(2009) 10 DEL CK 0201

In the Delhi High Court

Case No : CUS.A.C. No. 12 of 2005

Union of India (UOI) APPELLANT

Vs

Entrack Internatinoal Trading Pvt. Ltd. RESPONDENT

Date of Decision : 30-10-2009

Acts Referred:

Citation : (2010) 250 ELT 166

Hon'ble Judges : Siddharth Mridul, J;A.K. Sikri, J

Bench : Division Bench

Advocate : A.K. Bhardwaj, for the Appellant; M.P. Devnath and Abhishek Anand, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Sikri, J.—The respondent is engaged in the business of import and distribution of Mont Blanc products supplied by M/s. Mont Blanc, Switzerland. The respondent has a boutique at Maurya Sheraton Hotel in Delhi and their office is located at Rajkot in Gujarat. The respondent had placed an order for the supply of watch straps made of ostrich, calf and alligator leather. The airline through which the goods came handed over two invoices to the Custom House Agent of the respondent and on the basis of these two invoices, the Custom House Agent filed Bill of Entry No. 467881 dated 4.4.2003. Based on the said two invoices (Invoice No. 10488473 and 10488486) the respondent declared 513 and 600 watch straps respectively The respondent had also produced a certificate under Convention of International Trade in Endangered Species (hereinafter referred to as "CITES") The goods were examined and it was felt that he leather straps of ostrich and alligator were restricted in terms of licensing note to Chapter 1 of ITC (HS) and that the permission of the wildlife authorities was required for their clearance It was also alleged that the examination of the consignment revealed an excess of 25 pieces of alligator watch straps valued at Rs. 52980/- and that the said watch straps had not been included in the Bill of Entry.

2. The show-cause notice was accordingly issued to which the respondent herein

filed its reply on the two issues raised therein in the following manner:

(a) Insofar as objection of the adjudicating authority that the straps made of ostrich and alligator leather were of the endangered species submission of the respondent was that it had produced certificate from CITES which was sufficient and there was no need to produce CITES import permit from the jurisdictional wildlife authority as well.

(b) In respect of 25 pieces of alligator watch straps in excess of what was mentioned in the Bill of Entry explanation of the respondent was that the items imported were covered by three invoices and raised by M/s Mont Blanc It was the mistake on the part of the airlines to handover two invoices to the Custom House Agent and on the basis of these two, Bill of Entry was filed. Thus, the non-inclusion of the alligator watch straps in the Bill of Entry was not due to any mistake on the part of the respondent but it happened at the end of the airlines. Therefore, it was not correct to say that these 25 watch straps were being sought to be clandestinely removed.

3. Personal hearing was granted to the respondent and after considering the records of the respondent, the adjudicating authority passed order in original dated 28.8.2003 holding that the items in question were restricted items and were, thus, liable for confiscation. Absolute confiscation was ordered accordingly.

4. The respondent challenged this order by filing an appeal before the Commissioner of Customs (Appeals), New Delhi. On the application for waiver of pre-deposit/stay application, the appellant authority passed orders dated 31.12.2003 directing the respondent to deposit Rs. 1,00,000/-. This amount was deposited on 6.1.2004. After hearing the appeal, the Commissioner (Appeals) confirmed the order of the adjudicating authority and dismissed the appeal.

5. Aggrieved with the order of the Commissioner (Appeals), the respondent on 23.3.2005 filed an appeal before the Customs, Excise & Service Tax Appellate Tribunal (CESTAT), New Delhi. The CESTAT directed the respondent to deposit a further amount of Rs. 1.5 lakhs which the respondent complied with by depositing the said amount on 30.4.2005. CESTAT disposed of the appeal filed by the respondent vide Final Order No. 640/05-NB-A of CESTAT dated 31.5.2005 by allowing the appeal. In the final order, the Tribunal has held that - (i) the lower authorities were clearly in error in treating the instant import as in violation of Wild Life Protection Act and CITES, (ii) the confiscation of the consignment was not legal under those provisions, and (iii) directed the lower authorities to return the consignment included 25 pieces imported in excess of the declaration to the respondent and after assessing the same to customs duty.

6. Present appeal is filed challenging the order dated 31.5.2005 of the Appellate Tribunal. Thereafter, the appellant also filed additional submissions dated 31.8.2006 wherein following questions of law were raised:

a) As per ITC (HS) Regulations those live animals which are restricted for import, their parts and products are also restricted under the Regulations.

b) Failure of the respondent to submit country of origin certificate and "No Objection Certificate" from Wildlife Department which are the conditions for import of such items. Therefore, the appellant contended that the impugned goods were rightly confiscated for violation of provisions of Wild Life Act, 1972.

