(2017) 07 BOM CK 0048

In the Bombay High Court

Case No : 2 of 2007

The Commissioner of Customs | APPELLANT

Vs

M/s. Hyundai Heavy Industries Co. Ltd., & Ors. | RESPONDENT

Date of Decision : 13-07-2017

Acts Referred:

Customs Act, 1962, Section 30, Section 42, Section 47, Section 18, Section 38, Section 17, <a href=4115-48>Section

Citation : (2017) 07 BOM CK 0048

Hon'ble Judges : Anoop V. Mohta, Anuja Prabhudessai

Bench : DIVISON BENCH

Advocate : Pradeep S. Jetly, Jitendra B. Mishra, Hormaz Daruwalla, Krishna Borkute, Subodh Kurdukar, V. Subramaniam

Final Decision : Dismissed

Judgement

1. Present Appeal is under section 130 (1) of the Customs Act, 1962 (''the Customs Act'').

2. The Appellant /Department preferred this Appeal against common order dated 14th August, 2006 passed by the Customs, Excise and Service Tax Appellate Tribunal (''CESTAT'') whereby, the order of imposing penalty and confiscation passed by the Commissioner of Customs (Imports) Mumbai, has been set aside. All the Respondents were the Appellants before the Commissioner of Customs. The other connected appeals are also listed with this Appeal.

3. This Court on 18th July, 2007, admitted the departmental Appeals on following common questions of law:

" Admit on the following substantial questions of law:

a) Whether the CESTAT was correct in holding that the order of confiscation under section 111(j) of the Customs Act, 1962 was not legal on the ground that the importers had obtained the permissions for conversion of the vessels and the port clearance without obtaining an order permitting clearance of goods for home consumption under section 47 of the Customs Act, 1962?

b) Whether CESTAT was correct in holding that clearance of the goods on the basis of the port clearance permissions was proper despite the fact that Bills of Entry were filed by importers for home consumption under section 46 of the Customs Act, 1962 for clearance of such goods wherein permissions were statutorily to obtained for clearance of the goods as per the provisions of section 47 of the Customs Act, 1962?

c) Whether the CESTAT was correct in treating the goods imported only as foreign vessels, requiring permissions for conversion and port clearance instead of treating them also as imported cargo whereas the importers had imported vessels and had filed Bills of Entry for clearance of the vessels as goods as required under section 46 of the Customs Act, 1962 for the clearance of which the compliance of the provisions of section 47 was a statutory requirement?

d) Whether the CESTAT was correct in holding that the confiscation under section 111(j) is not applicable since the section 111(j) deals with permission for removal of the goods while section 47 of the Customs Act, 1962 relates to permission for clearance and nowhere in the Act the terms ''removal'' and ''clearance'' have been defined.

e) Whether the CESTAT was correct in holding that the confiscation under section 111(j) was not correct since the importers had the pay orders ready for payment of duty whereas, as per section 47 of the Customs Act, 1962, the importer on filing the Bills of Entry can clear the goods only after the payment of import duty as assessed thereon and any charges payable under the Act?

ADDITIONAL QUESTION OF LAW

Having regard to facts and circumstances of the case whether the order of the Tribunal is sustainable in Law having been passed after six months of conclusion of hearing of Appeal.

2. Ad-interim relief in terms of prayer clause (c) except the bracketed portions with the following directions:

i. The respondent No.1 to furnish a bond for the full amount of penalty and fine in favour of the appellant and further bank a guarantee for 50% of the amount of fine and penalty in favour of the appellant within a period of 6 weeks from today and shall keep the same alive pending hearing and final disposal of the appeal.

ii. The existing bank guarantee already given by the respondent No.1 to the appellant to be returned on the respondent No.1 furnishing the bank guarantee as indicated in the order.

iii. This order is subject to the final order in this petition.

3. Notice waived on behalf of respondent No.1 to 14."

Restricted background of litigations, for deciding the appeal on law points:

4. The Importer (Respondent No.1) M/s. Hyundai Heavy Industries Co. Ltd. submitted about 9 bills of entry (the Bill) on respective dates. Respondent No.2 M/s. Boskalis Westminister Middle East and Respondent No.3 M/s. CGG Marine filed respective Bill. All three importers filed their Bills through M/s. J.M. Baxi.

