

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 18.02.2014

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W.P.(C) 8229/2013

ZTE CORPORATION

.....Petitioner

Through: Sh. Arun Kathpalia and Sh. Dhruwad Das,
Advocates.

Versus

THE COMMISSIONER OF CUSTOMS (IMPORT & GENERAL) AND
ORS. Respondents

Through: Sh. Satish Kumar, Sr. Standing Counsel,
Sh. Sumeet Pushkarna, CGSC with Ms. Aditi
Mohan, Advocate, for UOI.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R.V. EASWAR

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. The petitioner seeks appropriate directions under Article 226 of the Constitution of India, to the respondents, including Customs authorities, to permit it to re-export Synchronous Digital Hierarchy (SDH) Transmission Equipment, which had been brought into the country.

2. The facts necessary to decide the case are that M/s. Etisalat DB Telecom Pvt. Ltd. the third respondent (hereafter "Etisalat") had placed a Purchase Order No. (hereafter "PO") dated 16.09.2009 for

supply of Microwave Hops & Mux Hardware (hereafter “the goods”) with the petitioner, a manufacturer of those items. The petitioner on 10.12.2009 sent a pre-shipment alert to Etisalat regarding consignments proposed to be moved (by the petitioner) on 12.12.2009 and 15.12.2009. On 08.12.2009, the second respondent, the Central Government issued a Notification (No. 132/2009-Customs) by which import of all kinds of Synchronous Digital Hierarchy (SDH) Transmission Equipment originating from or exported from China and Israel were liable to attract anti-dumping duties. The said Notification was made public on 11.12.2009. Etisalat, on becoming aware of that notification, cancelled the SDH line items, i.e. the goods from the PO issued to the petitioner, the overseas supplier. Etisalat thereafter sought permission of the first respondent, the Commissioner of Customs to re-export the goods. This request was rejected by the said first respondent, by order of 08.06.2010.

3. Etisalat, feeling aggrieved by the first respondent’s refusal of permission to re-export the goods, filed Customs Appeal No. C/490/2010 before the Customs, Excise and Service Tax Appellate Tribunal (“the CESTAT”). However, thereafter an application for withdrawal of Customs Appeal (being Custom Misc. Application No. 390 of 2011) was filed by Etisalat before CESTAT, which was allowed by that Tribunal, by its Order dated 17.10.2011. Apparently, subsequent to this event, winding-up proceedings were commenced against Etisalat before the Bombay High Court, (C.P. No. 114/2012); those proceedings are pending. Resultantly, Etisalat took no further

action and virtually abandoned the matter, and did not take any steps to re-export the goods to the Petitioner supplier.

4. The petitioner alleges that by its letters dated 30.04.2012 and 14.05.2013 to the first respondent, it sought permission to take back the goods to China. Since the PO by virtue of which the SDH Equipment had been ordered had been cancelled by the third respondent, the goods, it is stated are in the bonded warehouse. Contending that ownership in the goods continues to vest in it, the petitioner asserts a claim to the said goods, i.e. the SDH Equipment and consequently, the right to ensure their shipment back to China. It is urged that despite several reminders and letters, the respondents are not taking any action.

5. Mr. Arun Kathpalia, counsel for the petitioner, submits that the title to the goods continue to vest in the said supplier. Learned counsel relied on the documents of title and emphasized that the revised PO issued on 22.12.2009 had deleted all references to the goods. This was on account of a completely unforeseen event, i.e. imposition of 236% provisional anti-dumping duty. By the time this event came to light, the goods had been shipped. This rendered the entire contract unviable for Etisalat; it resultantly cancelled the contract and even abandoned its efforts in assisting the petitioner to ensure re-export of the goods. Learned counsel highlighted that the petitioner was not an importer, and that its status as owner of the goods continued; neither were they appropriated to the contract, so that the title passed to Etisalat, nor did the petitioner receive consideration for the goods. Therefore, it cannot be penalized; it is a victim of circumstances.

6. Counsel submitted that the respondent authorities are not acting consistently. He emphasized that a subsidiary of Etisalat, M/s. Allianz had faced an identical problem in Kolkata, and like in the present case, applied to the Commissioner, who granted the request to re-export the goods (identical to the goods in this case) without Customs Duty. Counsel relied upon the order of the Kolkata Commissioner dated 25.02.2010 where it was held that such goods were not misdeclared and, more importantly, that they could be re-exported without payment of duty. Counsel also relied upon *Union of India v. Sampat Raj Dugar & Anr* AIR 1992 SC 1417.

7. The first respondent urges in its counter affidavit, and its counsel Mr. Satish Kumar argues before the Court that the petitioner should not be afforded any relief. It is submitted that while passing the Order-in-Original of 08.06.2010, the Commissioner (I&G) took into consideration all submissions by the importer. Counsel particularly highlighted that the order of the Commissioner impugned in this case became final, because Etisalat's appeal directed against it was withdrawn without any liberty to re-agitate the issue. It is also contended that the Commissioner passed a well-reasoned and speaking order after giving opportunity of hearing to the importer and on consideration of all facts, which were presented to him by the importer during adjudication. Counsel argues that in fact, the order of the Kolkata Commissioner was made after the Order-in-Original in this case was issued; it was made on 01.07.2010. It is further submitted that the impugned order was made after duly considering CBEC's circular No. 100/2003 dated 28.11.2003.

