(2013) 03 MAD CK 0214

In the Madras High Court

Case No : Writ Petition No. 3135 of 2013 and M.P. No. 1 of 2013

M/s. Veetrag Enterprises — APPELLANT

Vs

The Commissioner of Customs (Exports), The Additional Commissioner of Customs and The Assistant Director — RESPONDENT

Date of Decision : 19-03-2013

Acts Referred:

Constitution of India, 1950 — Article 19, 21
Customs Act, 1962 — Section 110, 110(2), 110A, 124, 17

Citation : (2013) 198 ECR 277 : (2013) 293 ELT 529 : (2013) 21 GSTR 50

Hon'ble Judges : V. Dhanapalan, J

Bench : Single Bench

Advocate : A.K. Jayaraj, for the Appellant; Vikram Ramakrishnan, CGSC for Respondents 1 and 2 and Mr. Velayutham Pichaya, SCGSC for 3rd Respondent, for the Respondent

Judgement

V. Dhanapalan, J.—Heard Mr. A.K. Jayaraj learned counsel for the petitioner and Mr. Vikram Ramakrishnan, learned Central Government Standing Counsel appearing for the respondents 1 and 2 and Mr. Velayutham Pichaya, learned Senior Central Government Standing Counsel appearing for the third respondent. The petitioner has filed this writ petition for a direction to the respondents herein to release the goods viz., 760 Packages viz., 3800 Packets of Coated Gummed Paper imported, vide Bill of Entry No. 8711998, dated 10.12.2012, which was finally assessed by the Proper Officer under the Customs Act and total duty of Rs. 1,81,532/- was also debited on 10.12.2012.

2. The case of the petitioner in a nut-shell is as follows:-

(a) The petitioner-Company had imported 760 Packages viz., 3800 Packets of Coated Gummed Paper from China at USD 11400.00 CIF Chennai. The above goods were shipped from M/s. Fancyco, China, vide Invoice No. FY 122244, dated 19.11.2012 and filed Bill of Entry No. 8711998, dated 10.12.2012 and claimed for clearance of goods for Home Consumption.

(b) On the arrival of the subject goods at Chennai Port, the petitioner filed Bill of Entry for Home Consumption and sought for clearance of the goods and they had declared the value of the goods at USD 11400.00 (CIF Chennai) totally. Thereafter, the petitioner had requested the respondents to pass orders for clearance of the imported goods. Subsequently, the goods were assessed by the Proper Officer and the appropriate duty of Rs. 1,81,532/- as assessed by the Proper Officer has also been debited by the petitioner on 10.12.2012. After payment of duty, on 03.01.2013, the petitioner was informed that the goods have been detained by DRI Officers under Mahazar. The samples from the goods detained on 03.01.2013 were taken by DRI Officers in the presence of representatives.

(c) The petitioner, vide letter dated 12.01.2013 requested the Assistant Director of DRI to provisionally release the goods after taking of samples and weighment of goods. Undertaking was given to the Department that the petitioner will not dispute the quantity of the goods imported. This request was followed, vide other letters also. The petitioner''s request for provisional release of goods was fully covered by Provisions of Section 110A of the Customs Act (hereinafter referred to as ''the Act''), which inter alia provides that any goods seized u/s 110 of the Act may be provisionally released pending adjudication. However, till date no reply has been received from the DRI Officers. The petitioner''s premises were searched by the DRI Officers and nothing incriminating was found. The DRI had issued summons on the partner of the petitioner and they appeared before the Officers, who took statement from the petitioner and they had also furnished Sales Contract made with the supplier for import of the above goods. The DRI officers thereafter, issued another summons to appear before them, for which the petitioner had asked for time.

