(2016) 04 GUJ CK 0039

In the Gujarat High Court

Case No : Special Civil Application No. 12494 of 2015 with SCA Nos. 12495-12496 of 2015

Kush Gems Pvt. Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 06-04-2016

Acts Referred:

Citation : (2016) 336 ELT 204

Hon'ble Judges : Akil Kureshi and A.Y. Kogje, JJ.

Bench : Division Bench

Advocate : Paresh M. Dave, Advocate, for the Petitioner; Hriday Buch, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Akil Kureshi, J.(Common Oral)—These petitions arise in common factual background and they have been heard together and would be disposed of by this common order. For convenience, we may record facts arising in Special Civil Application No. 12494 of 2015.

2. The petitioners are private limited company and its directors. The Customs Department had issued show cause notice for confiscation of goods and for imposition of penalties under the Customs Act, 1962 on the company as well as on the concerned director. This show cause notice culminated into an order-in-original being passed by the Additional Commissioner of Customs, Ahmedabad, in which, he, inter alia, directed as under :

"102. In the case of M/s. Kush Gems P. Ltd., holder of ICE5210018482 and Shri Nilesh Keda (de facto owner of the said goods), I hereby pass the following order :

(i) With regard to the import of 1 consignment of rough diamonds (containing total 3 packets) totally weighing 975.180 carats presented for import under Bill of entry no. 8816, dated 18-1-2013. I hereby re-determine at US $ 2,50,769.60

and compute assessable value as Rs. 1,39,93,571/- and hereby reject the value of US $ 8,63,680.20 declared by them, under Section 14 of Customs Act, 1962 read with Customs Valuation (Determination of value of the imported goods) Rules, 2007.

(ii) I hereby order the confiscation of 975.180 carats of rough diamonds of foreign origin totally valued at US $ 2,50,769.60 (re-determined value) and having re-determined assessable value INR 1,39,93,571/-, under Section 111(m) of the Customs Act, 1962. However, as the goods have already been released provisionally and as they are not prohibited goods, I hereby give the owner option to pay redemption fine of Rs. 32,61,000/-(Rupees thirty two lac, sixty one thousand only) under Section 125 of Customs Act, 1962. If the noticees exercise this option, then the Bank Guarantee (B.G.) of Rs. 32,61,000/- against Inv. No. 83/15-3-2012, already furnished by them may be appropriated against this option.

(iii) I impose penalty of Rs. 70,00,000/- (Rupees seventy lac only) under Section 112 on M/s. Kush Gems P. Ltd.

(iv) I impose penalty of Rs. 70,00,000/- (Rupees seventy lac only) under Section 112 on Shri Naresh Mehta, Director of M/s. Kush Gems P. Ltd."

3. Thus, the adjudicating authority ordered confiscation of the seized rough diamonds. However, by the time he passed the order, the diamonds were already provisionally released. He ordered redemption fine of Rs. 32.61 lacs on the petitioners, and directed that the bank guarantee of Rs. 32.61 lacs furnished by the petitioners may be appropriated against such redemption fine. Additionally, there were also fines imposed on the company as well as to the Directors.

4. The petitioners challenged such order of adjudicating authority before the appellate authority. The appellate authority allowed the appeal in part and disposed of the same as under :

"28. In view of my above discussion, the appeals are partly allowed and accordingly, I modify the order of the adjudicating authority in respect of fine and penalty as under, in the interest of justice :

Sl. No.

Appeal No.

Name of Appellant

Modification done

Redemption fine imposed

Penalty imposed

1

2

3

4

5

1

182/14

M/s. James Diamond Private Limited

6,41,100.00 (Rs. Six Lac Forty One Thousand One Hundred only)

13,00,000.00 (Rs. thirteen lac only)

2

183/14

Shri Rajesh Kumar Shah, Director, M/s. James Diamond Private Limited

--

1,30,000,.00 (Rs. one lac thirty thousand only)

3

184/14

M/s. Kush Gems Private Limited

3,26,100.00 (Rs. Three Lac Twenty Six Thousand One Hundred only)

7,00,000.00 (Rs. seven lac only)

4

185/14

Shri Naresh Mehta, Director, M/s. Kush Gems Private Limited

--

70,000.00 (Rs. seventy thousand only)

5

180/14

M/s. Designer Trading Private Limited

3,19,600.00 (Rs. Three Lac Nineteen Thousand Six Hundred only)

7,00,000.00 (Rs. seven lac only)