5. On 04/11/2004, Custom House Agent (the "CHA") M/s. J.M. Baxi requested Dy. Commissioner, Export Department of Customs, Mumbai (the Export Department) to issue instructions to convert vessel ''M.V. Echo Star'' of Importer M/s. CGG Marine from "Foreign Run to Coastal Run" as the Bill dated 03.11.2004 was filed at Import Department and cleared. On 06/11/2004, the Importer M/s. CGG Marine cleared the goods after obtaining the conversion of the Vessel and port clearance. The goods of the Bills were examined on first check. As stated, they had not discharged the duty liability and the goods were not ordered "Out of charge" from the proper officer of the Customs. On 20.11.2004, the goods of Bill dated 11.11.2004 of M/s. Boskalis Westminister Middle East were examined on first check and import documents were forwarded to Import Appraising Group for further assessment.

6. On 22.11.2004, M/s. J.M. Baxi requested the Export Department, to issue instructions to convert the vessel ''M.V. Sea Diamond'' of Importer M/s. Boskalis Westminister Middle East from "Foreign Run to Coastal Run" as the Bill dated 11.11.2004 filed at Import Department and processed. On 23rd November, 2004, Importer M/s Boskalis Westminister Middle East cleared the goods as stated, without payment of custom duty and obtaining the "Out of charge" from the proper officer of the Customs.

7. On 24.11.2004, M/s. J.M. Baxi requested the Export Department to issue instructions to convert the vessel/barge of M/s. Hyundai Heavy Industries from "Foreign Run to Coastal Run" as the Bill dated 23.11.2004 filed and processed at Import Department of Customs. As stated, the goods of the Bills were not examined on first check. It was examined on 27.11.2004.

8. As stated, on 28.11.2004 M/s. Hyundai Heavy Industries cleared the goods of the Bill, dated 23.11.2004. In the similar fashion, by stated misrepresentation, on other Bills, the Importer had not submitted pay order for the total duty leviable on the goods on the clearance of the goods.

9. On 11/12/2004, the Special Investigation & Intelligence Branch (SIIB), Import, CustomsMumbai, started investigation for unauthorized removal of the goods from the Customs area without payment of duty and without obtaining the "Out of charge" from the proper officer of the Customs.

10. On 22.12.2004/ 23.12.2004, request was made for provisional release of the subject goods/vessels by Respondent Nos.1, 2 and 3 and the goods were provisionally released on execution of PD Bond supported by Bank Guarantee of

10% of Assessable Value of the goods.

11. On 22.02.2005, common Show Cause Notice under section 124 of the Customs Act No.SG/INF4/ DC2004 SIIB(I) was issued by the Customs, Mumbai Department (the Department) to 17 noticees including all three Importers, their Managers and to the CHA and their officers for their alleged role in removal of vessels/goods from the customs area, without payment of duty and without obtaining out of charge.

12. On 31.10.2005, order in Original No.111 /2005/CAC/ CC(I) /AKP was issued by Commissioner of Customs (Imp), Mumbai wherein Redemption fine of 5% of Ass. Value was imposed on importers i.e. 1, 2 & 3 and penalty was imposed on all the Respondents i.e. 1 to 14 of the Appeals.

13. On 31.10.2005, encashment Letter was issued by the Appellant to Chouhang Bank in case of M/s. Hyundai Heavy Industries. On 24.11.2005, Writ Petition No.2745/2005 was filed against the action initiated by the department for encashment of BG. On 24.11.2005, Judgment in Writ Petition No.2745/2005 was passed by this Court, directing Respondent No.1 in this appeal to approach CESTAT.

14. On 28.11.2005, encashment of BG was executed by M/s. C.G.G. Marine to the extent of Rs.1,23,12,179/through ICICI Bank, Mumbai. On 28.11.2005, encashment of BG was executed by M/s. Boskalis Westminister Middle East Ltd. to the extent of Rs.88,31,774/through BNP Paribas Bank, Mumbai.

15. On 30.11.2005, Respondent Nos.1 and 5 filed the Appeal No.C/1345 & a461/05Mum with stay Applications. On 15.12.2005 by order the CESTAT allowed the stay applications. On 20.12.2005, Writ Petition (L) No.3054/05 was filed by the department against the CESTAT order dt.15.12.2005 and judgment was passed.

