
(2016) 04 DEL CK 0185

In the Delhi High Court

Case No : LPA No. 88 of 2016 and C.M. No. 4738 of 2016 (stay)

Principal Commissioner of Cus. (Import), ICD

APPELLANT

Vs

Santosh Handloom

RESPONDENT

Date of Decision : 29-04-2016

Acts Referred:

Citation : (2016) 337 ELT 44

Hon'ble Judges : G. Rohini, CJ. and Jayant Nath, J.

Bench : Division Bench

Advocate : S/Shri Satish Kumar with Agrim Bhasin, Advocates, for the Appellant; Shri Priyadarshi Manish with Ms. Anjali J. Manish, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Jayant Nath, J.—This appeal is filed by the Principal Commissioner of Customs (Import) seeking to impugn the order dated 23-11-2015 [2016 (331) E.L.T. 44 (Del.)] passed by the learned Single Judge allowing the writ petition filed by the respondent (petitioner therein). The writ petition was filed seeking a writ in the nature of certiorari to quash the order dated 23-1-2015 issued by the appellant and for a writ in the nature of mandamus for directions to release the goods imported by the respondent vide Bill of Entry Nos. 6097564 and 6097566 both dated 15-7-2014 and seized by panchnamas dated 25-7-2014. Other reliefs are also sought.

2. The relevant facts as stated in the writ petition, which led to filing of the petition by the respondent are that respondent had by commercial invoice dated 25-5-2014 placed an order of Polyester Quilt Covers, 100% Polyester Bed Sheet set of three pieces PVC pack for which 100% payment was made in advance. Another order was placed vide invoice dated 30-5-2014 for Polyester Quilt Covers. On arrival of the goods, the respondent filed Bill of Entry No. 6097566, dated 15-7-2014 and Bill Entry No. 6095764 also dated 15-7-2014. However, the goods were not cleared and were detained by the DRI officers after conducting

an examination on 25-7-2014.

3. The respondent states that on 4-8-2014 a detailed representation was sent to the Additional Director General-DZU, Delhi pointing out that the imported goods were covered and used as quilt covers as they had been assembled by sewing and the three sides were closed whereas one side was kept open for filling up. A request was made for release of the goods. Another firm had sent a similar sample of goods to the Textile Committee (Government of India, Ministry of Textiles). The Textile Committee in its report dated 25-8-2014 stated that the type of sample be classified as "polyester woven printed quilt case". Despite various representations of the respondent, the goods were not released.

4. On 26-11-2014, the appellants intimated to the respondent the conditions for provisional release of the goods. The respondent was directed to submit PD Bonds and bank guarantees for different amounts against the two bills of entry. The amounts were based on a provisional re-assessment of the price done by the appellants.

5. The appellants, in the meantime, allegedly issued a show cause notice dated 23-1-2015 to the respondent to show cause as to why the time limit for issuance of show cause notice should not be extended in terms of the provisions of Section 110(2) of the Customs Act, 1962 for a further period of six months due to expected expiry of six months from the date of the panchnama. A personal hearing was proposed to be held on the same date. It is urged by the respondent that the Commissioner of Customs without providing any personal hearing to the respondent vide its order which was also dated 23-1-2015 extended the period for issuance of show cause notice for a further period of six months from the date of panchnama. It was the contention of the respondent that they were never served with any show cause notice and the show cause notice had been back dated inasmuch as the same was dispatched on 30-1-2015 though purportedly dated 23-1-2015. The order of the Commissioner of Customs which is impugned in the present writ petition was also though dated 23-1-2015 was dispatched on 31-1-2015. Reliance was placed on envelopes in which the show cause notice and the impugned order were received, and the tracking records of the two documents to claim that the show cause notice and the impugned order are back dated. Hence, the present writ petition was filed stating that in view of the expiry of six months from the date of seizure of goods without issuance of any show cause notice, in terms of Section 110(2) of the Customs Act, 1962, the goods are liable to be returned to the respondent.