(d) The DRI Officers classified the goods viz., Coated Gummed Paper under Custom Tariff Heading 48114100 which are freely importable and Coated Gummed Paper is one type of self-adhesive paper and these papers are used for creating label products. The self-adhesive paper as alleged by the Department is one and the same to that of the Coated Gummed Paper, which is also classifiable under CTH 48114100. Hence, the allegation of the third respondent that the value declared is less and the petitioner had mis-declared the goods and imported self-adhesive paper is not correct. The petitioner undertakes that they have fully co-operated in the investigation and will continue to do so. The continued seizure of goods is causing acute financial hardship, as the goods are incurring demurrage, interest on borrowed capital, besides deterioration in quality of Coated Gummed Paper, which is of perishable nature. The action of the respondents in not ordering the release of the goods is causing much prejudice to the petitioner. Therefore, the withholding of the subject goods covered under the aforesaid Bill of Entry is exposing the petitioner to severe financial burden of demurrage charges and the action of the respondents herein is therefore void-ab-initio and bad in law, mala-fide and perverse, as there is no fault on the part of the petitioner.

(e) The petitioner has made several representations to the respondents herein for the provisional release of the goods which are now lying in Chennai Port and the petitioner is entitled to clear the goods. The respondents have failed to exercise the statutory functions vested in them and not ordered the release of the goods, for which duty was also paid and thereby they have violated the fundamental rights of the petitioner guaranteed under Articles 19 and 21 of the Constitution of India. Aggrieved by the inaction on the part of the respondents in not ordering the release of the goods, for which duty has also been paid and also on the unreasonable attitude of the respondents, the petitioner has filed this writ petition for the above relief.

3. The third respondent filed a counter affidavit, stating that while the petitioner''s firm imported Coated Gummed Paper, they undervalued the goods. Based on the documents recovered by the DRI, the actual value of the Gummed Paper appears to be USD 3 per packet. The goods declared as "Coated Gummed Paper" imported vide Bill of Entry No. 8711998 dated 10.12.2012 was intercepted and examined on 03.01.2013. The declared rate was USD 3 per packet and the quantity imported was 3800 packets. As the declared rate appears to be grossly undervalued, the goods were seized under the Act. Based on the investigations so far made, it appears that the value of goods imported by the petitioner which are abnormally low, has to be rejected and the value needs to be re-determined correctly. The total customs duty evasion for the past four years approximately is Rs. 3,00,00,000/-. With respect to goods imported, vide Bill of Entry No. 8711998, dated 10.12.2012, the duty evasion works out to Rs. 4,70,000/- approximately. It is further stated that the investigation done by the third respondent revealed that the petitioner resorted to the modus-operandi of grossly undervaluing the goods and has intentionally formed a syndicate with other importers and mis-declared the description as "coated gummed sheets" as against the international nomenclature of "self-adhesive sheets". The petitioner was evasive in their statements. Provisions of Section 110-A of the Act are applicable in respect of cases where seized goods can be released on bond with such security and other conditions as the adjudicating authority may require. The petitioner has attempted to tamper with the evidence by way of removing hard disk and not providing any mail/correspondence with the supplier. In terms of Section 110(2) read with Section 124 of the Act, the respondents have a time-limit of six months for issue of show cause notice, failing which, the goods are to be returned to the petitioner. The investigations conducted so far prima-facie has revealed that the declared value is liable for rejection because of under-invoicing and unrealistic price declaration and the petitioner evaded payment of appropriate duties of customs due to mis-declaration of value. The price declared is ridiculously low and the actual price is three to four times the declared price. Once the declared value is rejected, as per the Act, the determination of the value of the goods should be based on Customs Valuation Rules. It is the discretion of the adjudicating authority to release the goods on taking suitable bond with such security and conditions as he may require in terms of provisions

of Section 110-A of the Act. The investigation is not completed and has not reached the stage of adjudication/show cause notice either u/s 28 or u/s 124 of the Act. Therefore, the release of good at this stage might hamper investigation with the resultant revenue loss. The petitioner may exhaust the legal remedies as prescribed under the Act instead of filing this Writ Petition. Under such circumstances, provisional release of the goods as sought for by the petitioner cannot be entertained.

