(2017) 05 DEL CK 0127

In the Delhi High Court

Case No : 3965 of 2017

MALA PETROCHEMICALS & POLYMERS — APPELLANT

Vs

THE ADDITIONAL DIRECTOR GENERAL, DIRECTORATE OF REVENUE INTELLIGENCE & ANR — RESPONDENT

Date of Decision : 19-05-2017

Acts Referred:

Customs Act, 1962, Section 18, Section 18(1), Section 110, Section 114A, Section 112, Section 110A, <a href=

Citation : (2017) 05 DEL CK 0127

Hon'ble Judges : S.Muralidhar, Chander Shekhar

Bench : DIVISION BENCH

Advocate : Priyadarshi Manish, Anjali Jha Manish, Ashutosh Mishra, Sagar Rohatgi, Aditya Singla, Sanjeev Narula, Abhishek Ghai

Judgement

1. Writ Petition (Civil) No. 3965 of 2017 filed by the Petitioner, Mala Petrochemicals & Polymers, of which Mr. Manish Jain is the partner, seeks the following reliefs: (a) Issue a writ order or direction in the nature of mandamus to the Respondent to provisionally release the goods imported against bill of entry No. 8911267 dated 16.03.2017 and seized vide seizure memo dated 21st April 2017;

(b) Issue a writ order or direction in the nature of mandamus to the Respondent to provisionally release the goods seized at godown premises at 78/12 & 13, Ground Floor, Village Bakoli, Near Ganesh Dharam Kanta, Delhi-110036; and

(c) Issue a writ order or direction in the nature of mandamus to the Respondent to release the goods Seized at godown premises at Khasra No. 43/9, Village Hamidpur, Near HMR College, G.T. Kamal Road, New Delhi-110036;

2. The factual background is that the Petitioner is engaged in the business of import of chemicals. The Petitioner states that it had placed an order over its

foreign supplier, Rainbow Chemical Industry Limited, in China, for supply of ammonium sulphate industry grade for gross weight of 522080 kg for the value of USD 98,800 against commercial invoice dated 23rd January 2017. In both the said invoice and the bill of lading (''B/L'') dated 10th February 2017, the goods were declared as ''ammonium sulphate''. The Petitioner filed a bill of entry (''B/E'') No. 8911267 dated 16th March 2017 declaring the goods as ''ammonium sulphate'' at the assessable value of Rs. 67,50,658.20. The customs duty payable was indicated as Rs. 15,42,525.40 This was also paid upon arrival of the goods. However, on the directions of the Directorate of Revenue Intelligence (''DRI''), the goods were detained on 22nd March 2017.

3. It appears that on 22nd March 2017 itself, the DRI searched the premises and godowns of the Petitioner situated at Village Bakoli and Hamidpur. They were informed that the goods found there included goods that were imported against B/E and were even domestically purchased. However, since the Petitioner was unable to produce documents for possession/import of the goods, the goods were seized by drawing up a panchnama of that date. Mr. that Manish Jain, partner of the Petitioner, was summoned by the DRI. He appeared before them on 30th March 2017 and produced documents.

4. Therefore, in this case, there are two sets of goods. One that arrived in India on 16th March 2017 against what is termed as the ''live B/E'' (No. 8911267) and the other which were seized from the godowns/ premises of the Petitioner on 22nd March 2017. The case of the DRI is that as far as live B/E is concerned, although the invoice and the B/L stated that the goods being imported was ''ammonium sulphate'', what was actually imported, was ''PVC Resin Suspension Grade'' on which anti-dumping duty (''ADD'') was leviable. The physical examination of the 20 containers in which the consignment arrived against the live B/E revealed that 527.230 MT of PVC Resin Suspension Grade had been imported of a value (as determined by the DRI) of Rs. 3,27,86,143 on which the customs duty payable including the ADD on PVC resin suspension grade worked out to Rs. 1,37,52,524.

5. In respect of the consignment that arrived against the live B/E, a seizure memo was drawn up by the DRI on 21st April 2017 on a reasonable belief the said goods i.e., the PVC Resin of Suspension Grade was liable to be confiscated under Section 111 (m) of the Customs Act, 1962 (''Act''). The seizure memo dated 21st April 2017 noted that the samples drawn from 20 containers were sent under Test Memo to the CRCL. The seizure memo states that Manish Jain "categorically admitted to the fact of importing PVC Resin of Suspension grade by mis-declaring the same as Ammonium Sulphate Industrial grade" and that "the entire goods covered under Bill of Entry No. 8911267 dated 16th March 2017 is nothing but PVC Resin of Suspension grade."

