(2016) 06 P&H CK 0072

In the Punjab And Haryana At Chandigarh

Case No : C.W.P. No. 12517 of 2016

Horizon Ferro Alloys Pvt. Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 21-06-2016

Acts Referred:

Citation : (2016) 340 ELT 27

Hon'ble Judges : M. Jeyapaul and Harinder Singh Sidhu, JJ.

Bench : Division Bench

Advocate : S/Shri Sujay, N. Kantawala with Pankaj Bali, Advocates, for the Petitioner; S/Shri V.K. Kaushal and Kamal Sehgal, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

M. Jeyapaul, J.—Reply was filed.

2. Heard the submissions made by learned counsel appearing for the writ petitioners and the learned counsel appearing for the respondents.

3. The first grievance raised in the petition revolves around interpretation of Section 4 (2) of the Code. It is contention of the petitioners that the

respondents are not following the procedure prescribed under Sections 154, 157, 167, 172 and 177 of the Code, despite absence of any

provision inconsistent with the same in the Act. Several orders granting interim protection pending decision on this very issue are already placed on

record and referred in the earlier Order dated 13-6-2016. Without prejudice to their contentions on this legal issue, the petitioners have joined the

investigations being conducted by the DRI in respect of seizure of Cigarettes and restricted R-22 Gas, which were admittedly imported by the

petitioner company by concealment in aluminium scrap and mis-declaration of material particulars in the three Bills of Entry filed at ICD at

Ludhiana. The alleged offence is a ""cognisable"" offence in terms of Section 104 (4) of the Customs Act, 1962.

4. The petitioner company has admitted mis-declaration in these three Bills of Entry and is willing to pay the differential duty on the Cigarettes for

seeking its provisional release, and is willing to resort to statutory route of self-surrender by invoking jurisdiction of Settlement Commission for

settlement of case at once upon issuance of show cause cum demand notice in respect of these three Bills of Entry. The Settlement Commission is

statutorily empowered to grant immunities from penalty, fine and prosecution under the Customs Act, 1962. Moreover, even otherwise the alleged

offence is a compoundable offence.

5. It is submitted that although the R-22 Gas is a ''restricted'' item for import, and the goods Cigarettes and the R-22 Gas were imported by

concealment, however, none of these goods are expressly notified as ''prohibited'' for importation. Imported Goods can only be seized under

Section 110 of the Act, when there exists a reasonable belief that the same are liable to confiscation under Section 111. In respect of such goods

even if the same are confiscated upon culmination of adjudication under Section 28 read with 124 of the Act, the owner/importer ''shall'' be given

an option to redeem the goods on payment of redemption fine in terms of Section 125 of the Act. Section 110A of the Act provides for

provisional release of seized goods even pending adjudication. The petitioner company relies upon the Order dated 4-8-2015 of the Customs,

Excise and Service Tax Appellate Tribunal in the matter of Bhargav B. Patel Mum reported in 2015-TIOL-1951-CESTAT-Mum, which is in

the context of Section 125 of the Act. In Para 11 thereof, it was held that under Section 125 of the Customs Act, unless the importation or

exportation of goods is expressly ""prohibited"", the adjudication authority is obliged to offer to the owner of the goods an option to pay fine in lieu

of confiscation. The Tribunal referred to Union of India v. Asian Food Industries, 2006 (204) E.L.T. 8 (S.C.), wherein the Hon''ble Apex

Court inter alia observed that the meaning of word ""prohibited"" will have to be construed in regard to the text and context in which it is used and

the words prohibition, restriction and regulation are meant to be applied differently. The Tribunal also observed that in the context of Section

111(d) or 113(d), in several precedents, the definition of ''prohibited goods'' as contained in Section 2 (33) of the Customs Act, 1962 has been

applied liberally, including in Om Parkash Bhatia v. Union of India, 2003 (155) E.L.T. 423 (S.C.) and Sheikh Mohd. Omer v. Collector,

1983 (13) E.L.T. 1439 (S.C.). However, the issue, whether in the context of Section 125, the definition of ''prohibited goods'' under Section 2

