(2015) 02 KL CK 0253

In the High Court Of Kerala

Case No : WP (C) Nos. 29077 of 2006, 14472 of 2007 and 7065 of 2011

Kerala Hotels Pvt. Ltd. APPELLANT

Vs

Commissioner of Customs RESPONDENT

Date of Decision : 11-02-2015

Acts Referred:
Customs Act, 1962 — Section 112, 114A, 28

Citation : (2015) 323 ELT 743

Hon'ble Judges : K. Surendra Mohan, J

Bench : Single Bench

Advocate : D.S. Sreekumaran and T.S. Maya, Rekha Nair and K. Reena, for the Appellant; P. Nagaresh, Assistant Solicitor and Thomas Mathew Nellimoottil, SC, Advocates for the Respondent

Judgement

K. Surendra Mohan, J—The petitioner is a Private Limited Company engaged in the hotel business. They have two hotels one at Thiruvananthapuram and the other at Kuttalam. Under the Central Government Foreign Trade Policy, the Government decided to facilitate technological and infrastructural upgradation for the purpose of attaining internationally accepted standards of productivity. With the said object in view the Government decided to grant licences for the import of capital goods for use in manufacturing items for export and also to service sectors to develop infrastructure and quality of service with the object of earning more foreign exchange. To achieve the above objective it has been proposed to promote concessional rate of customs duty against bank guarantee or bond for import of certain articles. Under the scheme, the second respondent is the highest authority to issue licences and to regulate and control the import of capital goods in actual user condition. The petitioner being engaged in the hotel industry had sought permission for import of two cars. Permission was granted to the petitioner and the petitioner accordingly imported two cars manufactured by Mercedez Benz of Germany. The first car was imported on 17-2-2003 and the other on 19-6-2004. The applications submitted by the petitioner are Exts. P1 and P1(a) respectively. The motor cars were imported for providing service to hotel industry and earning foreign exchange. The licences issued to the petitioner are Exts. P2 and P2(a). It is the case of the petitioner that, as per the terms of the import the petitioner was to earn foreign exchange worth US $ 4,84,570 which is five times the value of the capital goods on FOB basis imported as per Ext. P2. The foreign exchange was to be earned within a period of eight years. Under Ext. P2(a), the required foreign currency expected is fixed at US $ 3,74,653. The petitioner executed a bank guarantee to the extent of 95% of the normal customs duty that was expected to be earned. The copies of the bank guarantee are Exts. P3 and P3(a) in WPC 29077/2006. Accordingly the cars were imported and were being used by the petitioner pursuant to installation certificates Exts. P4 and P4(a). While so, by Ext. P5 notification dated 14-6-2006 the Government of India notified that the vehicle so imported would have to be registered as a tourist vehicle. Thereupon, the second respondent required the petitioner to submit his Export Promotion Capital Goods (EPCG) licence for making necessary endorsements regarding the registration of the car as a tourist car. The petitioner objected to the same explaining that the notification had no retrospective effect and that for the said reason it was not necessary for the petitioner''s vehicles to be registered as tourist vehicles. Under protest, the petitioner produced his licence and an endorsement was made thereon to register the vehicle as a tourist taxi. In the meantime, the petitioner was served with a detention order Ext. P7 in respect of his vehicle and a restraint order Ext. P8. Since the said orders prevented the petitioner from using the vehicle for the purposes for which they were imported the petitioner approached this Court by filing WPC 29077/2006. The writ petition was admitted and an interim order of stay was granted on 7-11-2006. The said order continues to be in force till date.

2. WPC 14472/2007 has been filed by the petitioner challenging Ext. P12 show cause notice which according to him, is not warranted, in the face of the interim order passed by this Court in the earlier writ petition. As per Ext. P12, it has been alleged that the petitioner was guilty of violations of the conditions subject to which the vehicles were imported and therefore, he has been directed to show cause why the imported cars should not be confiscated, why the bank guarantees should not be enforced, why interest should not be recovered under Section 28 of the Customs Act, 1962, why penalty should not be imposed under Section 112 of the Customs Act, 1962, why penalty should not be imposed on the petitioner in his personal capacity under Section 114A/112 of the Customs Act, 1962 and failing which, action was proposed to be pursued as notified. The petitioner has sought for the issue of appropriate directions, quashing Ext. P12. The said writ petition was admitted on 24-5-2007 and an order of interim stay granted in the case continues to be in force.

3. While so, action was initiated to enforce the bank guarantees that were furnished by the petitioner by addressing the Canara Bank directly. The said proceedings, dated 22-2-2011 (Ext. P11) is the subject matter of challenge in WPC 7065/2011. In the said writ petition the petitioner sought for the issue of appropriate orders quashing Ext. P11.

4. In all the three writ petitions separate counter affidavits have been filed. I have heard Adv. D.S. Sreekumaran who appears for the petitioner in all the writ petitions as well as Adv. Thomas Mathew Nellimoottil who appears for the respondents and Adv. Pauly Mathew Muricken who appears for the fifth respondent Bank in WPC 7065/2011.