6. Before the learned Single Judge the appellant filed a counter affidavit. It was urged in the counter affidavit that when the consignment of the respondent reached the port, DRI undertook to investigate the case of the respondent pertaining to classification of the product which had been declared as quilt covers. It was observed that the consignment contained 203 bales of polyester Quilt Covers in running length of printed fabric which had been folded at mid length and having loose stitching on two sides, 214 cartons of 100% Polyester

Bed Sheets-three pieces packs, Bed Sheet (with 2 pillow covers) and 298 bales respectively made of HDPE bags. The bales were found to contain bundles of polyester woven fabric sheets which were folded at mid length and having loose stitching on two sides and the same had been declared as polyester quilt covers. Hence, it was the case of the appellant that the respondent had categorized the goods as 'made up' and not textile. Regarding the consignment in dispute, an opinion was sought from AEPC, a nodal agency sponsored by Ministry of Textile, Government of India. The three member committee formed by AEPC tendered its opinion that the samples of the so called quilt covers/quilt shells are articles which actually fall under the category of upholstery fabrics. A second set of sample was submitted to the Textile Committee. On a conjoint reading of the reports, it is urged that the quilt covers/quilt shells were made of polyester fabric which were basically two kinds of fabrics i.e. Polyester Woven Fabric and Polyester Knitted Fabric. The stitching on the two sides was so loose that even for the sake of making quilts, the concerned side would have to be stitched again i.e. stitching was redundant.

7. It was urged that as the investigation in the matter could not be completed within six months from the date of detention due to non-receipt of test report and expert's opinion, it was necessary to take steps to extend the period of detention in terms of proviso to sub-section (2) to Section 110 of the Customs Act, 1962 (hereinafter referred to as the 'Act'). Hence, a show cause notice was issued to the respondent on 23-1-2015 for extension of time for six months. The notice was duly served on the authorised Customs broker of the respondent on the said date with a request to appear for a personal hearing either at 1230 hours or 1430 hours on the same date. The Customs broker submitted a letter on the same date conveying that they did not want any personal hearing on behalf of the importers. It is only thereafter that the impugned order dated 23-1-2015 was passed by the Commissioner of Customs extending the period by six months. Reliance was placed on Sections 146, 146A and 147 of the Act to submit that authorised Customs brokers were duly empowered to make an appearance before an officer of the Customs.

8. The learned Single Judge by the impugned order noted that there was no dispute regarding the fact that the show cause notice was dispatched on 30-1-2015 though dated 23-1-2015. However, the submission of the appellant that the show cause notice had been duly served on the respondent as the Customs agent had been served on 23-1-2015 was rejected. The order notices that as per the receipt placed on record, the show cause notice was served on G Card holder of the Customs agent. The Court noted that Section 153 of the Act provides the manner in which any order or decision passed or summons or notice issued under the Act are required to be served. The order further noted that in 2012 an amendment took place in the said Section 153(a) of the Act by deleting the phrase "or to his agents" and whereby the said Section now provides that an order or decision passed or summons or notice issued under the Act shall be served by sending it by registered post or by approved courier to the person to

whom it was intended. Earlier the service could also be affected on the agent. The phrase "to his agents" as stated as one of the modes of service in Section 153(a) was deleted. Based on the said amendment, the order concludes that the legislature had consciously done away with service of order or decision or summons or notice on an agent or customs agent who operates under a special contract with an importer or exporter and that an agent or Customs agent would not be authorised to receive show cause notice. Reliance was also placed on Regulation 2(c) and 11(a) of the Customs Brokers Licensing Regulations, 2013 to cull out the scope of duties of a Customs agent. Based on the said Regulations, the order holds that it is no part of the usual and ordinary duty of a Customs agent to accept service of orders, summons, decision or notices issued by the Customs authorities. In a specific case, the importer or the exporter can issue an authority to do so but no such authority factually exists in the present case nor the appellant sought production of any such authority. In view of this, the impugned order granted relief to the respondent in terms of prayer A and B i.e. quashed the order dated 23-1-2015 and directed release of the concerned goods imported by the Bill of Entry Nos. 6097564 and 6097566 both dated 15-7-2014 and seized by panchnamas dated 25-7-2014. However, the order clarifies that the present order would not in any manner whatsoever affect the investigation which was underway. It is only the seized goods which would have to be returned to the respondent and no more inasmuch as the appellant would be free to continue their investigation and proceed to the next step towards trial by complying with the provisions of Section 124 of the Act.

