(1993) 05 CAL CK 0039

In the Calcutta High Court

Case No : Matter No. ... of 1993

Suresh Kumar Banthia APPELLANT

Vs

Collector of Customs RESPONDENT

Date of Decision : 12-05-1993

Acts Referred:

Customs (Provisional Duty Assessment) Regulations, 1963 — Regulation 2
Customs Act, 1962 — Section 18, 18(1)

Citation : (1993) 65 ELT 363

Hon'ble Judges : Ruma Pal, J

Bench : Single Bench

Advocate : S.K. Kapur and Ashok Gupta, assisted by Bidyut Dutt, for the Appellant;N.C. Roychowdhary and Amitava Dutta, for the Respondent

Judgement

Ruma Pal, J.—The petitioner is a partner of M/s. Parasnath Industries referred to as ''the firm''). The firm imported umbrella panels of different sizes and colours in March 1993. There was six separate consignments of umbrella panels. Each of the six consignments was examined by the Customs authorities and found to correspond to the description of the goods in the voices.

2. The Customs Authorities, however have refused to release the six consignments unless the petitioner executed a P.D. Bond and submitted a bank guarantee for 50% of the amount. The endorsement of each of the bills of entry ads - "submit P.D. Bond + submit bank guarantee as ascertained as practise (sic)m Bombay Customs. If no bank guarantee is taken at Bombay no bank guarantee shall be taken at Calcutta (W/O prejudice to Collectors order in (sic))".

3. The petitioners moved this writ application on 10th May, 1993 upon notice to the Customs Authorities. The Customs Authorities stated that they had evidence of under-valuation of the umbrella panels. They produced three orations of three foreign sellers in this context. It was further stated that they d asked for a bank guarantee to maintain a uniform pattern in all the customs Houses in the country with respect to identical goods. It is stated that Bombay Customs were insisting

on bank guarantee. Accordingly the Calcutta Customs were, to maintain such uniformity, also insisting upon the furnishing a bank guarantee. A copy of a telex was handed up to Court which reads -ease refer to your telex D.T.D. 26th April, 1993 regarding mode of clearance umbrella panels. There is verbal instruction only to release these goods under P.D. Assessment with bond and 50% bank guarantee. Not a single B/E is assessed so far accordingly, since nobody has come forward."

4. Copies of all the documents produced by the respondents were directed to be made over by the respondents to the petitioner. The petitioner conducted his own enquiry by sending messages to the persons/concerns from whom quotations had been obtained. Two of the concerns have written to the petitioner stating that they did not deal with umbrella panels at all. A third has quoted prices which are within the same price range as those shown by the petitioner in the firm''s invoice. The petitioner has also produced a letter addressed by Mr. B.P. Verma, Collector of Customs, Calcutta to Sri Tarun Roy Member (Customs) at New Delhi.

5. The respondents have submitted that the supplementary affidavit affirmed by the petitioner enclosing copies of its correspondence with the foreign sellers should not be taken into consideration as they had no opportunity of obtaining instructions with regard thereto. As far as the letter of Sri B.P. Verma was concerned, the respondents have handed up the original file relating to the matter. A copy of the letter as produced by the petitioner appears from the file. Therefore, there can be no dispute regarding the genuineness of the letter.

6. The goods in question have been provisionally assessed u/s 18 of the Customs Act, 1962. Section 18 of the Act provides for the provisional assessment of duty where inter alia the importer has produced all the necessary documents and furnished full information for the assessment of duty but the proper officer deems fit necessary to make further enquiry for assessing the duty. In such a case the proper officer has been given the power to direct that the duty leviable on the goods may, pending the production of such documents or furnishing of such information or completion of such test or enquiry, be assessed provisionally if the importer furnishes such security as the proper officer deems fit for the payment of the deficiency, if any, between the duty finally assessed and the duty provisionally assessed.

7. According to the respondent authorities the proper officer was entitled to ask for security in terms of Section 18 read with Rule 2 of the Customs (Provisional Duty Assessment) Regulations, 1962. Rule 2 provides as follows :

"Conditions for allowing provisional assessment. - When the proper officer on account of any of the grounds specified in Sub-section (1) of Section 18 of the Customs Act, 1962 (52 of 1962), is not able to make a final assessment of the duty on the imported goods or the export goods, as the case may be, he shall make an estimate of the duty that is most likely to be levied hereinafter referred to as the provisional duty. If the importer or the exporter, as the case may be, execute a bond in an amount equal to the difference between the duty that may be finally assessed and the provisional duty and deposits with the proper officer such sum not exceeding twenty per cent of the provisional duty, as the proper officer may direct, the proper officer may assess the duty on the goods provisionally at an amount equal to the provisional duty."

8. No further document however, has been produced by the Customs Authorities in support of the three quotations produced on first day of hearing. In my view, neither Section 18 nor Rule 2 of the Regulations as quoted above make it a pre-condition to the exercise of power by the Customs Authorities that security of the nature specified must be furnished. All that Regulation 2 does is to put an outer limit on the amount of cash that may be required to be deposited. It does not mean that the Customs Authority does have the power to dispense with the cash deposit in terms of Regulation 2 altogether. Indeed the very endorsement on the bills of entry namely P.D. Bond bank guarantee @ 50% would show that no cash deposit was being asked for in terms of the Regulation. The matter is one of the authorities, discretion, a discretion which must be exercised on the basis of relevant materials.

9. In this case the only material before the Customs Authorities are the quotations already referred to. In the Division Bench decision of Sandip Agarwal Vs. Collector of Customs, , it has been held that a higher quotation by itself without there being any other material or evidence would not justify an inference of under-invoicing.