6. The grievance of the Petitioner at the stage of filing W.P. (C) No. 3965 of 2017 was that the Respondents were not passing orders for provisional release of the goods against the live B/E or even the goods seized at the premises/godowns of

the Petitioner. The said writ petition was first listed for hearing before this Court on 8th May 2017. Mr. Sanjeev Narula, learned Senior standing counsel for the Principal Commissioner of Customs while accepting notice on that date produced before the Court copy of an order dated 5th May 2017 passed by the Assistant Commissioner SIIB-Import granting provisional release of the goods imported against the live B/E subject to certain conditions. While acknowledging that such order had been passed, Ms. Anjali Jha Manish, learned counsel for the Petitioner, stated before the Court that those conditions were onerous and contrary to the settled legal position. At that stage, Mr Narula sought time to file a reply to the petition. The reply has since been filed both by the Customs and the DRI.

7. In the meanwhile, the Petitioner filed the second accompanying petition Writ Petition (Civil) No. 4123 of 2017 challenging the order of provisional release dated 5th May 2017. It must be noted that the said order dated 5th May 2017 permits provisional release of the goods covered under the live B/E subject to the following conditions: "(i) the furnishing of Bank Guarantee representing 30% of the differential duty of Rs.1,22,09,999/- with auto renewal clause as per RBI guidelines;

(ii) the furnishing of a bond equivalent to the value of the goods i.e. Rs. 3,27,86,143/ -.

(iii) the furnishing of an undertaking, that you will not contest the identity of the provisionally released goods."

8. It is submitted by Mr. Priyadarshi Manish and Ms. Anjali Jha Manish, learned counsel for the Petitioner that the conditions imposed for the provisional release were contrary to several judgments and orders of the Court beginning with Navshakti Industries Private Limited v. Commissioner of Customs 2011 (267) ELT 483 (Del), the order dated 4th May 2011 of the Supreme Court modifying the said order [Commissioner of Customs v. Navshakti Industries Private Limited 2011 (269) ELT A 146 (SC)], Aban Exim Private Limited v. Principal Commissioner of Customs 2015 (319) ELT 430 (Del), Zest Aviation Private Limited v. Union of India 2013 (289) ELT 243 (Del), Spirotech Heat Exchangers Private Limited v. Union of India 2016 (341) ELT 110 (Del), Dhriti Enterprises v. Commissioner of Customs (Import), Chennai 2013 (292) ELT 481 (Mad) and J.B. Overseas v. Union of India 2016 (340) ELT 507 (Del). Reliance was also placed on the decisions in Biharilal Singhal v. Union of India 2010 (253) ELT 358 (Bom) and Kuber Casting (P) Limited v. Union of India 2013 (297) ELT 4 (P&H), Horizon Ferro Alloys Pvt. Ltd. v. Union of India 2016 (340) ELT 143 (P&H); Daya Enterprises v. The Commissioner of Customs 2016 (336) ELT 73 (Del). The decisions of this Court dated 18th January 2017 of this Court in Writ Petition (Civil) No. 477 of 2017 (G.B. International v. The Union of India).

9. It is pointed out by learned counsel for the Petitioner that it has been acknowledged by the Respondents themselves that even before the seizure memo was formally drawn up, the Petitioner had deposited an amount of Rs.

1,19,78,677 on 21st April 2017 towards differential amount of duty as regards the consignment imported against the live B/E. This was in addition to the customs duty of Rs. 15,42,525 paid immediately upon arrival of the goods.