9. We have heard the learned counsel for the parties and gone through the record.

10. Learned counsel appearing for the appellant has submitted that the goods were actually detained under Section 17(2) of the Customs Act and there was no confiscation under Section 110 of the Act. Hence, it is his submission that Section 110(2) of the Act had no application and there was no question of permitting return of goods to the respondent. He has also reiterated the submissions made in the counter affidavit contending that the service of show cause notice on the Customs agent was valid service.

11. We are not impressed by the submissions of the learned counsel for the appellant. A perusal of the impugned order shows that no such submission about Section 17(2) of the Customs Act was made before the learned Single Judge. It is for the first time before us that the submission had been made. A perusal of Section 17 of the Act shows that the same deals with self-assessment of duty, if any, leviable on the goods. A bare perusal of the said provisions would show that there is no provision for detention of goods. This contention of the learned counsel for the appellant is clearly without merit.

12. We may now deal with the issue of service on the respondent regarding proceedings relating to the proviso to Section 110(2) of the Customs Act. Relevant portion of Section 110 of the Act reads as follows :

"110. Seizure of goods, documents and things. - (1) If the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods :

Provided that where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer.

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(2) Where any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized :

Provided that the aforesaid period of six months may, on sufficient cause being shown, be extended by the Commissioner of Customs for a period not exceeding six months."

Hence, Commissioner of Customs can extend the period of seizure of goods for a period of six months, beyond the initial period of six months.

13. Section 153 of the Act deals with the service. Section 153 reads as follows :

"153. Service of order, decision, etc.

- Any order or decision passed or any summons or notice issued under this Act, shall be served, -

(a) by tendering the order, decision, summons or notice or sending it by registered post or by such courier as may be approved by Commissioner of Customs.

(b) if the order, decision, summons or notice cannot be served in the manner provided in clause (a), by affixing it on the notice board of the customs house."

14. Hence, a notice issued under the Act can be served by sending it by registered post or by approved courier and if for some reason, it cannot be served, by affixing it on the notice board of the Customs house. The said Section does not provide for service of show cause notice on a Customs broker/Customs agent.

15. In this context, reference may be had to the said Section 153 of the Act prior to its amendment in 2012. Un-amended Section 153 reads as follows :

"153. Service of order, decision, etc. - Any order or decision passed or any summons or notice issued under this Act, shall be served, -

(a) by tendering the order, decision, summons or notice or sending it by registered post to the person for whom it is intended or to his agent.

(b) if the order, decision, summons of notice cannot be served in the manner provided in clause (a), by affixing it on the notice board of the customs house."

Hence, under the un-amended provisions of Section 153, an agent could also be served an order, or decision, or summons or notice issued under the Act. Clearly the amendment had been introduced to ensure service on the person concerned.

16. In the present case, none of the procedures as stipulated under Section 153 of the Act were followed by the appellant while serving a show cause notice before exercising power under proviso to sub-section (2) of Section 110 of the Act. The service on the Custom agent was no service and vitiates the order dated 23-1-2015.

17. The reliance of the appellant is on Sections 146, 146A and 147 of the Act to contend that service could also be effected on the CHA/Customs agent. Section 146(1) provides for license to be issued to Customs brokers. Section 146(1) reads as follows :-

"146. License for customs brokers. - (1) No person shall carry on business as a customs broker relating to the entry or departure of a conveyance or the import or export of goods at any customs station unless such person holds a license granted in this behalf in accordance with the regulations.