(33) is applicable or not, was neither raised nor determined in these precedents. The Tribunal also relied upon settled principles of statutory

interpretation as held in Ramesh Mehta v. Sanwal Chand Singhvi, (2004) 5 SCC 409 for ascertaining the scope of words ''unless the context

otherwise requires'' appearing in Section 2 (33) for application of the definition of ''prohibited goods'', and rightly held that the liberal definition of

Section 2 (33) which is applied in the context of Section 111 or 113 cannot be applied in the context of Section 125. The Tribunal relied upon the

judgment of Hon''ble Andhra Pradesh High Court in Shaik Jamal Basha v. GOI, 1997 (91) E.L.T. 277 (A.P.), wherein after considering both

Section 111 as well as scheme of Section 125 in a case of concealment the High Court was pleased to hold that attempt to import gold un-

authorisedly will come under the second part of Section 125 (1) of the Act where the adjudging officer is under mandatory duty to give option to

the person found guilty to pay fine in lieu of confiscation. Section 125 of the Act leaves option to the officer to grant the benefit or not so far as

goods whose import is ''prohibited'' but no such option is available in respect of goods which can be imported, but because of the method of

importation adopted, become liable for confiscation. Hon''ble Madras High Court in T. Elavarasan, 2011 (266) E.L.T. 167 (Mad.), was

pleased to rely on the said judgment of Hon''ble Andhra Pradesh High Court and held that an option has to be given to the petitioner to pay the

applicable customs duty and the redemption fine and to get the gold jewellery released, as per Section 125 of the Customs Act, 1962. In the

context of Section 125 if the word ""prohibited"" is construed as to apply in respect of every violation of any regulation or restriction or statutory

procedural requirement, the word ''shall'' in said Section would be rendered redundant and meaningless. If the definition of ''prohibited goods'' is applied in the context of Section 125, it would result in absurdity rendering the word ''shall'' redundant and otiose, because there cannot be any

situation where the goods would be liable to confiscation under Sections 111 and 113 as the case may be without there being any violation of the

provisions under the Customs Act, 1962 or under any other law or rules, regulations made thereunder. Therefore, in the context of statutory

provisions of Section 125, so as to give a meaningful application to both words ''may'' and ''shall'' used in the said Section, the definition of

''prohibited goods'' is inapplicable by application of settled principles of statutory interpretation. The Tribunal was therefore correct in observing

that under Section 125 of the Customs Act, unless the importation or exportation of goods is expressly ""prohibited"" the adjudication authority

would be obliged to offer to the owner the goods an option to pay fine in lieu of confiscation.

6. In the instant case the Cigarettes and restricted R-22 Gas were admittedly imported by concealment. None of the two goods are expressly

prohibited"" for importation. Therefore, ultimately the petitioner company who is owner as well as importer would be entitled for an option to

redeem the goods even upon adjudication. In such case, Section 110A concerning provisional release would be applicable.

7. In the instant case, the stand taken on behalf of DRI was that the goods which according to their own estimate have local market value of Rs. 10

crores would be absolutely confiscated and would have to be burnt or destroyed, and that such cases of fraud cannot be settled by the Settlement

Commission. On behalf of DRI objection was raised even on territorial jurisdiction of this Court in respect of the matter. However, since the place

of importation is at Ludhiana where the declaration was filed, we see no merit in this objection. The learned Counsel appearing for the petitioners

has shown us an order passed by the Settlement Commission in the matter of Mohammed Irfan Khwajamiya Shaikh, 2006 (204) E.L.T. 637,

granting complete immunity from prosecution and settling the case against adjustment of duty, fine and penalty where Cigarettes were illegally

imported by concealing them among Radio Cassette Recorders. Therefore, even other objections are without merits.