The matter was admitted and thereafter final arguments heard.

7. First issue that needs determination is as to whether the certificate of CITES produced by the respondent would suffice or the law mandates permission of the wildlife authorities as well. Though the adjudicating authority found that the correct classification of watch straps was under 9113.20.90 and noted that there was no licensing requirement under this heading, he concluded that permission from the wildlife authorities was still required, as clarified by the said authorities, because these were restricted items. This conclusion is preceded by the following discussion:

The Wild Life Regional Office (NR), Ministry of Environment & Forests, New Delhi vide their letter No. 10-10/WN/03 dated 23.6.2003, enclosing a copy of letter from DGFT, intimated that ''as per ITC (HS) Regulations those live animals which are restricted for import, their parts & products are also under the Regulations which stands goods for the Reptiles finished leather which was being imported from Wild Life Angle''. The Directorate General of Foreign Trade has also clarified that the ''Import of animals'', birds, reptiles (parts & products thereof) as classified under various exim codes in the ITC (HS) are regulated in terms of the provisiosn of the Wild Life Protection Act as well as CITES. The said conditions will be applicable even when the items are freely importable as per ITC (HS). However, freely importable items do not require a licence from DGFT but the provisions of the licensing note will apply. As such, all conditions stipulated in Exim Policy or other laws or rules will have to be complied with by the importer.

8. The Commissioner (Appeals), while affirming the aforesaid order, observed as under:

5. I have carefully considered the various submissions made by the appellant in the Appeal Memorandum as also the submissions made during the personal hearing. I observe that the subject goods are covered in the CITES schedule. As such, provision of the Wild Life Act would be applicable. I observe that the following are essentially required before such items can be imported:

(a) CITES Export Permit from country of origin.

(b) CITES Import Permit issued by jurisdictional Wild Life Authority.

(c) Port examination: No Objection Certificate issued by the Wild Life Officers.

In the instant case, the CITES Import Permit and the No Objection Certificate for the Wild Life Officer were not available. The adjudication and subsequent confiscation therefore appear to be unassailable. Considering the value of the goods viz. Rs. 11,03,533/- the personal penalty of Rs. 2,50,000/- also appears to be justifiable.

9. In the brief order of the Tribunal, entire discussion is in paras 3 & 4 thereof, which is also reproduced hereunder:

3. When the appeal came up for hearing today, both sides took us through the provisions of the law in question in great detail. In regard to Alligator leather, it is seen that the appellant has produced CITES certificate from Federal Veterinary Office of the Government of Switzerland for the export of 205 Nos. of watch straps. Learned Counsel has also pointed out that the Alligator skin under import is of Mississipiens variety, while crocodiles mentioned in Wild Life Act Appendix is other varieties. We find that the learned Counsel''s contention is right. Entry in Part-II relating to reptiles in schedule-I of the Act reads as follows:

I-D "Crocodiles (Including the Estuarine or salt water crocodile)(Crocodilus porosus and "Crocodilus palustris")

It is clear from the above entry that "Crorodilus Porosus" and "Crocodilus palustris" varieties only are covered and not the imported one i.e. Mississipiens. In regard to Ostrich and Calf, there are no entries at all under the Wild Life Protection Act. It is, thus, clear that the three varieties of straps under import were not subject to any restriction for import under the Wild Life Protection Act. Import Trade Control Schedule mentions watch strap under entry 91132090. Items under that entry are freely importable. Thus, the lower authorities were clearly in error in treating the instant import as in violation of Wild Life Protection Act and CITES.

4. As already noted, the goods have been treated as offending only to the Wild Life Protection Act and CITES and not under any other provision of law. Since we have already held that the confiscation of the consignment was not legal under those provisions, the impugned order is set aside. The lower authorities are directed to return the consignment, including the 25 pieces which have been imported in excess of the declaration to the appellant after assessing them to custom duty. The appeal is allowed.

10. Learned Counsel for the appellant submitted that the approach of CESTAT was clearly erroneous. According to him, whether the import of goods made of part of a particular animal is prohibited or not prohibited was not the issue to be adjudicated by either of the revenue authorities or the CESTAT. What could be adjudicated by the appellate authority was that whether the two certificates required to be produced by the importers were produced or not produced. Admittedly, such certificates i.e. CITES import permit, issued by jurisdictional wild life authority and no objection certificate issued by wildlife officers were not produced by the importer.