10. Mr Aditya Singla, learned Senior Standing counsel for the DRI, pointed out that during the pendency of the writ petition, on 17th May 2017, the DRI addressed a further letter to the Principal Commissioner of Customs (Import) on the subject of "Investigation into import made by M/s. Mala Petro Chemicals & Polymers and others". This was as a result of the examination of the goods seized from the godowns and premises of the Petitioner. Pursuant to the request for provisional release of those goods, the DRI has in the said letter estimated the total value of the seized goods to be as follows: Melamine (Rs. 80,28,546 for a quantity of 97,225 kg) and PVC Resin (Rs. 42,00,154 for a quantity of 56515 kg) with the total duty payable against both those goods as Rs. 45,46,947 and Rs. 16,50,172 respectively. Thus, the total differential duty as estimated by the DRI on those seized goods (i.e. seized from the premises and godowns of the Petitioner) worked out to Rs. 61.97 lakhs approximately. The said letter dated 17th May 2017 further notes that the Petitioner had voluntarily deposited Rs. 3 crores towards partial discharge of duty liability of past consignments. It is mentioned therein that the market value of the seized goods is Rs. 1.73 crore (approximately). It must be mentioned at this stage as regards the goods seized from the premises and godowns of the Petitioner that no provisional release order is yet to be passed by the Customs Department.

11. Mr. Sanjeev Narula, learned Senior standing counsel for the Customs Department referred to Section 110A of the Act which provides for provisional release of goods, documents and things seized pending adjudication. It reads as under: "110A Provisional release of goods, documents and things seized pending adjuration: Any goods, documents or things seized under Section 110, may, pending the order of the adjudicating authority, be released to the owner on taking a bond from him in the proper form with such security and conditions as the adjudicating authority may require."

12. Mr. Narula drew a distinction between the provisional release of seized goods which is in terms of Section 110A of the Act and the provisional assessment of goods which is under Section 18 of the Act. He pointed out that provisional assessment is also governed by the Guidelines issued under ''Circular No. 38/2016- Customs'' issued by the Central Board of Excise & Customs (''CBEC'') replacing the Customs (Provisional Duty Assessment) Regulations 2011. However, for provisional release, no specific regulations as such have been issued. He referred to certain guidelines in this regard in a CBEC Manual. Mr. Narula submitted that the decisions of this Court and that of the Supreme Court in the Navshakti Industries Private Limited (supra) arose in an entirely different context and were simply followed in many subsequent orders involving provisional release without appreciating the distinction. He submitted that neither the above decision nor any of the decisions cited by the Petitioner

involved provisional release of ''mis-declared'' goods. In this context, he referred to the decisions of other High Courts in Apollo Cranes Pvt. Ltd. v. Union of India 2012 (275) ELT 148 (Bom), Dhriti Enterprises v. Commissioner of Customs (Import) Chennai (supra), Sada Sukhi Electronic P Ltd. v. CC (Seaport-Import) 2014 (304) ELT 42 (Mad) and Malabar Diamond Gallery P Ltd. v. The Addl Director General DRI 2016 (341) ELT 65 and of this Court in Dilshad Khan v. Principal Commissioner of Customs (Import) [W.P. (C) Nos. 347 and 1070 of 2017].

13. Mr Narula defended the conditions imposed in the impugned provisional release order dated 5th May 2017 as regards the consignment imported under the live B/E by submitting that this was an admitted case of misdeclaration of goods which would, in all probability attract penalties under Sections 112, 114A and 114AA of the Act. The requirement of furnishing a BG for 30% of the differential duty was therefore to cover the penalty that could be imposed notwithstanding that the importer may have paid a substantial portion of the differential duty. He submitted that ultimately each case turned on facts and in the circumstances of the present case, the conditions imposed could not be said to be harsh or unreasonable. He submitted that as far as the other seized goods were concerned, the Customs Department would consider issuing a provisional release order in a time bound manner on the same conditions.

14. The above submissions have been considered. In the first pace it requires to be noted that both the sides agreed that in the present case the Petitioner is seeking provisional release of seized goods. It is not and in fact cannot seek provisional assessment of the goods. This distinction requires to be kept in view. Provisional assessment of the goods takes place under the conditions mentioned in Section 18 (1) of the Act. Provisional release of imported goods that have been seized takes place under Section 110A of the Act.

15. The facts in Navshakti Industries Private Limited v. Commissioner of Customs (supra) decided by this Court were that newsprint had been imported and cleared by the importer on payment of the duty assessed after a final assessment. Subsequently, on information received that the goods were diverted for purposes other than what they were meant for, the goods were seized by the Customs in exercise of powers conferred by Section 111 (o) of the Act. When the importer sought provisional release of the goods, an order was passed under Section 110 A of the Act permitting it subject to the following four conditions: "(i) Payment of differential duty involved on the seized goods;

(ii) Execution of bank guarantee to the extent of 25% of the seizure value;

(iii) Execution of indemnity bond to the extent of full seizure value of seized goods;

(iv) Execution of an affidavit by the party that he will not challenge the identity of the said seized goods during the course of adjudication or prosecution proceedings, if any."