8. It was further stated on behalf of DRI that so far as payment of duty or provisional release is concerned, the same is to be determined or

decided by the Commissioner of Customs at Ludhiana. The Commissioner of Customs (Preventive), Amritsar who holds the charge of

Commissioner of Customs at Ludhiana, has filed a short affidavit inter alia taking a different stand that assessment/determination of duty would

have to be done by DRI after issuing a notice under Section 28. As per this affidavit, DRI is proper officer and such notice under Section 28

would have to be adjudicated in accordance with law before asking to pay the duty. Thus, although the petitioner company has shown willingness

to pay duty evaded for provisional release, both these respondents have taken contrary stand regarding who amongst them would have to

determine the duty, i.e., would be the adjudicating authority. In such peculiar circumstances, we find it just and expedient to entertain the request of

the petitioner company for considering conditional provisional release of the seized Cigarettes instead of relegating the petitioner company to the

respondents for deciding this issue of provisional release of seized Cigarettes which are perishable in nature.

9. The respondents have doubted the genuineness of the invoices submitted by the petitioner company under affidavit before this Court.

10. In the affidavit of the Commissioner of Customs, the total Customs Duty chargeable on total 900 cartons as per these three invoices is

computed at Rs. 6,21,14,598/-. The petitioner company is willing to make payment of this computed differential duty on provisional basis in three

instalments for seeking provisional release of seized Cigarettes imported under each of the three consignments.

11. Whereas the local market value of the seized Cigarettes is ascertained by the DRI as evident from the Panchnama, but no assessable value for

the purpose of arriving at duty liability is proposed either in the remand application or before this Court. The Local market value would be inclusive

of duties and taxes, etc. The invoices submitted before the Court under affidavit cannot be brushed aside.

12. We therefore, find it reasonable to permit provisional release of the seized Cigarettes on submission of a bond for total Rs. 6,21,14,598/-

indemnifying respondent Commissioner at Ludhiana for making good all the liabilities that may arise under the Act in respect of the goods imported

under the three Bills of Entry, with the following further conditions -

(a) The petitioner company is permitted to pay within one week from the date of this Order, the differential duty in respect of 300 cartons of

cigarettes admittedly imported by concealment vide Bill of Entry No. 4785466, dated 4-4-2016. Upon making such payment the said seized 300

cartons of cigarettes shall be released on provisional basis within 48 hours;

(b) Within 10 days thereafter, the petitioner company would deposit the differential duty in respect of 300 cartons of cigarettes admittedly

imported by concealment vide Bill of Entry No. 4308262, dated 19-2-2016. Upon making such payment the said seized 300 cartons of cigarettes

shall be released on provisional basis within 48 hours;

(c) Within 10 days thereafter, the petitioner company would deposit the differential duty in respect of 300 cartons of cigarettes admittedly imported

by concealment vide Bill of Entry No. 4410560, dated 27-2-2016. Upon making such payment the balance seized cartons of cigarettes shall be

released on provisional basis within 48 hours.

(d) After release of the seized goods, the petitioner company shall affix labels containing the mandatory warnings on the packages so released on

provisional basis before selling the same in market.

13. Although the petitioners have raised a substantial question of law regarding applicability of Section 4 (2) of the Code, which has prima facie

merits. However, since the petitioners have shown their willingness to adopt the route of settlement and to discharge their duty liability even before

issuance of notice under Section 28, we deem it appropriate to dispose of the petition at this stage with following directions -

(a) The petitioners would cooperate in investigations and would appear as and when summoned. The respondent DRI would permit the presence

of an advocate at visible but not audible distance during interrogation as well as recording of statement which shall be permitted to be recorded in

petitioner''s own handwriting during reasonable office hours;

(b) The respondent DRI shall issue a notice in respect of the aforesaid three Bills of Entry under Section 28 read with 124 of the Customs Act,

1962 within four weeks from the date of this Order;

(c) The petitioners would have to file their application for settlement of case not later than four weeks from the date of receipt of such notice;

(d) Settlement Commission would be free to decide all issues in respect of the said three Bills of Entry in accordance with law including release of

R-22 gas.

(e) No coercive steps prejudicing personal liberty would be taken against the petitioners on either punitive or preventive basis in relation to the

above case.

(f) In the event the petitioner company fails to make payment of duty as aforesaid for provisional release the respondents would be at liberty to

move for vacation of the protection granted to the petitioners.

14. With the above directions the writ petition is disposed of while keeping open for the petitioners to raise the legal issue regarding applicability of

Section 4 (2) of the Code, if so required.

