(1993) 09 CAL CK 0022

In the Calcutta High Court

Case No : Matter No...of 1993

Surendra Kumar Banthia APPELLANT

Vs

Collector of Customs RESPONDENT

Date of Decision : 28-09-1993

Acts Referred:

Customs (Provisional Duty Assessment) Regulations, 1963 — Regulation 1, 4
Customs Act, 1962 — Section 110(2), 124, 18, 7(11)
Foreign Trade (Development and Regulation) Act, 1992 — Section 5

Citation : (1994) 70 ELT 217

Hon'ble Judges : Ruma Pal, J

Bench : Single Bench

Judgement

Ruma Pal, J.—The petitioner has imported umbrella panels. A contract was entered into with the foreign seller on 2nd March, 1992 for this purpose. The goods arrived in Calcutta on 28th December, 1992 and 11th January, 1993. There were 12 separate consignments of the goods. Ten were released to the petitioner. As far as the remaining two were concerned the respondent authorities insisted that the goods would only be released provided that the petitioner furnished a PD Bond backed by a bank guarantee to the extent of 30% of the assessable value of the two consignments. The petitioner protested against the refusal of the Customs authorities to release the two remaining consignments of goods but ultimately on 22nd February, 1993 and 26th February, 1993 furnished two bank guarantees in support of the bonds executed by the petitioner in favour of the Customs Authorities as disputed by them. Upon the execution of the bond and the furnishing of the bank guarantee the goods were released to the petitioner.

2. After having obtained release of the goods the petitioner filed this writ application on 28th June, 1993. The petitioner has complained about the wrongful refusal of the Customs Authorities to release the goods except upon furnishing of bank guarantees. The petitioner has contended that the goods should have been released unconditionally to the petitioner as had been done in

respect of the earlier ten consignments. The petitioner has also contended :

(i) That under the earlier Export Import Policy the Umbrella panels were freely importable. The contract was entered into between the petitioner and the foreign seller when the earlier policy was in force. It is submitted that the relevant date for considering whether an item was freely importable or not was the date of the contract. Reliance has been placed on a decision reported in AIR 1990 SC 2190 in this context.

(ii) Under the new policy as it originally stood, umbrella panels continued to be freely importable. It was only on 30th June, 1992 that a public notice was purported to be issued seeking to widen the definition of consumer durable to include parts of consumer durables. It is stated that the notice dated, 30th June, 1992 in fact amounted to an amendment of the policy. It is stated that the policy could not be amended except by way of a public notification. Reliance has been placed on Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 as well as the decision reported i Sandip Agarwal Vs. Collector of Customs, .

(iii) In any event there had been no publication of any of the notices dated 30th June, 1992 and unless there was such publication, the importers could not be held bound by the contents thereof. Reliance has been placed on the decision reported in Raj Kumar Kedia Vs. Collector of Customs,

(iv) Finally it is contended that no adjudication proceedings having been initiated within a period of six months from the date on which the goods had arrived, the goods must be taken to have been in fact seized within the meaning of section 110 of the Customs Act, 1962. No notice u/s 124 having been issued, the petitioner was entitled to release of the goods u/s 110(2) of the Act.

3. The writ application was moved upon notice to the respondents. Directions were given for filing of affidavits. The time to file affidavits has expired. No affidavit-in-opposition was filed by the respondents.

4. At the hearing however, the respondents have contended :-

(i) That 1992-97 Import and Export Policy was introduced by publication in the Official Gazette. The policy as it stood did not clearly exempt umbrella panels from the negative list. The position was made clear by a Notification No. 22/(N-3)/92-93, dated 30th June, 1992. By this notification the definition of Section 7(11) of the policy had been amended so that umbrella panels could arguably be said to be included within the definition of consumables and could only be imported subject to the restrictions in the Act.

(ii) The bank guarantee had been asked for under the provisions of Section 18 of the Customs Act read with provisions of Regulations 1 and 4 of the Customs Act (Provisional Duty Assessment) Regulations, 1963 and was valid.

(iii) It was well established that the relevant date for determination whether the goods were importable freely or not was not the date of the contract but the date of importation. It is stated that even assuming that the umbrella panels were freely importable under the Original Policy of 1992-97, paragraph 4 of Chapter 1 would also permitted an Importer to continue to freely import the items provided the conditions in paragraph 4 were fulfilled. It is submitted that this was a matter which would have to be determined by the Customs Authorities in appropriate proceedings.