6

181/14

Shri Ranjit Singh, Director, M/s. Designer Trading Private Limited

--

70,000.00 (Rs. seventy thousand only)

7

179/14

Shri Nileshkumar M. Keda

--

10,00,000.00 (Rs. ten lac only)

8

186/14

Shri Punabhai Vallabhbhai Patel, Proprietor, M/s. Satnam Impex

--

10,00,000.00 (Rs. ten lac only)

29. On payment of redemption fine and penalty if any, (7.5% penalty already paid by them as pre-deposit for filing appeal), B.G. (Bank Guarantee) given at the time of provisional release of diamonds may be returned to the concerned appellants and Bond so executed may be cancelled."

5. In terms of Para No. 29 of the appellate order therefore, upon payment of redemption fine and the penalty if any, inclusive of 7.5% of the penalty amount already deposited by the petitioners by way of pre-deposit at the time of filing appeal, the bank guarantees given by the petitioners at the time of provisional release of the goods would be returned to them.

6. Contending that in the appellate order, the authority mistakenly linked the payment of penalty for release of the bank guarantees and cancellation of the bonds, the petitioner filed a rectification application dated 31-3-2015. In such application, it was contended that the addition of words "and penalty if any" was a mere typographical error and therefore, be deleted from the operative portion of the order. This application came to be dismissed by the appellate authority vide impugned order dated 5-5-2015, in which, he held that having passed and signed the order he has become functus officio. It was thereafter not open for him to make any change which was other than typographical errors. In the concluding portion, he observed as under :

"3. Here in the present case also, a final order is passed by this authority for payment of redemption fine and penalty if any, and removal of words "and penalty" may not be termed as clerical or arithmetical or typographical mistake but removal of condition of penalty may be termed as significant change in the order in view of the Law Ministry?s opinion and the CBEC circular dated 16-12-1999. Therefore, while agreeing that redemption fine imposed in lieu of confiscation of goods may not have relation with penalty imposed for offence committed by the appellants; this authority is now functus officio after signing the order. The appellants may take recourse to legal remedies available to them in law against the final order passed by this authority."

7. Learned counsel Shri Paritosh Gupta for the petitioner submitted that there was no connection whatsoever between the penalties and the bank guarantee and the bonds for provisional release of the goods. Even the adjudicating authority had not related the two different elements. The Appellate Authority therefore, committed a serious error in relating the penalties with release of the bank guarantees and cancellation of the bonds. Under Section 154 of the Customs Act, 1962, the Appellate Authority had the power of rectification. The Appellate Authority also agreed that it was a mere error despite which he refused to exercise its power of rectification. He submitted that the petitioners have already preferred appeal before the Central Excise and Sales Tax Appellate Tribunal, against the order of the appellate authority to the extent it is adverse to the petitioners and such appeal is pending.

8. On the other hand, learned counsel Shri Buch for the department submitted that when the appeal of the petitioners is pending before the Tribunal, interference by this Court should not be made.

9. Insofar as the Appellate Authority?s view expressed in the order dated 5-5-2015, that it is not a mere typographical error, we are prepared to concur. However, the powers of rectification flowing from Section 154 of the Customs Act, 1962, are not convened to correct mere typographical error. If there is any error apparent on the face of the record which requires rectification, it is always open for the authorities to exercise such powers. We are mindful of catena of decisions that in the guise of rectification, the power of review which do not vest in the authority, cannot be exercised. Be that as it may, when we have peruse the original order passed by the adjudicating authority, in which the redemption fine and personal penalties were imposed. Clearly, the bank guarantees and bonds were to be executed by the petitioners for provisional release of the goods. This provisional release was substituted by confiscation and redemption fine. If therefore, the petitioners pay such redemption fine, they should be entitled to return of the bank guarantees and cancellation of the bonds. The redemption fine and the penalties having been modified by the Appellate Authority, direction ought to have been given for return of the bank guarantee and cancellation of the bonds upon the petitioners depositing substituted redemption fine. Linking the return of the bank guarantee and the cancellation of bond to the penalties, was either done wholly through oversight or at any rate without legal justification. In either case, we would strike down that portion of the appellate order and permit the petitioners to pursue their pending appeal

before the Tribunal for the rest of the grievances.

10. In the result, the petitions are disposed of with a direction that in the appellate order dated 23-3-2015 in Para 29, following words "and penalty if any, (7.5% penalty already paid by them as pre-deposit for filing appeal)" shall be deleted.