(2001) 10 CAL CK 0014

In the Calcutta High Court

Case No : G.A. No''s. 1866 of 2000 and 2368 of 2001, APOT No. 384 of 2000 and W.P. No. 1122 of 2000

Sentosa Overseas Pvt. Ltd. APPELLANT

Vs

Commissioner of Customs (Port) RESPONDENT

Date of Decision : 10-10-2001

Acts Referred:

Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 — Rule 5(3)

Citation : (2002) 140 ELT 46

Hon'ble Judges : Y.R. Meena, J;M.K. Basu, J

Bench : Division Bench

Advocate : V.N. Dwivedi, for the Appellant;A. Law, for the Respondent

Judgement

Y.R. Meena, J.—This appeal is directed against the order of learned Single Judge dated 27th April, 2000 requesting that the balance 45% of the goods should be released forthwith.

2. The petitioner imported 9 consignments of Glasswares which arrived at Calcutta port between 12-10-1999 to 6-12-1999. The petitioner filed these Bills of Entry for assessment and clearance of the goods were detained and warehousing of the goods were partly allowed. Thereafter, under order of the Court warehousing of the rest of goods were allowed in April, 2000. As the goods are not allowed for shifting in the warehousing assessee suffered demurrage of Rs. 30,40,855/-.

3. On 244-2000 assessee filed writ petition No. 1122 of 2000 challenging in action of the authority and demand of bank guarantee for possible fine and penalty. On 25-4-2000 show cause notice are issued by the respondent upon the clearing agent of the petition. On 27-4-2000 learned Single Judge directed to release of 55% of four consignments out of nine consignments and directed adjudication be expedite and complete within 6 weeks.

4. On 10-5-2000 the Appeal Court directed to release of 55% of the rest of the consignments. On 25-4-2000 respondents also issued show cause notices covering the eight consignments. On 11-9-2000 the hearing of show cause notices were assigned to Commissioner of Customs (Air Port) and Board directed that complete the adjudication before 31-12-2000. On 15-2-2001 Appeal Court directed to complete the adjudication within two months. Again on 29-6-2001 Appeal Court directed that complete adjudication within two months, if adjudication is not completed the appellant can ask for release of goods. In spite of this direction the adjudication has not been completed.

5. Learned Counsel for the appellant submits that as there is inaction and undue delay on the part of the department the appellant is entitled for release of goods. He further submits that the goods of the appellant should be valued as has been valued in the similar cases of other parties who imported the similar goods. The lowest value should be taken for the purpose of valuation of the goods of the appellant as per Sub-rule (3) of Rule 5 of the Rules, 1988.

6. He further submits that the goods were arrived at the port on 12-10-1999 and these Bills of Entry were submitted for the assessment and clearance on 20-2-1999 and 6-12-1999. Now it is almost September, 2001 till today they have not made the final adjudication. It is clear case of harassment and undue delay. The goods of the appellant should be released forthwith accepting the customs duty on the price disclosed by the appellant.

7. Learned Counsel for the Customs Department Mr. Law submits that the concerned department officers have taken all steps to complete the adjudication as directed but due to some difficulties the final adjudication could not be made. Now officer for assessment of the appellants goods has come, the assessment will be made at an early date.

8. Before we considered the facts of the case we would like to refer some observations of the Courts and relevant clauses on the issue such as how the goods should be valued and how much the normal period should be taken in completion of the adjudication and whether it is a case of harassment.

9. Para 33 of the Schedule provides for expeditious adjudication of offences and seizure cases. In order to effect expeditious disposal of the Central Excise offences, Clause (iv) of the para 33 provides that cases should be adjudicated within five days from the date fixed in the show cause notice for reply. If personal hearing is requested by the party, the date should be fixed within seven days from the date of receipt of the reply from the party and the case should be adjudicated within five days from the day of hearing. Clause (C) of Sub-para (vi) of Para 33 provides that the procedure contained in this paragraph should also be followed mutatis mutandis in respect of Customs Cases.