4. I have heard the learned counsel appearing for the parties and perused the material documents available on record.

5. On an analysis of the entire facts, it would reveal that the petitioner-Company imported 760 Packages viz., 3800 Packets of Coated Gummed Paper from China at USD 11400.00 CIF Chennai. The above goods were shipped from M/s. Fancyco, China, vide Invoice No. FY 122244 dated 19.11.2012 and Bill of Entry No. 8711998, dated 10.12.2012 for Home Consumption. On the arrival of the subject goods at Chennai Port, the petitioner filed Bill of Entry for Home Consumption and sought for clearance of the goods and they had declared the value of the goods at USD 11400.00 (CIF Chennai) totally. Thereafter, the petitioner requested the respondents to release the above goods and the goods were assessed by the Proper Officer and the appropriate duty of Rs. 1,81,532/- as assessed by the Proper Officer has also been debited by the petitioner on 10.12.2012. After payment of duty, on 03.01.2013, the petitioner was informed that the goods have been detained by DRI Officers under Mahazhar and on the same day, the detained samples were taken by DRI Officers in the presence of representatives.

6. The petitioner, vide his letter dated 12.01.2013 requested the Assistant Director of DRI to provisionally release the goods after taking samples and weighment of goods. Undertaking was given to the Department that the petitioner will not dispute the quantity of the goods imported. The petitioner''s request for provisional release of goods was fully covered by the provisions of Section 110-A of the Act, which provides that any goods seized u/s 110 of the Act may be provisionally released pending adjudication. However, till date no reply has been received from the DRI Officers. The petitioner''s premises were searched by the DRI Officers and nothing incriminating was found. The DRI had issued summons on the partner of the petitioner and they appeared before the Officers and the above officers had taken statement from the petitioner and they had also furnished Sales Contract made with the supplier for import of the above goods. The DRI officers thereafter issued another summons to appear before them, for which the petitioner had asked for time. The DRI Officers had classified the goods viz., Coated Gummed Paper under Custom Tariff Heading 48114100 which are freely importable and Coated Gummed Paper is one type of self-adhesive paper and these papers are used for creating label products. The self-adhesive paper as alleged by the Department is one and the same to that of Coated Gummed Paper, which is also classifiable under CTH 48114100. Hence, it

is the claim of the petitioner that the allegation of the third respondent that the value declared is less and the petitioner had mis-declared the goods and imported self-adhesive paper is not correct. Therefore, withholding of the subject goods covered under the aforesaid Bill of Entry is exposing the petitioner to severe financial burden of demurrage charges and the action of the respondents. The petitioner made several representations to the respondents for the provisional release of the goods, which are now lying in Chennai Port. Aggrieved by the inaction on the part of the respondents in not ordering the release of the goods, for which duty has also been paid and also on the unreasonable attitude of the respondents, the petitioner has come before this Court.

7. It is the case of the respondents that the goods in question were undervalued and they were seized under the Act. Further investigation in the subject matter is in progress and hence, provisional release of the goods as sought for by the petitioner could not be entertained.

8. While examining the claim of the petitioner for the provisional release of goods, the circumstances under which the import was done, have to be looked into and thereafter, the value so declared by the petitioner is a matter to be taken into account. The petitioner declared the value of the goods as USD 11400.00 (CIF Chennai) totally, which according to the respondents is low. The further investigation is yet to be completed and the adjudication proceedings are also to be made thereafter. When such is the situation, what is the condition for provisional release to be made, has to be examined.

9. In this regard, the learned counsel for the petitioner relied on various decisions of this Court and also the decision of the Supreme Court in the case of Commissioner of Customs V. Navshakti Industries Private limited, (2011 (269) ELT A146 (SC)), wherein the Apex Court has held as follows:

.... having considered the facts and circumstances of the case and also taking notice of the fact that the goods in question are newsprint which is perishable in nature, we issue a direction that the goods of the respondents shall be cleared by the appellants herein on the respondents'' furnishing a bank guarantee of 30% of the differential duty to the satisfaction of the Commissioner of Customs. The goods shall be released in terms of this order immediately on furnishing of the aforesaid bank guarantee and satisfaction of the concerned Commissioner of Customs. We also direct the Commissioner of Customs to hear the adjudication proceedings pending before him as early as possible, preferably within a period of three months, from the date of receipt of a copy of this order.

