against the Order-in-Original dated 30th December, 2014 is stated to be pending before the CCA. In terms of the Circular No. 711/4/2006, dated 14th February, 2006 issued by the C.B.E. & C., the Department had to seek the permission of the CCA before proceeding with the auction. Accordingly, the Court directs status quo in respect of the auction of the confiscated goods covered by B/E No. 3 to be maintained till such time the CCA passes appropriate orders in relation thereto. The pending appeal shall be listed before the CCA peremptorily on 4th April, 2016 for that purpose. The CCA may consider issuing notice to the auction purchaser before passing further orders on this aspect.

26. To consider the issue as set out in Para 22 of this order, the petition be placed before the Hon''ble the Chief Justice for being listed before a Larger Bench on 29th April, 2016 at 2.15 pm.

27. Order dasti.