10. In Sub-rule (3) of Rule 5 of The Customs Valuation (Determination of Price of Imported Goods) Rules 1988, provides that while valuing the identical goods if more than one transaction the value of the identical goods is found, the lowest

value taken in the similar goods imported should be taken for adjudication. The relevant Sub-rule 3 reads as under :

"(3) In applying this rule, if more than one transaction value of identical goods is found, the lowest such value shall be used to determine the value of imported goods."

11. In case of Kishan Kumar Daga Vs. Collector of Customs, the Court has observed that if abnormal delay is there in adjudication, the principle of justice delayed is justice denied is applicable. Relevant para 9 reads as under :-

"9. In my opinion this is a classical case where the principle that delaying of justice is denial of justice is directly and clearly applicable. Here is a petitioner who has previously imported 25 similar consignments who does everything to get release of his imported consignment and is met with by sheer governmental error and neglect. He has no remedy. His adversaries are the Union of India and are too powerful. No suit will lie against them in these matters. No complaint against them in these matters. No complaint against them is of any value. The petitioner has at last approached the Writ Court. If the Writ Court refuses them relief then the petitioner might well ask what is the system of justice doing in India."

12. This Court further ordered in para 12 for release of goods in such cases. The relevant para reads as under :

"12. In the present circumstances an interim order is a must. The respondents will release the entire consignment to the petitioner unconditionally within seven days hereof. The petitioner undertakes to pay to Court, at the final hearing of this writ, without the necessity of any recourse being had by the respondents to any fresh proceedings, any excess duty or any damages in lieu of confiscation or any other sums, if any, that might appear to be payable by the petitioner."

13. All the Courts consistently held that while adjudicating and valuing the goods imported the value taken in comparable cases should not be ignored.

14. In Sandip Agarwal v. Collector of Customs 1992 (52) E.L.T. 528 in para 52 this Court observed that while adjudicating authority has charged the appellant with under valuation, the adjudicating authority failed to take into a crucial fact that the same Collectorate had cleared the identical goods of identical quantity at the identical price in case of similarly importers like that of the appellant and in para 53 they quoted the decision in case of Kajaria Exports Ltd. v. Collector of Customs and Ors. [(1986) 1 CLJ 231] it also reads as under for ready reference :

"In Kajaria Exports Ltd. v. Collector of Customs and Ors. [(1986) 1 CLJ 231] wherein it has been held that in order to arrive at a decision of under-invoicing the concerned authority must act fairly and reasonably and in accordance with known principles of law. The authority must not act as a mere tax gatherer by any means. There must be a reasonable basis for such belief supported by cogent evidence and no fanciful ideas that importers are out to take advantage over the authorities and thereby deprive the Exchequer. It has also been held therein that the fact that self same authority having cleared the very same articles few months earlier ought not to have been ignored. Giving a go-by to the evidence at hand and relying upon something which does not have a direct bearing on the concerned subject does not speak of a non-harassive attitude."

15. In Ghanshyam Chejra Vs. Collector of Customs,] this Court has taken the value that when value of a particular accepted by the Customs Authority becoming a precedent and a different value is taken in the subsequent cases that will be arbitrary. The relevant observation of the Court in para 29, which reads as under :

"29. Some of the instances set out in the adjudication order regarding valuations are quoted and it has been held in Kajoria Exports Ltd. (supra) that quotation at higher rate would not by itself show under-invoicing of the goods sought to be imported. The fact is that the respondents were and still are clearing the spares, which are the subject matter of the instant application more or less at the same price as declared by the petition and others. Some of such bills of entries evidencing the aforesaid fact have been annexed with the writ petition at pages 153 to 205. The petitioner has also relied on some more bills of entries evidencing the purchase of identical goods more or less at similar price. Documents evidencing such importations at more or less similar price before and after filing of the writ petition have been produced before this Court. Hence the charge of under valuation is misconceived and cannot be sustained. The respondents cannot ignore the basic materials in the form of their previous orders and decisions and proceed on the basis of their ipse dixit. Examples set out in the adjudication order pertains to small consignments whereas in the instant case bulk quantities were contracted for and a part of that was imported by way of part shipment. The same is also applicable in the case of Export Houses also. It is a matter of common knowledge in the International as well as in the Inland trade that purchasers of bulk quantity enjoys a better discount."