In terms of the aforesaid order, the appeal stands disposed of. We, however, make it clear that while passing the aforesaid order, we have not expressed any opinion or views on the merits of the dispute which shall be independently considered by the competent authority.

10. Similarly, in the very same recent ruling of the First Bench of this Court in W.A. No. 582 of 2011, dated 01.04.2011, the Division Bench took a view, while

modifying the order of the learned single Judge, by directing the respondent therein instead of depositing entire customs duty and the redemption fine, the respondent shall deposit 50% duty of the value of the goods and on such deposit being made, the goods shall be released forthwith in favour of the respondent. Therefore, the case of petitioner in the present case also stands on the same footing and their claim for provisional release of goods shall be considered along with a reasonable condition.

11. Refuting the above submissions, the learned counsel for the respondents contended that in the case of Commissioner of Customs V. Navshakti Industries Private limited, (2011 (269) ELT A146 (SC)), relied upon by the petitioner, the condition imposed for provisional release of the goods is only by a bank guarantee and in order to safeguard the interest of the Department, the petitioner has to pay 30% of the differential duty and shall furnish bank guarantee for 20% of the differential duty and for remaining 50%, the petitioner-Company should furnish a bond. The learned counsel further submitted that in case the Department succeeds in the adjudication proceedings, it is not possible for the Department to recover any ''amount'' if the goods are released.

12. It is seen that in Notification No. 81/2011-Customs (N.T.), dated 25.11.2011 issued by the Government of India, Ministry of Finance, Department of Revenue (Central Board of Excise and Customs), the customs (Provisional Duty Assessment) Regulations, 2011 were brought into force, which inter alia provided the following:-

1. Short title and commencement: (1) These regulations may be called the Customs (Provisional Duty Assessment) Regulations, 2011.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. Conditions for allowing provisional assessment.-

(1) Where-

a) an importer or an exporter, as the case may be, is unable to make self-assessment under sub-section (1) of Section 17 of the Customs Act, 1962 (52 of 1962) and makes a request in writing to the proper officer for assessment; or

b) the proper officer on account of any of the grounds specified in sub-section (1) of Section 18 of the said Act, is not able to verify the self-assessment or make re-assessment of the duty on the imported goods or the export goods, as the case may be, he shall make an estimate of the duty to be levied (hereinafter referred to as the provisional duty).

13. Section 110-A of the Customs Act, 1962 provides for provisional release of goods, documents and things seized pending adjudication. Any goods, documents or things seized u/s 110 of the Act, may, pending the order of the adjudicating officer, be released to the owner on taking a bond from him in the

proper form with such security and conditions as the Commissioner of Customs may require.

14. The only reason for non-releasing of the goods is that the petitioner has under-valued the goods in question. The respondents, on investigation, found that the differential duty has to be paid even for the provisional release of the goods. The investigation has to be completed and thereafter, the adjudication has to be done for the assessment of the value. Since the goods are perishable in nature, the petitioner claims for provisional release of the goods in question.

15. In the light of the above stated legal position and as the goods in question are not prohibitory items under the provisions of the Act and having regard to the foregoing reasons and discussions and considering the circumstances of the case, provisional release of the goods in question, is ordered with the following conditions:-

i) The petitioner shall deposit with the custom authorities the duty payable on the value declared by them i.e. USD 3 per packet.

ii) The petitioner shall deposit with the customs authorities 50% of the differential duty i.e., the difference between the value declared by them and the value provisionally assessed by the Department in the light of the decision of the First Bench of this Court in W.A. No. 582 of 2011, dated 01.04.2011 and for the balance 50% of the differential duty, the petitioner shall furnish personal bond to the satisfaction of the customs authorities.

iii) The investigation is yet to be completed and the adjudication has also to be done. Therefore, it is needless to state that this order shall not stand in the way of the respondents to proceed with the investigation and also the adjudication process. In such an event, the petitioner shall co-operate with the respondents for conclusion of the investigation as well as the adjudication proceedings.

With the above observations and directions, the Writ Petition is disposed of. No costs. Consequently, the connected miscellaneous petition is closed.

