(2015) 05 DEL CK 0350

In the Delhi High Court

Case No : Writ Petition (C) 348/2014 & CM 691 of 2014

TNT India Private Limited — APPELLANT

Vs

Union of India and Others — RESPONDENT

Date of Decision : 06-05-2015

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 110(1A), 112(a)

Citation : (2015) 322 ELT 881

Hon'ble Judges : Rajiv Shakdher, J

Bench : Single Bench

Advocate : Rajiv Nayar, Senior Advocate, Ajay Bhargav, Susmit Pushkar and Ayush A. Mehrotra, for the Appellant; Amit Mahajan, CGSC and Krishanu Barua, Advocates for the Respondent

Judgement

Rajiv Shakdher, J—This is a writ petition which throws up a very curious circumstance. The petitioner, which is a courier company, was, amongst others, served a show cause notice dated 15.01.2013. In the said show cause notice the petitioner, apart from the importer (i.e., Mr. P.K. Tiwari), who, as the narration of facts hereinafter will indicate, according to the respondents, is a spectre, was called upon to answer the following:

".....B. Further, M/s. TNT Express India Pvt. Ltd., EICI Terminal, IGI Airport, New Delhi, Shri Rakesh Kumar Gupta S/o Shri Shiv Prasad Gupta R/o S592, School Block Shakarpur, Nehru Enclave, Delhi, Shri Satendra Panwar, Superintendent Customs, IGI Airport, New Delhi and Shri Surender Singh, Inspector Customs, IGI Airport, New Delhi are required to show cause to the Commissioner of Customs (Export), New Customs House, Near I.G.I. Airport, New Delhi, within 30 days of receipt of this notice as to why penalty should not be imposed upon them under section 112(a) of the said Act.

C. Further M/s. TNT Express India Pvt. Ltd., EICI Terminal, IGI Airport, New Delhi are also required to show cause to the Commissioner of Customs (Export), New

Customs House, Near I.G.I Airport, New Delhi, within 30 days of receipt of this notice as to why their registration should not be revoked in terms of Regulation 13 of Courier Imports and Exports (Electronic Declaration And Processing) Regulations, 2010, for failure to comply with the provisions of there regulations as brought out in Para 10(iv) to Para 10(vi) above. It is not only technical failure, it seems to be intentional failure and the chain of events point to the possibility of smuggling by M/s. TNT Express India Pvt. Ltd. Nothing at all has been said, done or suggested which establish the bonafides of the courier company. Therefore, the responsibility of misdeclaration has to be laid at their door...."

(emphasis is mine)

2. As would be evident from the extract hereinabove, the explanation vis-a-vis the issue, as to why the petitioner''s registration ought not to be revoked in terms of Regulation 13 of the Courier Imports and Exports (Electronic Declaration and Processing) Regulations, 2010 (in short the 2010 Regulations), was squarely in issue. To this show cause notice, a reply was filed by the petitioner on 15.03.2013.

3. The said show cause notice was adjudicated upon by the concerned adjudicating officer, i.e., Commissioner of Customs, vide order dated 18.11.2013. In the said adjudication order, a penalty was imposed in the sum of Rs. 1 lac on the petitioner under Section 112(a) of the Customs Act, 1962 (in short the 1962 Act). The adjudication order, inter alia, also ordered confiscation of goods valued at Rs. 74,97,500/-. The order went on to say that the said goods would vest absolutely in the Central Government, and that, since they were perishable, they would be disposed of within one month of the order, in terms of Section 110(1A) of the 1962 Act.

3.1. In so far as Mr. P.K. Tiwari is concerned, who even according to the respondent is a non-existent entity, and almost a ghost, a penalty in the sum of Rs. 5 lacs was imposed; whereas, as indicated above, a penalty of Rs. 1 lac was imposed on the petitioner.

3.2. As is evident from the above narration, the order is rather curious. Respondent no. 2 knowing-fully well that Mr. P.K. Tiwari, who does not exist, has mulcted him with a higher penalty as compared to that which is imposed on the petitioner. Ordinarily such distinction between the importer and the courier company would stand to reason but not when the conclusion reached is that, in fact, there is no importer in existence.

3.3. Be that as it may, it is not disputed before me that the petitioner has preferred an appeal against the order which is pending with the Tribunal.

3.4. Nearly two months later, that is, after adjudicating upon the show cause notice, vide order dated 18.11.2013, the impugned order was passed by the respondent. This order is dated 10.01.2014. While passing the said order, very same findings were recorded which are subject matter of the adjudication order dated 18.11.2013. In the impugned order, in paragraph 11, following has been recorded:

"....11. From the above investigations, the following has been alleged to have emerged:-

(i) The name and address of the importer mentioned in the import documents was found to be bogus, showing fraudulent intention for the import of the consignment.

(ii) The description and value of the consignment was mis- declared with intent to evade payment of Customs duty.