16. This Court in Navshakti Industries Private Limited v. Commissioner of Customs (supra) noted that there were no regulations as such for provisional release and, therefore, by way of guidance sought to rely upon the Customs (Provisional Duty Assessment) Regulations, 1963 prevalent at that time, it was stated that the Appellants therein cannot be in a worse off position that if the goods were provisionally assessed under Section 18 of the Customs Act read with Regulation 2 of the aforesaid Regulations." In those circumstances, the conditions for provisional release were modified by this Court by permitting the Appellants to furnish a bond of 20% of the differential duty to the satisfaction of the Commissioner of Customs. The matter then travelled to the Supreme Court. The conditions for provisional lease were modified by directing that the goods be released on the Assessee furnishing a bank guarantee (''BG'') of 30% of the differential duty to the satisfaction of the Commissioner of Customs.

17. Navshakti Industries Private Limited v. Commissioner of Customs (supra) therefore did not involve ''mis-declared'' goods. It involved goods that were being diverted for purposes other than what they were meant for. It requires to be noticed at this stage that mis-declared goods attract confiscation under Section 111 (m) of the Act and, where the circumstances so warrant, penalty provisions contained in Sections 112, 114 A and 114 AA of the Act. It appears from a careful scrutiny of many of the orders of this Court that they were cases other than that of mis-declared goods.

18. In Zest Aviation Private Limited v. Union of India (supra), the Court was dealing with the case where the aircraft that was imported was seized when it was found being used by the promoters of the Petitioner company and not for passenger service or charter service. In other words, the conditions of the notification under which the import of the said aircraft was permitted were not adhered to. It was not a case of misdeclaration. The Court distinguished the judgment of the Bombay High Court in Apollo Cranes (P) Limited v. Union of India (supra) on the ground that the Bombay High Court had wrongly distinguished the decision of this Court in Navshakti Industries Pvt. Ltd. v. Commissioner of Customs (supra). The Court then modified the conditions of provisional lease by directing that the Petitioner there would execute a bond for a sum of Rs. 70 crores and, in addition, provide a BG for Rs. 3.6 crores being 30% of the alleged differential duty amount of Rs. 12 crores.

19. Likewise the other decisions including Spirotech Heat Exchangers Pvt Ltd. v. Union of India (supra), Aban Exim Private Limited v. Principal Commissioner of Customs (supra), J.B. Overseas v. Union of India (supra), G.B. International v. The Union of India and Daya Enterprises v. The Commissioner of Customs (supra) did not involve seizure of mis-declared goods. They were cases of either undervaluation or wrong classification of the imported goods leading to their seizure. Biharilal Singhal v. Union of India (supra) and Kuber Casting (P) Ltd v. Union of India (supra) were cases of undervaluation of imported goods leading to their seizure. In Horizon Ferro Alloys Pvt. Ltd. v. Union of India (supra) the entire

differential duty was directed to be deposited as a condition of provisional release.

20. On the other hand, in Dilshad Khan v. Principal Commissioner of Customs (Import) (supra) where upon seizure of mis-declared goods, the importer deposited Rs. 1.4 crores toward differential duty of goods, the Court declined to interfere with the provisional release order which required the importer to furnish apart from provisional bond, a BG for 100% of the differential duty.

21. The Court finds that the distinction between the goods being released provisionally in terms of Section 110 A of the Act and provisional assessment of the goods under Section 18 of the Act read with the Regulations thereof was perhaps not acknowledged in many of the orders earlier passed by the Court. More importantly, none of these cases, as already noticed, actually dealt with the provisional release of goods that had been imported by misdeclaring them.

22. Ultimately, each case turns on its peculiar facts. There can never be a blanket rule that in all cases of misdeclaration 100% of the duty must be asked to be deposited or that if the importer is asked to do so then he cannot be asked to furnish a BG. For instance, in Malabar Diamond Gallery P Ltd. v. The Addl Dir General DRI (supra), the Madras High Court held that although the import of gold was not prohibited, if the import was in violation of the conditions attached to such import, could amount to smuggling and that a prayer for provisional release could be refused. The decision in Sada Sukhi Electronic P Ltd v CC (Seaport-Import) (supra) involved mis-declared goods and the conditions imposed were the deposit of 100% of the duty on the declared value, 50% of the differential duty, and personal bond for the remaining 50%.

