
(2009) 12 BOM CK 0133

In the Bombay High Court

Case No : Writ Petition No. 10582 of 2009

GKN Sinter Metals Private Limited (formerly known as GKN
Sinter Metals Limited)

APPELLANT

Vs

Union of India (UOI) and The Dy. Commissioner of Customs

RESPONDENT

Date of Decision : 19-12-2009

Acts Referred:

Contempt of Courts Act, 1971 — Section 2
Customs Act, 1962 — Section 142

Citation : (2010) 112 BOMLR 529 : (2010) 172 ECR 89 : (2010) 249 ELT 481

Hon'ble Judges : V.C. Daga, J; J.P. Devadhar, J

Bench : Division Bench

Advocate : S.N. Kantawala, instructed by Mr. Brijesh Pathak, for the Appellant;
R.V. Desai and R.B. Pardeshi, for the Respondent

Judgement

J.P. Devadhar, J.—The only question raised in this petition is, whether the Customs authorities are justified in coercively collecting the customs duty demand with interest on the ground that the petitioner has not produced the export obligation discharge certificates ("EODC" for short) when, firstly the application for EODC filed by the petitioner are pending before DGFT and secondly the period of limitation for filing appeal before CESTAT against the order of Commissioner (Appeals) has not expired?

2. Since the above question is raised again and again, we admit the writ petition and take it up for final hearing by consent of both the parties.

3. The petitioner company manufactures automobile components. The petitioner had obtained several advance licenses from the Director General of Foreign Trade (DGFT for short) under which the petitioner could import raw materials duty free and the export the final product to the extent specified in the respective advance licences. Accordingly, under the said advance licences the petitioner had imported raw materials duty free and exported the resultant product manufactured by it.

4. During the period 2008-2009, four show cause notices were issued to the petitioner by the customs authorities and the Assistant Commissioner of Customs, Pune by four adjudication orders held that the petitioner was liable to pay the customs duty with interest on the duty free imports made under the advance licences, mainly on the ground that the petitioner has failed to produce the EODC to show that the export obligation has been fulfilled. The case of the petitioner was that the export obligation was fulfilled under several advance licenses and wherever the negligible quantity had remained to be fulfilled, the petitioner had paid the customs duty and applied for regularization and issuance of EODC by the DGFT and the same are pending. However, the above contentions were rejected and adjudication orders were passed under the Customs Act, 1962.

5. Challenging the aforesaid adjudication orders, the petitioner filed appeals before the Commissioner (Appeals) who by his orders dated 24-4-2009 and 16-11-2009 dismissed all the four appeals either on the ground of non compliance of pre-deposit order or on the ground of non production of EODC. The petitioner thereupon filed four appeals before CESTAT against the order of Commissioner (Appeals) with an application for stay on 4-7-2009 and 9-12-2009 respectively.

6. Even before the aforesaid stay applications could be heard, the Deputy Commissioner of Customs, Pune issued detention notices on 7-12-2009 seeking to recover from the petitioner the customs duty demand amounting to Rs. 3.57 crores determined under the aforesaid adjudication orders. In the said detention notice, it was stated that if the amount specified therein was not paid within 7 days, the goods detained shall be put to auction. In these circumstances, the petitioner was compelled to pay Rs. 3,57,66,672/- which was paid under protest by two cheques vide covering letter dated 9-12-2009. Thereafter, by letter dated 10-12-2009, the petitioner pointed out to the Chief Commissioner of Customs, Pune, the Commissioner of Customs, Pune and the Deputy Commissioner of Customs, Pimpri, Pune that the above amount was virtually extorted from the petitioner contrary to Board circular dated 2-6-1998 and called upon the respondents to forthwith return the amounts collected under two cheques on 9-12-2009. As no action was taken, the present writ petition is filed.

7. Mr. Kantawala, learned Counsel appearing on behalf of the petitioner submitted that the coercive action of the Customs authorities in seeking to recover the amount of customs duty during the pendency of the stay application is totally high-handed and contrary to the Board Circulars and the law laid down by this Court. In this connection, he relied upon the Board Circulars and the Judgments of this Court in the case of Mahindra and Mahindra Ltd. Vs. Union of India, , K.N. Guruwsami Oil Mills Limited v. Union of India reported in 2000 (12) E.L.T. 57 (Bom), Noble Asset Company Ltd. Vs. Union of India (UOI), , Castrol India Limited v. Union of India reported in 2007 (208) E.L.T. 490 (Bom.), Legrand (India) Private Limited v. Union of India reported in 2007 (216) E.L.T. 678 (Bom.) and a decision of the Andhra Pradesh High Court in the case of Lanco

Kondapalli Power Private Limited v. Union of India reported in 2009 (142) E.L.T. 340 (A.P.), Mr. Kantawala submitted that in view of the willful disobedience on the part of customs officers in disobeying the decisions of this Court, stern action be taken and further the respondents be directed to forthwith return the amount of Rs. 3,57,66,672/- illegally recovered from the petitioner with interest at such rate as this Court deems fit and proper.