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18. Similarly, Section 146(A) of the Act provides that any person who is to appear before an officer of the Customs/appellate authority may do so other than where appearance is required under Section 108, by an authorised representative. Section 146A(2) provides that an authorised representative would include a relative/regular employee/Customs broker licensed under Section 146/legal practitioner/person who has acquired such qualification as may be specified. Section 146A(1) and (2) of the Act read as follows :

"146A. Appearance by authorised representative. - (1) Any person who is entitled or required to appear before an officer of customs or the Appellate Tribunal in connection with any proceedings under this Act, otherwise than when required under section 108 to attend personally for examination on oath or affirmation, may, subject to the other provisions of this section, appear by an authorised representative.

(2) For the purpose of this section, "authorised representative" means a person authorised referred to in sub-section (1) to appear on this behalf, being -

(a) his relative or regular employee; or

(b) a custom broker licensed under section 146; or

(c) any legal practitioner who is entitled to practise in any civil court in India; or

(d) any person who has acquired such qualifications as the Central Government may specify by rules made in this behalf.

19. Similarly, Section 147 of the Act provides for liability of principal and agent. Section 147(1) provides that where the Act requires anything to be done by the owner/importer/exporter, the same may be done by his agent.

20. The Section dealing with the functions of a Custom agent is Section 146 of the Act. This Section defines the role of a Custom agent as relating to the business of entry or departure of a conveyance, or the import or export of goods at any Customs station.

21. Similarly, Rule 2(c) of the Customs Brokers Licensing Regulations, 2013 states as follows :

"2(c) "Customs Broker" means a person licensed under these regulations to act as agent for the transaction of any business relating to the entry or departure of conveyances or the import or export of goods at any Customs Station."

Hence, even as per these regulations, a Customs broker acts as agent for the transaction of the business relating to entry or departure of conveyance or import or export of goods at any Customs Station.

22. In this case as we are dealing with import, import is defined under Section 2(23) of the Act, which reads as follows :

"2(23). "import", with its grammatical variations and cognate expressions, means bringing into India from a place outside India."

In our opinion, confiscation/seizure of goods would not fall within the meaning of "import of goods" as used in Section 146 of the Act and Regulation 2(c) of the Customs Brokers Licensing Regulations, 2013. Such confiscation being penal in nature cannot be termed to be a part of the duty of a Custom agent. Service would have to be effected on the owner of the goods personally or through agent so specifically authorised to accept.

23. Reference in this context may be had to the judgment of the Supreme Court in the case of Harbans Lal v. Collector of Central Excise & Customs, Chandigarh, (1993) 3 SCC 656 : 1993 (67) E.L.T. 20 (S.C.), where the Supreme Court held as follows :

"7 ??????.. It was also pointed out that on the expiry of the period of six months, from the date of seizure, the owner of the goods would be entitled as of right to restoration of the seized goods, and that right could not be defeated without notice to him that an extension was proposed. It is found that the point was considered again in Lokenath Tolaram v. B.N. Rangwani but this case had been concluded on different considerations. Unquestionably thus is the settled position of law that while extending time under Section 110(2), the owner of the seized goods is entitled to notice, because the seized goods on the expiry of period of six months are required to be returned to him, and if that period was to be extended for another period of six months he had the right to be heard. The High Court in the decision under appeal has thus rightly observed that it was not

disputed before it that the ex parte order extending the time by another six months as postulated in Sections 110(2) and 124 of the Act, was vitiated."

Clearly the right of owner of goods cannot be defeated without prior notice on him. Hence, the contention of the appellant that service of the show cause notice could also be effected on the Custom Agent in view of Sections 146, 146A & 147 of the Act is a contention without merits.

24. We agree with the view of the learned Single Judge that for a Custom agent to be able to receive notice of show cause in circumstance as stated above, he would have to be conferred special authority by the owner of the goods/ concerned person. There is no merit in the appeal and the same is dismissed.