23. The power under Section 110 A of the Act involves exercise of discretion. The scope of judicial review is to examine if the discretion has been rightly exercised; that it is not based on irrelevant materials and is fair and reasonable in the circumstances. It is not an appellate power. The drawing of a distinction between seizure of imported goods as a result of undervaluation and seizure of imported goods upon misdeclaration cannot per se be said to be irrational. On the contrary, the failure to draw such a distinction and treat all types of wrongful imports on an equal footing might result in miscarriage of justice. That is perhaps why Section 110 A has been worded in the way it has, leaving some margin to the Customs in the exercise of their discretion subject, of course, to the recognised legal limits.

24. Keeping the above parameters in view, the Court proceeds to examine the impugned order dated 5th May 2017 directing provisional release of the goods imported against the live B/E subject to the conditions as noticed hereinbefore.

25. The test reports received thus far appear to bear out the case of the customs and the DRI that the imported goods are mis-declared. While keeping the right of the Petitioner to contest this prima facie determination, it requires to be noted that, at this stage, the Petitioner has not placed on record any material to suggest to the contrary. At the same time, it is not in dispute that the Petitioner

has deposited nearly 98% of the differential duty as far as the live B/E is concerned. As regards the goods seized from the premises and godowns, a sum of Rs. 3 crores has been deposited. The value of those goods has been estimated at Rs. 1.73 crores and the differential duty liability as Rs. 61.97 lakhs.

26. It is seen that in the event a penalty is imposed, it can be equal to the duty under Section 114A and five times the value of the goods under Section 114AA of the Act. While upto the Court at this stage would not like to comment on whether the case would attract the entire penalty as envisaged, it cannot be said that it would not involve any penalty whatsoever in the event the goods are found to be mis-declared. This is definitely a factor that has to be kept in view.

27. Learned counsel for the Petitioner pointed out that the show-cause notice (''SCN'') is yet to be issued to the Petitioner. After paying over Rs. 4 crores, the Petitioner does not have the financial resources to furnish a BG for 30% of the differential duty.

28. Keeping in view all the above factors, the Court directs that as far as the live B/E is concerned, the order dated 5th May 2017 passed by the Assistant Commissioner of Customs should be modified by directing that the Petitioner will furnish BG for a sum equivalent to 15% of the differential duty of Rs. 1,22,09,999. The other conditions imposed in the said order of provisional release are left undisturbed. It is made clear that the sums deposited by the Petitioner are without prejudice to the rights and contentions of either party and will be subject to the final orders in the adjudication proceedings.

29. As far as the goods seized from the godown and premises are concerned, in view of the letter dated 17th May 2017 of the DRI to the Customs and in view of the fact that what has been deposited by the Petitioner is in excess of the value of the goods and differential duty, it is directed that: (i) not later ten days from today, the Customs officer concerned will issue an order of provisional release subject to the following conditions: (a) the Petitioner will furnish a bond equivalent to the value of the goods of Rs. 1.73 crores (approximately);

(b) the Petitioner will furnish an undertaking that it will not contest the identity of the provisionally released goods;

(c) Of the sums deposited by the Petitioner, the differential duty of Rs. 61.97 lakhs and a sum equivalent 15% of the said differential duty shall be retained and the balance shall be returned forthwith to the Petitioner.

(ii) It is made clear that the sums deposited by the Petitioner are without prejudice to the rights and contentions of either party and will be subject to the final orders in the adjudication proceedings.

30. It is further clarified that nothing said in this order on merits will influence the final orders to be passed in the adjudication proceedings.

31. The petitions are disposed of in the above terms. The next date already fixed

in W.P. (C) No. 3965 of 2017 stands cancelled. A copy of this order be given dasti under the signature of the Court Master.

32. A Special Messenger of the Registry will deliver within three days and not later than Monday, i.e. 22nd May 2017 for compliance a certified copy of the present order to the Commissioner of Customs, (Import) ICD Tughlakabad, New Delhi and the Additional Director General, DRI, New Delhi.