8. Mr. R.V. Desai, learned Senior Advocate appearing on behalf of the respondents on the other hand submitted that although the decisions of this Court are binding on the respondents, in the present case, Mr. R. Sekar, Commissioner of Customs, Pune is of the opinion that the respondents are justified in recovering the amount from the petitioner, because, firstly, the CBEC Circular dated 2-6-1998 relied upon by the petitioner is applicable in respect of recovery of dues during the pendency of the stay application before the Commissioner (Appeals) and not before CESTAT, secondly, as per para 1.3, Part III, Chapter 18 of the Central Excise Manual, no coercive action can be taken during the pendency of the stay application only if the appeal filed before the CESTAT is the first stage appeal, whereas, in the present case, the appeal pending before the CESTAT is the second stage appeal. Thirdly, Mr. Desai relied upon the Circular No. 788 dated 25-5-2004, the relevant portion of which reads thus:

a) For cases where the appeals lie with the Commissioner (Appeals) and no stay application is filed along with the appeal, recovery proceedings may be initiated after 60 days from the date of communication of the order. In respect of Orders-In-Original of Commissioners where the first appeal lies with the Tribunal and no stay application is filed along with the appeal, the aforesaid time period would be 90 days.

b) Where conditional stay orders are issued specifying the time limit for fulfillment of the conditions but conditions are not fulfilled as per the directions of the Tribunal or Commissioner (Appeals), as the case may be, recovery proceedings should be initiated immediately after the lapse of the time period prescribed in the appellate stay order for fulfillment of the conditions.

Fourthly, Mr. Desai submitted that two appeals filed by the petitioner were dismissed on 24-4-2009 for non-compliance of pre-deposit order. In these circumstances, he submitted that the respondents were justified in taking coercive action against the petitioner.

9. In our opinion, the argument advanced on behalf of the respondents are wholly unsustainable. Way back in the year 1992, this Court in the case of Mahindra & Mahindra Limited (supra), has held thus:

4. In our opinion, it was highly improper on the part of the Collector and Assistant Collector to encash the bank guarantees before expiry of the statutory period of three months and in particular when petitioners had specifically informed that the stay application is fixed for hearing on 17th February 1992. Be

that as it may, we accordingly direct Respondents Nos. 2 and 3 to pay entire amount recovered by encashing bank guarantees to the petitioners within 10 days from today. On receipt of the said amount by the petitioners, they shall execute bank guarantee in favour of the Collector of Central Excise within two weeks thereafter. It is also made clear that until disposal of the stay application bank guarantee will continue and in the event if the Tribunal rejects the application for stay, the said order shall not be executed for a period of two weeks from the date of its service on the petitioners.

(emphasis supplied)

10. In the case of Noble Asset Company Limited (supra), this Court held that encashment of bank guarantee pending disposal of stay application before CESTAT is illegal. Similar view is taken in the case of Castrol India Limited (supra).

11. Again this Court in the case of Legrand (India) Private Limited (supra) after considering the Board Circular dated 25-5-2004 and various decisions of this Court as well as the Apex Court held thus:

9. From the above four decisions, the following prepositions emerge:

a) It is immaterial that in a previous litigation the particular petitioner before the Court was or was not a party, but if a law on a particular point has been laid down by the High Court, it must be followed by all authorities and tribunals in the State;

b) The law laid down by the High Court must be followed by all authorities and subordinate tribunals when it has been declared by the highest Court in the State and they cannot ignore it either in initiating proceedings or deciding on the rights involved in such a proceeding;

c) If inspite of the earlier exposition of law by the High Court having been pointed out and attention being pointedly drawn to that legal position, in utter disregard of that position, proceedings are initiated, it must be held to be a wilful disregard of the law laid down by the High Court and would amount to civil contempt as defined in Section 2(b) of the Contempt of Courts Act, 1971.