16. On 22.12.2005, M/s. Hyundai Heavy Industries extended their both Bank Guarantees amounting to Rs.39.37 crores for another one year i.e. upto 22.12.2006. On 30.12.2005, Misc. Application for Transfer of Bench was filed before CESTAT.

17. On 12.01.2006, this Court dismissed Writ Petition (L) No.3054/2005 as the Tribunal had started the hearing of the main appeals filed by Respondent Nos.1 and 5. On 19.1.2006, Revenue filed Writ Petition Lodging No.119 of 2006 for transfer of Bench of the Tribunal hearing Appeal. On 19.1.2006, hearing was completed by CESTAT of Appeal No.C/1431 & 1465/05Mum. and granted two weeks time to both the parties to file written submissions. On 20.1.2006, this Court dismissed the Writ Petition of the Department as withdrawn since the hearing before CESTAT had been completed.

18. On 03/02/2006, the Department submitted written submissions to the CESTAT. The CESTAT, passed the Common Final Order dated 14.8.2006 wherein the confiscation was set aside. Therefore, on 08/12/2006, a prayer was made to

cancel the B.G. of Rs.39.37 crores.

19. On 13.12.2006, the Customs Appeal was filed by the Department challenging the CESTAT order dated 14.08.2006, making all the noticees/ the Respondents herein as party. On 14.12.2006, this Court gave date for hearing of Customs Appeal on 20.12.2006 alongwith W.P. No.3046/2006 of M/s. Hyundai Heavy Industries. On 15.12.2006, the Notice of Motion was filed, supported by the Affidavit in Customs Appeal Lodging No.99/2006.

20. The common show cause notices were issued under section 124 of the Customs Act to all the Respondents, by giving the subject details. The basic allegations that, respective Respondents had removed unauthorizedly vessels/ barges/ tugs/dredger, etc. from the Customs area, though the subject bills were not assessed. It is stated that prior to payment of custom duty on port clearance order from proper officers of Customs, removal of the same was in contravention of provisions under section 47 of the Customs Act and therefore, liable for confiscation under 111(j) and penalty under section 112(a) of the Customs Act. The reference was made to other provisions of the Customs Act. The crux is that and as submitted the action of Respondents of getting the Vessels/Barges/Tugs, removed in contravention of provisions by "misrepresentation". The Respondents have denied the same and participated in the proceedings. Ultimately, the order went against them. They preferred appeal before the Commissioner, who confirmed the said order, which the CESTAT has set aside, as recorded earlier. The relevant provisions:

21. The relevant Sections /provisions of the Customs Act, in Chapter VI, which deals with the provisions relating to conveyance carrying imported and exported goods are sections 17, 18, 30, 38, 42, 46, 47, 111(j) and 112(a), 128(A), 129(A), 130(1) and the related procedure rules:

" Section 42. No conveyance to leave without written order.(1) The personincharge of a conveyance which has brought any imported goods or has loaded any export goods at a customs station shall not cause or permit the conveyance to depart from that customs station until a written order to that effect has been given by the proper officer.......

Section 47. Clearance of goods for home consumption.-

[(1)]Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption:......

Section 111. Confiscation of improperly imported goods, etc.(j) any dutiable or prohibited goods removed or attempted to be removed from a customs area or a warehouse without the permission of the proper officer or contrary to the terms of such permission;....

Section 112 (a) Penalty for improper importation of goods, etc.Any person....

(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or......."

Reasons in support of operative part of this Judgment:

22. CESTAT, being a statutory Appellate Tribunal of exports, has considered, keeping in mind the provisions of law and the documents so available on record, and so also the background of the transactions. There is no issue that these vessels, barges, self propelled tugs and consumable stores on board, were imported. They were chargeable to the duty, as prescribed. These vessels and barges were imported subject to reexport conditions after the work of conducting high technology laying of pipelines etc. from ONGC wells in Bombay High, to main land at Uran, on the basis of the contract. The bills of entries were filled in all cases, after the vessels, barges etc. had first entered in Bombay Port. The bills were noted and thereafter presented for assessment. Orders for examination were given. The goods were examined. The examination reports did not find any misdeclaration of the goods, as declared on the bills. The permissions and clearances, so granted never revoked:

23. The Respondents, Clearing Agent (Shipping Agent), has completed the formality and obtained the permissions for conversion of vessels as imported into vessels for coastal run, which was allowed as also port clearance, under the provisions of section 42 of the Customs Act. The concerned officers at the relevant time, keeping in mind the provisions of law and considering the documents, which were placed on record, granted the requisite permissions and the clearances. The vessels were examined by the concerned officials. As regards, the consumable ship stores and the inventories were taken and so the necessary action ought to have been taken, as applicable. The grant of port clearances were by following the due procedure at the relevant time and were subject to the satisfaction, therefore, permitted the vessels, barges and self propels and others, and accordingly it left for operation, at the destination so fixed as per the contract in Bombay High area. The Agent had also obtained necessary bonds required for clearance of the vessels. The Demand Draft and other sanctions for discharge of liabilities on the vessels were filed. The assessments on the Bills were not completed by the concerned officers in the Mumbai Custom House, Appraising Group, which ought to have been done at earliest possible time, without delay. The reasons for Officer''s defaults, if any, cannot be stated to be that the vessels, barges, sales propels were left in contravention of the cited provisions. The allegations that the concerned ACDC incharge had not approved the noting and the Bills were not countersigned, which ought to have been done, cannot be the reason to accept the case that importers or its agents were in breach of the provisions. This is in the background that all necessary permissions, sanctions and clearances have been obtained by the Respondents and the vessel was left accordingly.

24. The question of penalty and other confiscation will come, only if, there is a breach and/or contravention of the basic provisions so raised and referred. The act of release and/or selling of vessels, barges from Mumbai port, just cannot be overlooked especially when every mechanism, machinery and required procedure was available under the provisions and the same were under the control of the concerned authorities. As noted, they have already been cleared the requisite permissions/clearances to the Respondents. There was no issue about the requisite payment so, deposited at the relevant time.

25. A plain reading of these Sections and considering the fact that at the relevant time, and subsequently for the period upto the stage of release, clearances and such removal of the vessel, no way can be stated to be in contravention of any provisions. The relevant time, there was proper compliances from the side of the Respondents, now it cannot be the foundation of misrepresentation. The delay to the assessment by the Appellant''s Officers, cannot be the reason for taking such action of seizing and confiscating and imposing of penalty. Admittedly, though there are procedures and powers provided under the Customs Act to the Appellant of reviewing and/or challenging and/or revoking the permissions/ clearances so granted, there were no such steps taken at the relevant time, before taking such drastic action. There is nothing on record to show that those permissions, clearances and sanctions so granted by the authorities have been revoked at any point of time.

26. The submission that, this was a case of misrepresentation and/or stated fraud, but there was no reason for the Appellant not to initiate and/or take action and/or to take the proceedings, by recalling and revoking those permissions. Having not done so, the action initiated on the basis of mere allegations on facts in the show cause notices against the Respondents only is unsupportable and untenable. The burden is upon the Department to prove the misrepresentation. The law is settled that the allegations of misrepresentation require the specific details and particulars for specific actions and against the specific involved persons. There is nothing on record to show that the Appellant has taken or initiated any proceedings against the concerned officers. The show cause notices are silent about the same. The allegations are unsustainable of not getting assessment, including provisional assessment and/or non completion of formalities, though the Respondents'' documents, and the data were before the issuance of such clearances/permissions by the concerned authorities. The mandate of relevant provisions have been complied with at the relevant time and the Respondents proceeded accordingly, as the Appellant''s Officers permitted them to do so. The supportive reasons of the CESTAT-No case of perversity and illegality:

27. We have to keep in mind the provisions and the power and scope of High Court to interfere with the findings so arrived at, by the CESTAT. Having once noted above, we have gone through the reasons while setting aside the order of confiscation and penalty. The CESTAT has considered the issue of "port

clearance" and its procedure, as prescribed under Section 42 (2)(d) read with Section 111(j) of the Customs Act. It is noted that the fact of grant of port clearances, which includes the safeguard and security required for the Custom House were never recalled. The goods were permitted to remove from the customs area, by the concerned officers. The importers and/or their agents or employees cannot be held responsible for removal from the Customs area of the port in such situation. The CESTAT has noted that the "removal" and "clearance" cannot be equated to clear the goods for home consumption under Section 47 of the Customs Act. The permissions to clear the goods would not be in violation of Section 111(j), which is applicable to "removals" and not to the "clearance". We also endorse these reasons.