5. According to the counsel for the petitioner, the vehicle in question was imported in the year 2003 and 2004 respectively. The notification Ext. P5 that is relied upon has no retrospective operation. The motor vehicles had been imported and were being used by the petitioner pursuant to installation permits Exts. P4 and P4(a) in WPC 29077/2006. Therefore, the vehicles that were already registered and were being put to use for the purpose for which they were imported could not be subject matter of the change that has been introduced by Ext. P5. It is also pointed out that as per Rule 82 of Central Motor Vehicle Rules, a motor vehicle that is more than two years old is not permitted to be registered as a tourist vehicle. Therefore, the petitioner''s vehicles are entitled to be exempted from the stipulation contained in Ext. P5. According to the petitioner, he has earned more than the amount of foreign exchange that has been stipulated in Exts. P2 and P2(a) by putting the imported cars for use in the hotel industry itself. Therefore, there are absolutely no grounds for initiating the action as per Exts. P7, P8 and P10 in WPC 29077/2006, Ext. P12 in WPC 14472/2007 and Ext. P11 in WPC 7065/2011. The counsel therefore seeks the issue of appropriate orders quashing the said proceedings.

6. According to Mr. Thomas Mathew Nellimootil, Senior Standing Counsel for Central Board of Excise and Customs, these writ petitions are premature. No action prejudicial to the interests of the petitioner has been initiated by the respondents so far. Though it is true that Exts. P7 and P8 have been issued restraining the use of the motor cars they are intended only to safeguard the assets and to preserve them intact. Ext. P10 in WPC 29077/06 is only a summons issued to the petitioner to appear. He has not responded to the same. Ext. P12 in WPC 14472/2007 is only a show cause notice. It was only because the petitioner had not responded to the said notice, Ext. P11 in WPC 7065/2011 was issued proposing to encash the bank guarantees furnished by him. The counsel also contends that the foreign exchange that was stipulated as a condition for import was to be earned by use of the imported vehicle alone. The petitioner has not been able to show that he had earned the stipulated amount of foreign exchange from the use of motor vehicle itself. It is alleged that he had clubbed the foreign exchange earned from other activities also to contend that he had complied with the stipulation contained in Exts. P2 and P2(a). For the above reason, according to the counsel, the petitioner is not entitled to any of the reliefs claimed.

7. Heard. I notice that as per Exts. P2 and P2(a) the petitioner had been permitted to import two motor cars, subject to the conditions stipulated therein. The allegation of the respondents is that, the petitioner has not complied with

the conditions that formed the subject matter of such import and a concessional rate of customs duty. There is also an incidental question that is pressed by the counsel for the respondents, whether the petitioner is entitled to club his foreign exchange earnings from all sources for the purposes of satisfying the requirements of Exts. P2 and P2(a) or whether the entire foreign exchange earnings stipulated by the said proceedings would have to be confined to the use of the motor vehicles alone.

8. The question as to whether the petitioner has satisfied the requirements of Exts. P2 and P2(a) has to be decided by the second respondent, the Joint Director of Foreign Trade, Trivandrum who is in a position to access the records maintained by the petitioner in this connection also. Since no such determination has taken place, I am of the view that in the first instance it is necessary for such a determination to be conducted. It is for the said purpose that, Ext. P10 in WPC 29077/2006 and P12 WPC 14472/07 were issued. It is for the petitioner to respond to the said communications and to put forward his contentions, supported by all necessary documents before the second respondent. It is for the second respondent to thereafter consider the contentions of the petitioner also and to take a decision in the matter. The petitioner would be entitled to challenge any such decision before the appropriate authority if the same is against him. Since no final decision has been taken yet, I am not satisfied that it is necessary to set aside the impugned orders in these writ petitions, WPC 29077/2006 and 14772/2007.

9. With respect to the impugned order in WPC 7065/2011 which is Ext. P11 by which, the bank guarantees furnished by the petitioner are sought to be encashed, I do not find any justification. The bank guarantees can be encashed only after a proper determination of the issues that I have referred to in the earlier portion of this judgment. Until a quantification is made and the petitioner is found to be liable for some amount there is no justification for the issue of Ext. P11. Therefore Ext. P11 is unsustainable and is set aside. These writ petitions are accordingly disposed of with the following directions:--

"(i) The second respondent in WPC 29077/2006 is directed to consider the explanation of the petitioner to Ext. P12 show cause notice, which shall be submitted by the petitioner within a period of one month of the date of receipt of a copy of this judgment, with supporting documents if any. The second respondent shall consider the explanation and the material or evidence that may be produced by the petitioner in support of his contentions and shall decide whether any further action is necessary to be pursued on the basis of Ext. P12 show cause notice. Such decision shall be taken, as expeditiously as possible and at any rate within a period of two months of the date of receipt of the petitioner''s explanation to the show cause notice. Further action in the matter shall be pursued only after passing an order in accordance with the above direction.

(ii) WPC 7065/2011 is allowed. Ext. P11 is set aside.

(iii) The interim order granted in this case shall continue to be in force until a decision is taken by the Joint Director of Foreign Trade in accordance with the above direction."