12. In the present case, it is not in dispute that the petitioner has fulfilled the export obligation substantially and wherever there is little short fall, the petitioner has sought regularization and issuance of EODC by offering to pay customs duty proportionately to that extent. In fact, advance licence No. 3110022667 has already been redeemed by DGFT, but still duty amounting to Rs. 56,72,534/- has been recovered under that advance licence (see page 56 of the Petition). Similarly, in respect of advance licence No. 3110006115, the export obligation fulfilled is to the extent of 94% and for the balance export obligation proportionate customs duty with interest has been paid and application for regularization and issuance of EODC is pending before DGFT (see page 56 of the petition). Similarly, in respect of other advance licences the export obligation has

been substantially complied with and for the balance the petitioner has offered to pay the proportionate customs duty with interest and application for regularization and issuance of EODC is pending before the DGFT. The fact that the matter is pending before DGFT is not disputed by the respondents. If there is delay in regularization and issuance of EODC by the DGFT, the customs authorities cannot penalise the petitioner by resorting to coercive action.

13. It is not the case of the respondents that the petitioner with a view to defeat the interests of the revenue was trying to dispose of the assets and, therefore, coercive action was necessitated. In fact, the specific case of the respondents is that the customs duty has been coercively collected u/s 142 of the Customs Act, 1962 read with the provisions of the Customs (Attachment of Property of Defaulters for recovery of Government dues) Rules, 1995, because the petitioner has not produced the EODC.

14. It is pertinent to note that neither Section 142 nor the 1995 Rules authorize recovery of customs duty even before the expiry of the statutory period of limitation for filing appeal before CESTAT. In the present case, admittedly, the appeal with stay application has been filed before CESTAT on 9-12-2009 against the order of Commissioner (Appeals) dated 16-11-2009. Statutory period of limitation for filing appeal against the order of Commissioner (Appeals) dated 16-11-2009 expires on 14-2-2010. Therefore, in the facts of the present case, where the export obligation has been substantially complied with and application for regularization on payment of proportionate customs duty with interest and issuance of EODC is pending before DGFT, coercively collecting the entire customs duty even before the expiry of the statutory period for filing appeal is wholly unjustified, especially when no case is made out for initiating coercive action against the petitioner.

15. In these circumstances, we are clearly of the opinion that coercively collecting the customs duty even though one of the advance licences is redeemed by DGFT and even though application for regularization and issuance of EODC in respect of other advance licences are pending before DGFT, is wholly unjustified. Moreover, the period for filing appeal and obtaining stay has not expired. Accordingly, we direct the respondents to return to the petitioner Rs. 2,85,47,277/- being the amount of customs duty coercively collected from the petitioner in respect of which the period of limitation for filing appeal against the order of Commissioner of Customs (Appeals) has not even expired.

16. As regards the validity of the coercive action even before the expiry of the period of limitation for filing appeal, it was contended that the decisions of this Court relate to first stage appeals before CESTAT and not the second stage appeal as in the present case. It is also contended that in spite of the decisions of this Court, in view of the Circular dated 25-5-2004, the respondents are justified in taking coercive action.

17. We are not impressed by these arguments. The Circular dated 25-5-2004 has

been considered by this Court in the case of Legrand (India) Private Limited (supra). At this juncture, we may place it on record that at the request of Mr. Desai time was granted to take fresh instructions in the matter. Mr. Desai, after taking instructions from Mr. R. Sekar, Commissioner of Customs, Pune reiterated and emphasised his stand and invited a reasoned order. In the circumstances, we are left with no other alternative but to ink the same.

18. In our prima facie opinion, coercively collecting customs duty in spite of redemption certificate issued by DGFT in respect of one advance licence and in spite of pendency of the application for regularization and issuance of EODC in respect of other licences and even before the expiry of the period of limitation for filing appeal before CESTAT is highly improper and contrary to the decisions of this Court.

19. Accordingly, we allow the writ petition by directing the respondents to return the amount of Rs. 2,85,47,277/- with interest at the rate of 6% per annum illegally collected from the petitioner from the date of realisation till payment.

20. We further direct the registry to issue show-cause notice to Shri R. Sekar, Commissioner of Customs, Pune to show cause as to why action should not be taken against him under the Contempt of Courts Act, 1971 for coercively collecting the customs duty and retaining the same in spite of the fact that the DGFT has granted redemption certificate in respect of one of the advance licence and in respect of the remaining licence the applications are pending before the DGFT and in spite of various decisions of this Court brought to the notice of the customs authorities. Notice be made returnable after eight weeks.

21. The writ petition is disposed of in the above terms with no order as to costs.