10. On the basis of this decision there is no evidence before the Customs Authorities which would entitle them to draw the necessary inference of under-invoicing. Furthermore, it is not in dispute that subsequent to the dates of the quotations, the Customs Authorities have themselves released umbrella panels accepting the invoice value at the same rate as those declared by the firm. The bills of entry annexed to the petition would show that such releases were accepted till the end of April 1993 not only by the Calcutta Customs but also by the Bombay Customs. The assessments were provisionally against execution of P.D. bonds alone.

11. It also cannot be disputed that the discretion of the proper officer making the provisional assessment to demand duty is his alone. He cannot act on the basis of someone''s discretion without question. The endorsement on the bill of entry would show that the assessing officer had completely abdicated this function and made his discretion dependent upon say so of the Bombay Customs.

12. Even the Bombay Customs appeared to be acting on the basis of a verbal instruction, it does not say whose verbal instruction, when such verbal instruction was given or on what basis such verbal instruction was issued in the first place. The basis of such instruction has not been disclosed to the Court. The Court cannot accept the same as a valid exercise of discretion

13. This brings us to the letter of Sri B.P. Verma to Sri Tarun Roy. That letter

states :-

"From the computer print outs obtained in respect of importation of these goods, it is seen that the prices as declared/accepted for purpose of assessment are more or less the same at all the ports in India. The price range as noticed is between US $ 3.60 to US $ 4 per doz. set depending on the sizes of the umbrella panels.

2. In fact, a complaint was received in the Customs House from one M/s. Shankar Umbrella Industries in the month of January, 1993 and the entire matter was deliberated and it was decided that in absence of any actual import at the higher price and the fact that for the past so many years the various Custom Houses had been apparently clearing consignments of umbrella panels at the above-mentioned price range, the assessment done on provisional basis.

3. Incidentally, it may be mentioned that most of the importations of umbrella panels are taking place in Calcutta from the suppliers, viz. M/s. Ginda Industries, Taiwan. It has also been seen that in Bombay, mainly the goods are being imported from China and UAE at about the same prices which are noticed for Taiwanese goods at Calcutta.

4. Although the matter is being inquired into by the S.I.B. of this Custom House level it is felt that no worthwhile enquiry could possibly be conducted without contacting the suppliers of the product whose telephone/Fax numbers have been supplied. It is , therefore, suggested that the case of under-invoicing in respect of import of umbrella panels may be handed over to the Directorate of Revenue Intelligence who can also conduct overseas enquiries and provide vital information on the basis of which fraud of this proportion could be unearthed."

It is clear, therefore, that there is no evidence at present before the Customs Authorities on the basis of which they can come to the conclusion that the umbrella panels have, in fact, been under-invoiced. This is not to say that there is no scope for inquiry. The Customs Authority can of course conduct the inquiry as proposed in the letter quoted above.

14. The question is pending such enquiry what would be the appropriate security taking into consideration the facts and circumstances of the case. I have already held that Regulation 2 is not a mandatory provision. In my view it does not insist upon the deposit of cash. It is clear that the Customs Authorities had, thus, been accepting PD bond without more as sufficient security pending the inquiry. It was only because of the "verbal instruction" of the Bombay Customs House that they have taken a different view.

15. The respondents have stated that the mere fact that they had released the goods upto April, 1993 on the basis of PD bond alone did not mean that the petitioner could claim the release on the same terms and conditions. The respondents have relied upon two decisions of this Court. The first decision is the decision of Collector of Customs, Calcutta and Others Vs. Uday Engineering

Enterprises and Others, . In that decision the Calcutta High Court held that if the Customs Authority had been in error in allowing the release of goods, this did not mean that they were bound to repeat the error for all times to come and that a factual error could always be corrected and the Authorities could not be forced to stick to the error.

16. This decision applies to a case where an error has, in fact, been detected. In the case before me, there is no evidence to show that in realising the umbrella panels at the rates declared by the firm there has, in fact, been such an error. The question of forcing the Customs Authorities to repeat the error, therefore, could not arise. For the same reasons, the second decision in Coromandel Fertilizers Ltd. Vs. Union of India (UOI) and Others, is not applicable. A wrong decision in that case was demonstrated and the Court held that the Revenue Authorities were not bound by such wrong decision. The wrong decision must be demonstrated or at least demonstrable. There is nothing before this Court to show that the decision of the Customs Authorities to release the goods against the PD bond only was a wrong decision. The decision of the Supreme Court in Coromondal Fertilizers Limited is also, therefore, not applicable.

17. Considering the facts and circumstances of the case and having heard the learned Advocate for the parties at length, I am of the view that the writ application must be allowed by directing the respondent authorities to release the consignment of umbrella panels in question subject to the petitioner''s executing the bond in favour of the Collector of Customs in such manner as may be directed by the authorities concerned. The authorities will indicate the nature of the bond to be executed by the petitioner within a period of forty eight hours from date. Upon the petitioner''s executing the bond in the manner required, the Customs Authorities will release the umbrella panels to the petitioner. It is made clear that the decision will not stand in the way of the Customs Authorities making inquiries and proceeding against the firm, if so advised, in respect of the consignment in question on the grounds of under-invoicing provided that there is material for it to do so. As no affidavit in opposition has been used, it is recorded that the allegations contained in the petition are not admitted. The learned Advocate, appearing for the respondents, prays for stay of the operation of this judgment which is granted for two days from date.

18. All parties concerned are to act on a signed copy of the operative portion of this judgment on the usual undertaking.