(iii) Nobody has claimed ownership of the seized goods.

(iv) M/s. TNT Express India Pvt. Ltd. did not present the goods for examination although the same was marked for examination by the assessing officer.

(v) M/s. TNT Express India Pvt. Ltd. failed to fulfil the obligations stipulated under Regulation 12(iii) and (iv) of the Courier Imports and Exports (Electronic Declaration and Processing) Regulations, 2010. The said provisions are as under:

Regulation 12(iii)

Advise his consignor or consignee to comply with the provisions of the Act, rules and regulations made there under and in case of non-compliance thereof he shall bring the matter to the notice of the Assistant Commissioner of Customs or Deputy Commissioner of Customs.

Regulation 12(iv)

Verify the antecedent, correctness of Importer Exporter Code (IEC) Number, identity of his client and the functioning of his client in the declared address by using reliable, independent, authentic documents, data or information.

(vi) Shri Rakesh Kumar Gupta representative of M/s. TNT India Pvt. Ltd. has failed to fulfil his duty of presenting the goods for examination before the Customs Officer as admitted in his statement dated 14.08.2012...."

3.5. It may be pertinent, at this stage, to extract paragraph 10 of the show cause notice dated 15.01.2013, which had identical assertion. The said paragraph, for the sake of convenience, is extracted below:

"....10. From the above investigations, the following emerge:-

(i) The name and address of the importer mentioned in the import documents was found to be bogus, showing fraudulent intention for the import of the consignment.

(ii) The description and value of the consignment was mis- declared with intent to evade payment of Customs duty.

(iii) Nobody has claimed ownership of the seized goods.

(iv) M/s. TNT India Pvt. Ltd., did not present the goods for examination although the same was marked for examination by the assessing officer.

(v) M/s. TNT India Pvt. Ltd., failed to fulfil the obligations stipulated under Regulation 12(iii) and (iv) of the Courier Imports and Exports (Electronic Declaration and Processing) Regulations, 2010. The said provisions are as under...."

4. In the adjudication order dated 18.11.2013, the tentative results of the investigation, as recorded in the show cause notice dated 15.01.2013, have been confirmed. Despite this situation obtaining, as indicated above, only consequences which befell the petitioner, was the imposition of a penalty in the sum of Rs. 1 lac. The adjudicating officer in paragraphs 60 and 61 of the order dated 18.11.2013, while recording that the petitioner had abetted the improper importation of the goods in issue by its acts of omission and commission, and noting thereafter that it was liable for action under Regulation 13 of the 2010 Regulations, did not proceed to impose any penalty, as was possible in terms of the said regulation.

5. In these circumstances, I had put to the learned counsel for respondent no. 2, as to whether the adjudicating officer had been rendered in "functus officio" with regard to the impugned order.

6. Learned counsel for respondent no. 2 submits that the imposition of penalty, in the adjudication order dated 18.11.2013, was in exercise of powers under Section 112(a) of the 1962 Act. It is his contention that the impugned order suspending the petitioner''s registration, pending further action for revocation, has been passed under the 2010 Regulations.

6.1. Furthermore, learned counsel for respondent no. 2 says that the impugned order passed under the 2010 Regulations is appealable, and that, an appeal qua the impugned order lies to the Chief Commissioner, under Regulation 13(2).

7. According to me, the second submission can be disposed of immediately. The question is with regard to the jurisdiction of the Commissioner of Customs, who passed the impugned order, to act and pass an order, after adjudication had taken place on the show cause notice dated 15.01.2013; which, called upon the petitioner to, inter alia, render explanation vis-a-vis the tentative view of the respondent as to why its registration should not be revoked in terms of the 2010 Regulations. Since, it is a question of lack of jurisdiction, this court under Article 226 of the Constitution can entertain the petition, notwithstanding the alternate remedy of an appeal under the aforementioned regulation.

8. This brings me to the first submission of learned counsel for respondent no. 2 that the impugned order has been passed by the Commissioner of Customs in exercise of powers under the 2010 Regulations. According to me, this submission is untenable in law, for the reasons given hereinabove. The Commissioner of

Customs became functus officio upon passing the order of adjudication dated 18.11.2013. It is not disputed by the learned counsel for respondent no. 2 that the said respondent could have filed an appeal against the adjudication order, if it was dissatisfied or aggrieved by the order passed by the Commissioner of Customs. It appears that, respondent no. 2, has not preferred an appeal.

9. Therefore, in the aforesaid circumstances, the impugned order is set aside. This, however, will not come in the way of the respondents to take recourse to an appropriate remedy, if it was otherwise available to it, even at this juncture.

10. The writ petition is allowed. The impugned order is set aside. Needless to say, if recourse is taken to a remedy, the observations made hereinabove will not come in the way of the respondents. The petition is, accordingly, disposed of.

11. A copy of this order be placed before the Central Board of Excise and Customs.