11. Learned Counsel also referred to various provisions of CITES as well as interpretation of various terms given in the Appendix I, II & III of CITES, on the

basis of which he tried to argue that the references given there were only for the purposes of information or classification. They were intended to indicate the species within the family concerned that are included in the Appendix. Ostrich and Crocodylus Palustris and Crocodylus Porosus are mentioned in prohibited categories. He further referred to OM dated 4.7.2001 issued by the Ministry of Environment and Forest prohibiting import of trophies and animal articles of lookalike species. On this basis, he argued that merely because the Mississippian species of crocodile was not mentioned in the Wild Life Protection Act would be no ground to allow the import thereof without the permission of the authorities under the Wild Life Protection Act.

12. The aforesaid contention of learned Counsel for the appellant is clearly misconceived. We may first point out the admitted factual position which appears in this case, namely:

(a) The Mississippian species of crocodile does not exist in India. Same is the position in regard to Ostrich.

(b) There are no entries of these species under the Wild Life Protection Act. Reason is obvious. Since these species do not exist in India, there is no question of their protection in this country.

(c) The adjudicating authority himself concluded that watch strap is covered by Entry No. 9113.20.90 of Import Trade Control Schedule. As per this entry, the items are freely importable. Once we look into the matter from this angle, the irresistible conclusion is that clearance from the wild life authorities in India under the Wild Life Protection Act is not required. Under such circumstances, these kinds of matters would be covered by CITES and all the nations signatory to the said treaty agreed to bind by the provisions contained in CITES.

13. The CITES of Wild Fauna and Flora works by subjecting international trade in specimens of selected species to certain controls. The species covered by CITES are listed in three Apendices viz. I, II and III. The Appendix I includes species threatened with extinction and trade in these species is permitted only in exceptional circumstances. The respondent wish to submit that the source of imported Ostrich watch straps belong to Buckle Struthio Camelus linnaeua from South Africa made in Austria. The Ostrich watch strap belonging to South Africa has not been prohibited under CITES. In respect of Alligator also, the foreign supplier provided a CITES certificate which clearly states that the imported item was not restricted.

14. Thus, when the country of origin has given specific certificates under the provisions of CITES allowing the export from its country on the ground that these items are not restricted, insistence upon additional certificate by the authorities under the Wild Life Protection Act is meaningless in the facts of this case. Insofar as demand of the appellant to produce country of origin certificate to check the origin of Ostrich is concerned, the respondent is right in the submission that neither at the adjudication stage, when the order in original was passed, nor at

the two subsequent appellate stages, such a certificate was sought. The appellant cannot take this kind of plea in this appeal for the first time. We, thus, are of the opinion that this question is rightly decided by the Tribunal in favour of the respondent.

15. Admittedly, in the Bills of entry 25 pieces of Alligator watch straps were not included. Submission of the respondent was that they are regular importers of such high value items from Mont Blanc and have been paying customs duty of the order of about Rs. 2 crores annually. In the year 2004-05, the payment of customs duty exceeded Rs. 5 crores. The said 25 watch straps were not declared in the Bill of Entry only because the foreign supplier has inadvertently omitted to incorporate the delivery number in the Airway Bill made available to the respondent and the declaration was made on that basis. In any case, the value of these watch straps was not significant being Rs. 52,918/-. If it was the intention of the respondent to evade customs duty, the respondent would not have even placed an order for that item The respondent?s bona fide conduct in this regard is evident from the correspondence exchanged between the respondent and the foreign exporter The respondent vide fax dated 1842003 requested the foreign exporter to inform the status of Delivery Note No 5375747 dated 28112002 and Delivery Note No 5192159 dated 3172002 In response to this letter the foreign exporter vide fax dated 252003 apologized for DEL 5192159 which did not appear in the Airway Bill No 176-86692281 Thus these documents conclusively show that there was a genuine mistake on the part of the exporter in not reflecting the 25 straps in the Airway Bill and correspondingly on the invoice.

16. The aforesaid explanation is not seriously contested by the appellants Moreover as the item is otherwise freely importable and certificate of CITES is produced and the duty of a paltry sum of Rs. 52914/- is only involved in the interest of justice the respondent can be allowed to clear the goods subject to the payment of aforesaid duty.

17. We thus are of the opinion that there is no merit in this appeal and the same is dismissed.