28. The CESTAT has noted that even, the no action of appraisal, cannot be a reason to hold the Respondents liable. It is noted that this is not the case of misdescription and of any breach regarding the declaration. The goods were under import. The Appellants were ready with the duty/payment. Once the goods are removed by obtaining port clearance, there was no question of such confiscation under provision of section 111(j) of the Customs Act and of penalty on the Respondents. There was no loss of Duty. This is not a case that Respondents deliberately, by breaching the basic provisions of law, had removed unaccounted goods, without written permissions. The show cause notices itself noted that, all supporting documents, materials and requisite permissions were placed on record. The nature of contract and short duration and the purpose and object of these imports and practical part of removal of vessel with goods through the port, after getting the clearances and permissions, cannot be overlooked while considering the allegation of the breach of provisions of the Act. All the departmental officers of the respective Departments, ought to have taken decisions simultaneously. As noted, even by the CESTAT that the removal were after due permission of conversion, preventive checks on ship stores and port clearance obtained, which in a given case could have been refused and revoked by the authorities, immediately before the show cause notice and the actions taken. We have declined to accept the case of corruption by evasion of custom duty by the Respondents, as alleged without supporting material and /or the prior inquiry.

29. There is no justification and explanation on record as to why those permissions and clearance were not revoked or set aside. There is no denial to the fact of granting clearances and permissions and release of vessels with goods. There is no case of declaration or misdeclaration. The necessary documents were with the concerned department, even at the time of such permissions and clearance stage. Both the parties, including the concerned officers have knowledge of the documents and the supportive material. It is an admitted position that the payment of duty has been made before issuing show cause notice itself. No case of "misrepresentation", "misstatement" and of "fraud":

30. It is settled that Section 46 of the Customs Act contemplates, directory procedure. Sections 48 and 46 read together support this aspect. The duties were paid even prior to show cause notices. Every technical breach cannot be treated, as breach for penalty or confiscation Hindustan Steel Ltd. Vs. State of Orissa, 1978(2) ELT. 159 (S.C.). The goods were released after port clearances and due permissions. The vessels left the port/Custom''s area after due permission, under Section 42 of the Customs Act. All the vessels were subsequently cleared for home consumption also. Therefore, the penalty and the confiscation order is rightly set aside by the CESTAT.

31. It is settled that, mere nonpayment of duties, even if any, cannot be treated and read for meaning "collusion" or "willful misstatement" or "suppress of facts". M/S. Uniworth Textiles Ltd vs Commissioner of Central Excise, Raipur., 2013 (9) SCC 753, (2013) 288 ELT, 161. The Respondents have paid even the same, after due declaration. Therefore, in the present case, the Department /revenue failed to discharge its burden, as required under the law. There is no case made out of any "willful" or intent to evade duty to bring in the case of "fraud" and "collusion". There is no case of stated "misstatement" or "suppressing of fact". The impugned order, therefore, needs no interference, even on the ground of stated delayed decision. All the questions of law, therefore, are required to be answered accordingly.

32. Having once recorded the above reasons, the written submissions, based around the action of show cause notice and the related proceedings, even by recording the statement of concerned officers and/or of the Respondents, are of no assistance to interfere with the findings so arrived at by the CESTAT. There is no case of perversity and/or illegality. The oral evidence, cannot override the written permissions/clearances, on record. Therefore, for the reasons recorded above and in addition to the reasons so recorded in the impugned order, we are inclined to dismiss the appeal. All the questions are answered accordingly, against the department and in favour of the Respondents. Hence, this order. ORDER

(a) The Appeal is dismissed. The CESTAT order, is maintained.

(b) The questions of law (a) to (e) are answered in the positive, in favour of assessee and against the revenue. The additional question is answered in the positive accordingly;

(c) The consequential action /order to follow;

(d) Interim order dated 18th July, 2007, stands vacated. The parties to act accordingly.

(e) No costs.