16. In Trident Television Private Limited Vs. Collector of Customs, this Court has observed that purchase in bulk quantity than the smaller quantity that makes difference itself in the price purchased. The relevant observation of the Court in para 27 reads as under :

"27. The charge of under-valuation is not substantiated on the facts of the case. The instances and/or example referred to in the adjudication order with respect to the Colour Picture Tube does not indicate any model number. Number of pieces imported are also mentioned. According to the petitioners, in the International as well as Inland Trade, the prices vary according to the quality of the goods i.e. Model number and the quantity of import. An importer of bulk quantity naturally enjoys a higher discount and/or advantage than an importer of small quantity. Moreover, the contract entered into by the petitioners with the foreign supplier pertains to much earlier period when the price of the spares were much lower. The subject consignments are part shipment of the contract for purchase of bulk quantity. The instances and/or examples set out in the impugned adjudication order itself reveal that the Customs Authorities are releasing Colour Picture Tubes more or less at the same price as declared by the petitioners. The respondents, in order to justify their action commented that "Picture Tubes appears to be Honkong made" but in fact no Picture Tubes are manufactured in Hongkong. The respondents being creatures of statute should not have resorted to such flimsy pleas to circumvent the real issue."

17. Whether the value accepted by the department earlier should be taken into account or not, the Court further observed in para 28, which reads as under :

"28. It has not been disputed that the respondents have at the material time been clearing the spares of Colour Television more or less at the same price as declared by the petitioners. The petitioners have annexed with the writ petition at pages 164 to 178 some of the Bills of Entry showing that the respondents were and still are clearing the spares for Colour Televisions more or less at the same price as declared by the petitioner. Thus the action of the respondents is arbitrary. The petitioners have also relied on Bill of Entry evidencing purchase of identical goods at more or less similar price. On these facts it is contended that Customs Authorities being creature of statute are bound by their own precedence. Once the Customs authorities have accepted the value of a particular item it becomes a precedent and subsequently it cannot held that the valuation is not correct. In support of the aforesaid contentions, Mr. Sen relied on a decision of this Court in Kajaria Exports Ltd. v. Collector of Customs and Ors., reported in 1986 (1) CLJ 231 wherein it has been held that for under-invoicing Customs authorities may refuse clearance. But, quotation at higher rate would not by itself show under-invoicing of the goods sought to be imported. To arrive at a decision of under-invoicing the concerned authority must act reasonably when a few months earlier the Authority cleared the goods to others at the same invoice amount, the Authority cannot take the plea of under-invoicing."

18. In case of Karn Vir Mehta Vs. Collector of Customs, in para 11 Court has taken the view that proforma invoice/quotation is not a relevant evidence of sale price in absence of actual importance of such invoice/quotation. The relevant para reads as under :

"11. In the case on hand, the facts are clearly distinguishable. The Commissioner of Customs relied upon the proforma invoice said to have been issued by a different company in Singapore. Proforma invoice is nothing more than a tentative statement of the seller for sale of the goods at the price mentioned therein. Until the buyer accepts it and enters into the actual transaction of sale and purchase, there can be no presumption that the goods must have been sold at that price. Such quotations or proforma invoices are not relevant evidence in the absence of an actual import in pursuance of the quotation. They are in the nature of offer and there is scope for negotiation to fix the final price for the import of the goods. Hence, no reliance can be placed on such quotations."

