(1993) 09 MAD CK 0093

In the Madras High Court

Case No : Writ Petition No. 15064/93

Photon India Ltd. APPELLANT

Vs

Assistant Collector of Customs and Others RESPONDENT

Date of Decision : 16-09-1993

Acts Referred:
Customs Act, 1962 — Section 111, 129A, 49

Citation : (1996) 53 ECC 79

Hon'ble Judges : Kanakaraj, J

Bench : Single Bench

Judgement

Kanakaraj, J.—By consent of parties the writ petition itself is taken up for final disposal. The petitioner is a company carrying on business in the purchase of paper in rolls, cutting the same and selling the paper. For this purpose he had arranged for the purchase of a second hand paper-cutting and slitting machine from West Germany. The machine was shipped from Germany on 19.12.1992 and arrived at the Madras Port Trust on 19.1.1993. A bill of lading (sic bill of entry?) for home consumption was filed by the petitioner with the second respondent. Since there was delay in assessment of duty the goods were stored in bond under the provisions of Section 49 of the Customs Act.

2. By an order dated 8.3.1993, the Additional Collector of Customs (Appraising Department), the second respondent herein, held that the import of the subject goods was illegal because there was no proper import licence for the import. Consequently, he directed confiscation of the subject goods u/s 111(d) of the Customs Act, 1962 read with Section 3(2) of the Imports and Exports (Control) Act, 1947, giving an option to the importers to redeem the goods on payment of a sum of Rs. 1,00,000/-. This is further subject to the payment of the duly. The value of the machine was assessed at Rs. 8,99,104/- c.i.f. and the containers were assessed at Rs. 90,000/-. There was no other penalty imposed Under the order. The petitioner filed an appeal and by an order dated 24.6.1993 the Appellate Collector upheld the contentions of the petitioner and set aside the

order of the Additional Collector. In doing so, the appellate authority held that the invoice value claimed by the petitioner was to be accepted. The duty is payable under heading 8441.10 read with notification No. 59/87. It was also directed that the cost of the container should not be assessed separately.

3. On the basis of the appellate order, the petitioner approached the first respondent for clearance of the goods and for payment for duty in accordance with the said appellate order. According to the petitioner, the first respondent declined to permit the petitioner to clear the goods on the ground that the first respondent was proposing to file an appeal against the order of the third respondent. The case of the petitioner is that the question of clearance of goods cannot brook any further delay and at any rate cannot wait till the first respondent actually files an appeal. The appellate order is binding on all the parties, and therefore, the petitioner is entitled to clear the goods in terms of the appellate order.

4. A counter-affidavit has been filed by the respondents. According to the respondents the appellate order of the third respondent has not yet become final since the respondents proposed to file an appeal against the said order. It is pointed out that Section 129-A(2) of the Customs Act enables the first respondent to file an appeal and he has time up to 26.10.1993 for filing such an appeal to the Tribunal. This is because the order was communicated only on 26.7.1993. Therefore, it is contended that statutorily the first respondent has time up to 26.10.1993 to file an appeal and till then the petitioner has no right to seek clearance of the goods. The demand of the petitioner is said to be premature. It is also pointed out that the first respondent in his letter dated 19.8.1993 had offered to give permission provided the petitioner paid the admitted duty and also furnished bank guarantee for 50% of the disputed duty and redemption fine. During argument learned Counsel for the petitioner also sought for a direction to the respondents that if the goods are permitted to be cleared on certain conditions, the respondents should also be directed to issue a detention certificate. In the counter-affidavit it is stated that the request for detention certificate is not maintainable.

5. On the above pleading the only question to be decided is whether pending the first respondent''s proposal to file an appeal should the goods be permitted to be cleared and if so on what conditions? In deciding this question I have perused the order of the second respondent dated 8.3.1993 wherein, he holds that the import requires a licence, that the value of the machine works out to Rs. 8,99,104 (c.i.f.) and that the container should be separately valued at Rs. 90,000/-. He has also held that the duty is leviable under the heading 9010.20 of the Indian Customs Tariff and not under the heading 8441.10. The appellate authority in his order dated 24.6.1993 holds that the machine imported is only a paper-cutting and slitting machine and therefore, the heading 8441.10 will alone apply. Similarly, on the basis of the description of the machine, the appellate authority concludes that it could be freely imported. Certainly I do not propose to

render any finding one way or the other because the first respondent proposed to file an appeal to the Tribunal. One has to balance the interest of the Revenue and the prejudice suffered by the importer while considering the grant of relief to either of the Parties. The Court cannot forget the fact that the statute gives a right to the first respondent to file an appeal against the order of the third respondent and for aught one knows, the Tribunal may hold in favour of the first respondent. When the chance of the Revenue succeeding in the second appellate forum is not ruled out would it be proper to permit the release of the goods without any conditions? If the goods are released without any condition and if the appeal is ultimately allowed in favour of the department, the chance of recovering the correct duty and the redemption fine are remote. Therefore, I am inclined to permit the release of the goods only on certain reasonable conditions which according to me will safeguard the interest of both the parties. The first respondent has offered the release of the goods on the petitioner furnishing bank guarantee for 50% of the differential duty and redemption fine. The petitioner says that this is a very stringent condition especially when the petitioner has succeeded in the first appeal. I am of the opinion that it will be sufficient if the petitioner furnishes bank guarantee to an extent of 30% of the disputed duty and redemption fine. In respect of the balance of disputed duty and redemption fine the petitioner should execute a personal bond in accordance with the Act and Rules.

6. There is yet another question relating to the issue of detention certificate. A detention certificate is issued under Clause 16, Section III, Chapter 8 of the Central Appraising Manual. Such a certificate will enable the petitioner from avoiding the demand for rent by the Port Trust Authorities. It is, in effect a recommendation to the Port Trust to waive the rent on the ground that the goods were detained at the instance of and due to the requirements of the Customs Authority. In my opinion this question is inextricably connected with the decision in the proposed appeal to the Tribunal. In other words, if the stand of the Customs Authority is found to be correct they need not issue a detention certificate which will in effect go against their case in the appeal. Having decided to file an appeal the Customs Authority cannot tell the Port Trust that the detention was due to their mistake and therefore, the rent may be waived. Clause 16(iv) of the said Manual says that no detention certificate should be issued when the detention was technically correct. For example when the goods covered by Bill of Entry is proceeded against, for breach of Customs Act or allied legislation and penal action has been taken and successfully maintained, no recommendation should be made to the Port Trust for exemption of the rent. In such cases, it is up to the parties to move the Port Trust Authorities for relief. In this view of the matter I am of the opinion that there can be no direction in respect of the detention certificate.

7. In fine, the following directions are given in disposing of the writ petition:

The respondents are directed to permit the release of the subject goods on the following conditions:

(i) Payment of admitted duty.

(ii) Furnishing of Bank Guarantee for 30% of the disputed duty and redemption fine.

(iii) Execution of personal bond for the balance of the disputed duty and redemption fine.

The writ petition is ordered accordingly. However, there will be no order as to costs.