(2010) 10 KL CK 0076

In the High Court Of Kerala

Case No : Writ Petition (C) No. 25989 of 2010 (W)

Shree Ganapathi Kutir Udyog APPELLANT

Vs

Commissioner of Customs RESPONDENT

Date of Decision : 01-10-2010

Acts Referred:
Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 128, 27

Citation : (2010) 259 ELT 649

Hon'ble Judges : Antony Dominic, J

Bench : Single Bench

Advocate : P.A. Augustian, for the Appellant; Tojan J. Vathikulam, S.C., CBEC, for the Respondent

Final Decision : Dismissed

Judgement

Antony Dominic, J.—Petitioner imported used photocopier machines through the Cochin Port some time in 2006. Alleging that the import was in violation of the provisions of the Customs Act, proceedings were initiated by the Respondents. The adjudication proceedings, concluded by Ext. PI order of confiscation, giving liberty to the Petitioner, to get the goods released on payment of redemption fine of Rs. 3,70,000/- and penalty of Rs. 1,90,000/-. Though the goods were got cleared on payment as advised, Petitioner filed an appeal against Ext. PI order before the Commissioner of Customs (Appeals). The appellate authority, by Ext. P2 order, upheld Ext. PI, but, however, the fine and penalty were reduced and was fixed at 10% and 5% respectively of the assessable value of the goods imported. As a result of the appellate order, the Petitioner became eligible for refund of Rs. 38,740/-.

2. Accordingly, Petitioner filed Ext. P3 refund claim on 8-3-2008 in Form No. 102. Along with the refund claim, Petitioner produced only copies of the documents required to be produced. They were thereupon issued Ext. P4 deficiency memo requiring them to produce originals of the bill of entry and duty paid challan.

Petitioner thereupon submitted Ext. P6, an indemnity bond. A personal hearing was allowed and according to the Petitioner, their Custom House Agent represented them before the adjudication officer. During the course of the adjudication, they also submitted Ext. P9(2), intimating change of address. Petitioner states that nothing transpired thereafter, as a result of which, Ext. P10 notice was issued on 21-4-2009, demanding refund of the amount claimed, relying on Ext. P11, a judgment rendered by this Court on 26-3-2009. In this writ petition, it is stated that without considering the submissions made or Ext. P11 judgment, Respondents handed over a copy of Ext. P12 to the Petitioner''s Custom House Agent, rejecting the refund claim submitted by the Petitioner on the ground that the Petitioner failed to produce originals of the documents, supporting their refund claim. It is stated that so far, neither the order is communicated to the Petitioner nor were they issued any reply to Ext. P10 notice. It is in these circumstances, this writ petition is filed, challenging Ext. P12 order, rejecting the refund of the claim.

3. Contention raised by the counsel for the Petitioner is that the refund of fine and penalty applied for by the Petitioner is not a claim covered by Section 27 of the Customs Act and, therefore, the provisions of Customs Refund Application (Form) Regulations, 1995 are inapplicable. It is also their case that in Ext. P11 judgment, this Court had held that refund claims cannot be rejected on technical grounds. Counsel for the Petitioner also contended that in Ext. P14, the circular issued by the Government of India, it was clarified that no formal application for refund is necessary and that a simple letter from the person, who made such a deposit would suffice. It is also his contention that there is no statutory requirement, obliging an importer to produce the originals of the documents to support a claim for refund of the fine and penalty.

4. Respondents, on the other hand, contended that the application for refund should be in Form No. 102 and that original of the documents specified therein should be produced. According to them, the Petitioner did not enclose the original documents and, therefore, their refund claim was rightly rejected by Ext. P12 order. It is further contended that the impugned order, Ext. P12, was issued way back on 24-11-2008 and even if the case of the Petitioner that it was not served on them is accepted, the order was served on their Custom House Agent, who represented the Petitioner during the adjudication. It is contended that appeal should have been filed within the period specified in Section 128 of the Customs Act. It is stated that the appeal period expired long ago and cannot be filed at this distance of time and that by filing this writ petition, Petitioner is attempting to revive a cause of action which has become stale and time-barred. Respondents also contend that production of original documents is insisted in order to ensure transparency in the matter of refund. It is, therefore, contended that the writ petition deserves to be dismissed.

