(2016) 05 KL CK 0032

In the High Court Of Kerala

Case No : Customs Appeal No. 23 of 2009

Sadiq Brothers Marine Works	APPELLANT
Vs	
Commissioner of Customs, Cochin	RESPONDENT

Date of Decision : 31-05-2016

Acts Referred:

Citation : (2016) 339 ELT 548

Hon'ble Judges : Antony Dominic and Dama Seshadri Naidu, JJ.

Bench : Division Bench

Advocate : Shri P.V. Jyothi Prasad, Advocate, for the Appellant; S/Shri Thomas Mathew Nellimoottil, SC and Tojan J. Vathikulam, Advocate, for the Respondents

Final Decision : Allowed

Judgement

Antony Dominic, J.—This appeal filed under Section 130 of the Customs Act is against an order passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai in Appeal No. C/43/2007, dated 28-4-2008 [2008 (229) E.L.T. 424 (Tri. - Chennai)], whereby the appeal filed was rejected, but the penalty and fine were reduced.

2. We heard the learned counsel for the appellant and the learned Standing Counsel appearing for the Revenue.

3. Briefly stated the facts of the case are, that two deep sea fishing trawlers of foreign origin were imported by M/s. Kerala State Co-operative Federation for Fisheries Development Ltd. (''Matsyafed'' for short). Subsequently, Matsyafed invited tenders for the disposal of the trawlers and being the successful tenderer, the trawlers were sold to the appellant on 26-2-1998. According to the appellant, finding the trawlers to be not seaworthy, they sent it for breaking up. Later, show cause notice was issued to the appellant under Section 124 of the Customs Act for confiscating the vessels under Section 111(o) of the Act and imposing penalty on the appellant under Section 112 of the Act, besides recovering duty from him. This was on the basis that there was non-compliance of the provisions contained

in Notification No. 133/87. In the adjudication that was followed, the demand was confirmed. In the further appeal that was filed, the Tribunal passed the impugned order, whereby the order was upheld, but the fine and penalty alone were reduced. This is the background in which the appeal is filed.

4. The first contention raised before us was with respect to the very legality of the proceedings that were initiated against the appellant. According to the learned counsel for the appellant, by Notification No. 262/58 the ocean going vessels, other than the vessels imported to be broken up, were exempted from the payment of customs duty leviable thereon. It is stated that as per the proviso to the notification, any such vessels subsequently broken up, shall be chargeable with the duty which would be payable on such vessels as if it were then imported to be broken up. The learned counsel contended that this notification was rescinded and superseded by Notification No. 133/87, the relevant portion of which reads as follows :

(a) the exemption under this Notification shall not be available to such goods (that is to say, vessels and other floating structures) as are imported for the purpose of breaking up; and

(b) any such goods (that is to say vessels and other floating structures), if subsequently are intended to be broken, the importer shall present fresh Bill of entry to the Collector of Customs, and thereupon such goods shall be chargeable with the duty which would be payable on such goods as if such goods were entered for home consumption under Sec. 46 of the Customs Act, 1962 (52 of 1962), on the date of the presentation of such fresh Bill of Entry to the Collector of Customs for the purpose of break-up of such goods."

It is pointed out that Notification No. 133/87 was again rescinded by Notification No. 47/96-Customs, dated 23-7-1996.

5. It is stated that the appellant purchased the trawlers in question only on 26-2-1998. According to them, it was thereafter that they found the vessels to be not seaworthy and decided to send the same for breaking up. It is stated that by that time, since Notification No. 133/87 was rescinded by Notification No. 47/96, dated 23-7-1996, the liability under Notification No. 133/87 was not in existence from 23-7-1996 and that therefore, the proceedings initiated by the respondent resulting in the impugned order was illegal.

6. However, this contention of the learned counsel for the appellant was sought to be resisted by the learned Standing Counsel appearing for the respondents by relying on Section 159A of the Customs Act, 1962, which was introduced by the Finance Act, 2001 with retrospective effect from 1-2-1963. The counsel contends that clause (c) of Section 159A of the Act expressly provides that the rescission of the notification would not affect any liability acquired, accrued or incurred under any notification repealed, superseded or rescinded. It is stated that irrespective of the fact that Notification No. 133/87 was rescinded by Notification No. 47/96, the obligation of the importer to file a fresh bill of entry to the

Collector and to pay duty as if the vessel was imported, survived. Therefore, it is stated that proceedings impugned are unassailable.

7. We have considered the submissions made. A reading of Notification No. 133/1987 shows that subsequent transfer of the vessel for breaking up fastened the liability on the importer to present a fresh bill of entry to the Collector of Customs and thereupon the vessel shall be chargeable with duty in the manner as provided in the notification. However, this notification was rescinded by Notification No. 47/96, dated 23-7-1996.

8. Admittedly, acquisition of the vessel by the appellant was only on 26-2-1998 and they transferred the vessel for breaking up still later. The question is whether such transfer of the vessel by the appellant for breaking up would attract the liability under Notification No. 133/87. In our view, the answer should be in the negative for the reason that as on the date of acquisition of the vessel or its transfer for breaking up, Notification No. 133/87 was already rescinded by Notification No. 47/96. Section 159A of the Customs Act, 1962 reads thus :

"159A. Effect of amendments, etc., of rules, regulations, notifications or orders. - Where any rule, regulation, notification or order made or issued under this Act or any notification or order issued under such rule or regulation, is amended, repealed, superseded or rescinded, then, unless a different intention appears, such amendment, repeal, supersession or rescinding shall not -

(a) receive anything not in force or existing at the time at which the amendment, repeal, supersession or rescinding takes effect; or

(b) affect the previous operation of any rule, regulation, notification or order so amended, repealed, superseded or rescinded or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any rule, regulation, notification or order so amended, repealed, superseded or rescinded; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under or in violation of any rule, regulation, notification or order so amended, repealed, superseded or rescinded; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the rule, regulation, notification or order, as the case may be, had been amended, repealed, superseded or rescinded."

9. Clause (c) of Section 159A is attracted only in a case where a right, privilege, obligation or the liability is acquired, accrued or incurred under any notification superseded or rescinded. Insofar as this case is concerned, the acquisition of

liability could have arisen only on the transfer of the vessels for breaking up, which event took place either on 26-2-1998 or thereafter. As on that date, Notification No. 133/1987 was no longer in force. This means that as on 26-2-1998 or thereafter, in the absence of Notification No. 133/1987 being in existence, the liability thereunder could not have been acquired or incurred, to attract clause (c) of Section 159A. This, therefore, means that Section 159A would not save the proceedings initiated against the appellant under Notification No. 133/1987. If that be so, the whole proceedings initiated against the appellant are without jurisdiction.

10. We are, therefore, inclined to allow the appeal. This appeal is accordingly allowed and the impugned order would stand set aside.

11. Although various other contentions, including the right of duty, were pressed into service by the learned counsel for the appellant, having regard to the above conclusion, we do not think that it is necessary to deal with any of those contentions.