(iv) Finally, it is submitted that the petitioner should not be granted the reliefs prayed for because the petitioner had in fact taken advantage of the order of provisional assessment and had obtained release of the goods by furnishing a bank guarantee. It is submitted that it was not open to the petitioner to now turn around and challenge the order of provisional assessment by which the petitioner was given the goods subject to the condition of furnishing of a bank guarantee.

5. In my view, although the respondents have not filed any affidavit-in-opposition, the submissions made by them cannot be disregarded. The submissions do not relate to any matter of fact but are matters of record such as notifications issued. The arguments have been advanced on an interpretation of the provisions of the policy and the relevant sections of the Customs Act.

6. Having heard the submissions of the parties, I am unable to accept the contentions of the petitioners. The decision of the Supreme Court in Union of India and others Vs. Kanunga Industries, does not appear to have considered the earlier decisions which held directly to the contrary viz. that the relevant date for determining the importability of the goods was not the date of the contract but the date of actual import. The earlier decisions on this points have been considered at some length in the decision of the full Bench of the Bombay High Court in Apar Private Limited v. Union of India [1985 (6] ECC 241). The decision of the Supreme Court therefore in Kanunga Industries case appears to have been given per incuriam.

7. The second submission of the petitioner is negatived by the fact that a notification was indeed issued for amendment of the policy by inclusion of the phrase "accessories, components, parts and spares of such consumer durables" in paragraph 7(12) of the Import & Export Policy, 1992-97. There is some dispute as to whether the amendment was of the definition of consumer goods or consumables. From the copy of the Import Policy as amended upto 31st March, 1993 handed up to this Court it appears that the amendment was not to the definition of the word "consumables" but to the word "consumer goods". Consumer goods have been referred to in paragraph 156 of Part II of Chapter XV of the Import Policy of 1992-97. Chapter XV deals with the negative list. Consumer goods comes within restricted items. I am, however, not deciding the issue finally in this proceedings as I feel that the Customs Authorities should be given an opportunity to address their minds to the issues raised by the petitioner in properly constituted proceedings.

8. The third submission of the petitioner has not been adequately pleaded in the

writ petition. Be that as it may the notification dated 30th June, 1992 is contained in All India Import Export Journal published on 14th July, 1992. It may be that the journal is a private one. But, if the question of publication or knowledge is in issue, it would certainly indicate that the contents of the Notification dated 30th June, 1992 was made known to the public at large, at least on 14th July, 1992, much before the petitioner''s goods, in fact, arrived in India.

9. The last submission of the petitioner does not bear scrutiny. In order that the provision of Section 110(2) can come into play, it is imperative that there should be a seizure of the goods. There has been no such seizure of the goods in this case and the mere refusal to release the goods until final assessment cannot be considered as a seizure.

10. The most telling factor, however, against the petitioner is the execution of the Bond and the Bank Guarantee and the removal of the goods after such execution. If the petitioner was indeed aggrieved by the respondents'' demand for a Bond supported by a Bank Guarantee, the petitioner should have approached this Court immediately instead of allowing the Authorities to make provisional assessment u/s 18 of the Customs Act, 1962 and to allow the release of the goods to the petitioner subject to the terms and conditions which the petitioner by his act of execution must be deemed to have accepted.

11. Having rejected all the submissions of the petitioner, nevertheless, it appears to me that the Customs Authorities cannot drag their feet over the matter and compel the petitioner to keep the Bank Guarantee renewed for an indefinite period.

12. Accordingly, I dispose of the writ application by directing the Customs Authorities to complete the assessment proceedings within a period of 8 weeks from the date of communication of this Judgment and Order to the concerned Officer or within such further extended period as may be mutually agreed to between the parties in writing. The final assessment shall be made in accordance with law.

13. In default of the final assessment being completed within the time specified, the Customs Authorities will cancel the Bond and return the Bank Guarantee to the petitioner duly discharged within 48 hours from the date of such default.

14. Be it stated that by this Judgment and Order this Court is not seeking to place any limitation on the adjudication proceedings. In other words, the adjudication proceedings may continue and also may be initiated beyond the time specified by this order; but the Bank Guarantee and the Bond must stand cancelled and discharged, if the proceedings are not initiated and concluded within the date specified.

15. There will be no order as to costs.

16. All parties concerned are to act on a signed copy of the operative portion of

this Judgment and Order on the usual undertaking.