5. Counsel for the Petitioner in reply submitted that as the order was passed without authority of law, the refund cannot be denied to him, on the technical

reason that the period prescribed for appeal in Section 128 has run out and that an appeal was not filed.

6. If, as stated by the Respondents, the writ petition is liable to be rejected on the ground that the cause of action has become stale and time-barred and that, therefore, the Petitioner is not entitled to relief in this writ petition, it may not be necessary for this Court to enter into the merits of the controversy. Therefore, I shall examine that question.

7. Section 128 of the Customs Act provides for appellate remedy. This Section provides that any person aggrieved by any decision or order passed under this Act by an officer of Customs lower in rank than a Commissioner of Customs, may appeal to the Commissioner (Appeals) within 60 days from the date of communication to him of such decision or order. Admittedly, Ext. P12 is an order passed by an officer of Customs, dealing with a claim of refund, made by the Petitioner under the provisions of the Customs Act and, therefore, this is an order passed under the Customs Act. Therefore, the statute itself provides an appellate remedy to a person aggrieved by an order in the nature of Ext. P12 and admittedly this remedy was not pursued. The Petitioner justifies this by contending that they were not served with a copy of Ext. P12 order. However, pleadings itself show that in the course of adjudication, the Petitioner was represented by their Custom House Agent. Even if the case of the Petitioner that they were not served with a copy of the order is accepted, a perusal of the order shows that a copy of the order was endorsed to their Custom House Agent. The writ petition does not contain a pleading that copy of the order was not served on the agent in time and on the other hand, Respondents are categoric in their statement that copy was sent. Thus, it has to be accepted that the order was served on the agent immediately on the passing of Ext. P12 order.

8. If that be so, I should proceed on the basis that the order of rejection passed by the officer of customs on 24-11-2008 was served on the agent of the Petitioner and that the Petitioner did not pursue the appellate remedy. In such circumstances, the question to be considered is whether this Court will be justified in invoking its jurisdiction under Article 226 enabling the Petitioner to revive a cause of action, which he lost by virtue of the provisions contained in the Customs Act. This very question has been considered by a Division Bench of this Court in the judgment in District Executive Officer Vs. Abel, , where it has been held thus:

In a case where party was not vigilant and had failed to avail of the statutory remedy he is not justified in invoking the extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India. Finality has been attached to the final determination order and this Court shall not come to the rescue of the party who was not vigilant of his rights and has not availed of the statutory remedy available to him. By entertaining the writ petition under Article 226 of the Constitution of India this Court would be permitting a party to bypass the statutory remedy. We are, therefore, of the considered view, this Court sitting in

Article 226 of the Constitution of India shall not exercise the discretion in favour of the party who had not availed of the alternate reedy available under the statute.

9. If the principles laid down by the Division Bench are applied, Petitioner will have to be declined the relief in this proceedings. Counsel for the Petitioner however contended that in view of the law laid down by the Apex Court in Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, , even if the Petitioner has not availed of statutory remedy, the Petitioner is entitled to relief. In the judgment relied on by the counsel for the Petitioner, the Apex Court has indicated exceptions to the rule of alternate remedy and pointed out that where fundamental rights are sought to be enforced, where principles of natural justice are violated and where orders are bad for want of jurisdiction, the rule of alternate remedy will not be insisted superior courts. According to the learned Counsel, this is a case where the order is passed without authority of law, and therefore, the exception which applies to orders passed without jurisdiction, should apply to his case.

10. In my view, the said principle canvassed by the learned Counsel is inapplicable to the facts situation. Under the scheme of the Customs Act, it for the Customs Officer to decide on the refund claimed. In this case, it is such a claim which has been considered and rejected by the Customs Officer. Therefore, the order cannot be said to be one without jurisdiction, and at best, it may be an erroneous or illegal order that has been passed. Therefore, the exception pointed out by the Apex Court in the judgment relied on by the learned Counsel is inapplicable to the case in hand.

11. In the result, following the principles laid down by the Division Bench in the judgment mentioned above, Petitioner has been declined the relief and I do so.

12. Writ petition is dismissed.