19. Under the Act the customs duty be charged u/s 14 of the Act. The valuation of customs duty, the relevant rules is Rule 3(1) and Rule 4(1) under these rules the authorities should accept the price actually paid subject to certain objections. These provisions are considered by this Court in the case of M/s. Eicher Tractors Ltd., Haryana Vs. Commissioner of Customs, Mumbai, the relevant observation in paras 8 and 9 reads as under :

"8. Reading Rule 3(i) and Rule 4(1) together, it is clear that a mandate has been cast on the authorities to accept the price actually paid or payable for the goods in respect of the goods under assessment as the transaction value. But the mandate is not invariable and is subject to certain exceptions specified in Rule 4(2) namely :

(a) there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which -

(i) are imposed or required by law or by the public authorities in India; or

(ii) limit the geographical area in which the goods may be resold; or (iii) do not substantially affect the value of the goods;

(b) the sale or price is not subject to same condition or consideration for which a value cannot be determined in respect of the goods being valued;

(c) no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of Rule 9 of these rules; and

(d) the buyer and seller are not related, or where the buyer and seller are related, that transaction value is acceptable for customs purposes under the provisions of Sub-rule (3)."

20. In Circular No. 84/95-Customs, dated 25-7-1995 provides in para 3 that the board desires that whenever it becomes necessary to detain the imported cargo for long time period pending completion of enquiry/ investigation, such cargo should be removed to a customs warehouse in terms of the provisions of Section 9 of the Customs Act 1961. For this purpose the cargo can also be removed from the container and the container can be released for use by the containers agents/ other importers. In this case the goods were not allowed to shift in the warehouses, they were allowed to be shifted in the warehouses only as per direction of the Court and on account of mistake of the department the appellant suffered loss of Rs. 30,40,855/- by way of demurrage charges.

21. In letter-dated 8-9-2000 Board has directed the Commissioner of Customs (Port) to complete the process of adjudication before 31-12-2000 without fail. The Court has also given direction thrice to complete the final adjudication within time given, but that has not been done.

22. Fluctuation in price of goods is very common in market, therefore, on

account of delay party may suffer some time heavy loss. Not only that in trade businessman normally businessmen invest the borrowed money, if goods are not released in time, he has to pay heavy interest on that amount till goods are released and sold. Therefore, there are provision for expedite adjudication, undue delay not only frustrate the object behind the relevant rules but also discourage the import of goods. In this case goods arrived between October/ December, 1999 till today 45% of goods have not been released, as no final assessment has been made.

23. The provisional assessment made is ex facie arbitrary. Therefore, it is not possible to pay duty or bank guarantee on the basis of such provisional assessment. Therefore, we deem it proper to order that goods should be released forthwith, if the customs duty liability is ascertained and paid for the purpose of release of goods as under.

24. For purpose of release of goods the authority is directed to take the provisional value taking into account, The Comparable cases set out in page 33 and 34 of the list of dates and Sub-rule (3) of Rule 5 of the Customs Valuation (Determination of Price of Imported Goods) Rules 1988. We have also noticed that the quantity imported by the assessee is much more than the quantities imported by NJT and P.S. Enterprises that shall also be kept in mind for purpose of provisional assessment for release of goods.

25. We further direct that in cases where similar goods are not available for purpose comparable cases, take the provisional value by adding 20% in the price disclosed in the Bill of Entries. And that will be the provisional value of the goods for purpose of release of the goods.

26. The provisional value for purpose of release of goods be ascertained within 7 days from the date of this order. In case the appellant pays the Customs duty as per price disclosed in the Bills of Entry, furnish the bank guarantee for the balance part of duty as per provisional assessment as directed by us. The appellant is further directed to furnish personal bond also on the differential duty payable on the basis of provisional assessment already made by the Department. The goods be released within three days from the date of payment of duty and furnishing bank guarantee and personal bond as directed.

27. However it is made clear that the Customs duty payable shall be subject to the final adjudication. The observation made in this order shall not effect the merits of this case in adjudication.

28. The appellant also brought to our notice that for no fault of appellant and because of mistake of Departmental authorities, the appellant had been made liable to pay Rs. 30,40,855/- on account of demurrage and detention charges. Learned Counsel submits that the Department be directed to compensate this loss to appellant.

29. Instead of going into merits of this issue, we deem it proper to leave the

matter to authority in the Department to take appropriate steps in this regard and avoid possible further litigation.

30. With the above directions the appeal stands disposed of. Stay prayed for is rejected. All parties are to act on a xeroxed signed copy of the operative portion of this judgment on the usual undertaking.