8. As is evident from the above narrative, the goods were dispatched by the petitioner pursuant to a purchase order. Apparently, the anti-dumping proposal, particularly the 236% provisional duty was unknown to the parties to the contract, i.e. the petitioner, supplier and the purchaser Etisalat. When, in these circumstances, the latter became aware of this circumstance, it modified the purchase order on 22.12.2009. Thus, though the goods had landed – and were later permitted to be kept in the bonded warehouse- the buyer, Etisalat cancelled the deal altogether. To compound the petitioner's woes, Etisalat is facing winding-up proceedings. Apparently, in view of these developments, i.e. the winding-up proceedings as well as cancellation of its licenses (for 2G spectrum services) consequent to the judgment of the Supreme Court, it lost interest in the appeal filed by it against the Commissioner's order refusing re-export. It consequently withdrew the appeal. This has resulted in a disadvantage and most certainly prejudiced it.

9. In *Sampat Raj Dugar* (supra), purchaser of goods obtained an advance import license for importing raw silk. The license was granted on the condition that the raw silk imported would be utilized for manufacturing and exporting garments. The purchaser later received three consignments but did not fulfill the stipulated condition. Subsequently, the supplier, an Indian national residing and doing business abroad, sent certain quantities of raw silk in four lots, deliverable to the purchaser. The necessary documents were sent to the first supplier's bankers with instructions to deliver them to it on receiving payment. When the four consignments arrived in India, the

overseas supplier appeared before the Customs authorities and claimed the right to take delivery of the goods. The authorities, who had come to know by then of the non-compliance of the stipulated condition with respect to the three earlier consignments and also of the alleged misrepresentation made by the buyer, while obtaining the advance import license, initiated proceedings against her and two other persons. In view of the proceedings, the purchaser failed to make the payment and receive the documents; and also did not take any steps to clear the goods, in effect abandoning them. The foreign supplier appeared in the proceedings, and contended that title to the goods had not passed to the purchaser, and that it continued as owner; the goods could not, therefore, be confiscated or proceeded against for the purchaser's transgression of the law and that since the supplier was in the dark on this aspect, he ought to be permitted to re-export the goods. The revenue had rejected this request; the High Court granted the relief. When proceedings were pending the licenses were cancelled.

10. In the above background of facts, the Supreme Court upheld the judgment of the High Court – which like in this case, had been directly approached by the foreign supplier. The Court also discussed relevant provisions of the prevalent Import Control Order, and observed as follows:

“19.....The exporter is outside the country, while the importer, i.e. the licensee is in India. It is at the instance of the licensee that the goods are imported into this country. Whether or not he is the owner of such goods

in law, the Imports (Control) Order creates a fiction that he shall be deemed to be the owner of the such goods from the time of their import till they are cleared through Customs. This fiction is created for the proper and effective implementation of the said order and the Import and Exports (Control) Act. The fiction however cannot be carried beyond that. It cannot be employed to attribute ownership of the imported goods to the importer even in a case where he abandons them, i.e. in a situation where he does not pay for and receive the documents of title. It may be that for such act of abandonment, action may be taken against him for suspension/cancellation of licence. May be, some other proceedings can also be taken against him. But certainly he cannot be treated as the owner of the goods even in such a case. Holding otherwise would place the exporter in a very difficult position; he loses the goods without receiving the payment and his only remedy is to sue the importer for the price of goods and for such damage as he may have suffered. This would not be conducive to international trade. We can well imagine situations where for one or other reason, an importer chooses or fails to pay for and take delivery of the imported goods. He just abandons them. (We may reiterate that we are speaking of a case where the import is not contrary to law). It is only with such a situation that we are concerned in this case and our decision is also confined only to such a situation. Condition (ii) in sub-clause (3) of Clause 5, in our opinion, does not operate to deprive the exporter of his title to said goods in such a situation.

20. *At this stage, it may be appropriate to clarify one aspect. There may be cases, where the importer opens a letter of credit and makes some other arrangement ensuring/guaranteeing payment of price of imported goods. In such a case, it will be open to the exporter, in*

case of non-payment of price or abandonment by the importer, to collect the price by invoking such arrangement. In such a case, it is obvious, the exporter will not be allowed to claim title to and/or to re-export the goods. (Indeed, it is unlikely that in such a case, the importer abandons the goods ordinarily speaking.) It is therefore necessary that in all such cases, the authority should issue a notice to the importer and/or his agent before allowing the exporter to deal with or seek to re-export the goods. So far as this case is concerned, both the importer and exporter (RR 2 and 1 respectively) were present before the Collector (Customs) as well as before the High Court. R2 did not plead any such arrangement.”

11. It is, therefore, clear from *Dugar (supra)* that when the goods are virtually abandoned by the importer/purchaser, as in this case, so long as ownership continues with the supplier, his request for their return through re-export cannot be turned down. In the present case, the order impugned by the petitioner does not allege that the goods were either mis-declared or wrongly classified or valued. In fact the revised PO supports the petitioner’s grievance that the importer was categorical in its intention not to take the goods and incur further anti-dumping duty liability. The importer- like in *Dugar (supra)*, abandoned the matter and even withdrew the appeal which it appeared to have filed before the CESTAT, primarily to aid the petitioner. In Etisalat’s appeal before CESTAT, which has been produced in these proceedings and strongly relied upon by the petitioner, it was urged, *inter alia*, that:

“18. That the supplier of the said SDH Equipment, i.e ZTE China had further consented to take the materials back and had not received any payment in lieu of the said

supply. The said understanding was arrived between the Appellant and its supplier after mutual consultations and agreement.”

12. During the course of proceedings, as well as in the counter affidavit, the first respondent had relied on a CBEC circular (No. 100/2003). A close reading of that circular reveals that it in fact supports the petitioner to a great extent. The said circular is extracted below:

“Circular No. 100/2003-Cus., dated 28-11-2003

F. No. 450/58/2003-Cus. IV

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs, New Delhi

Subject : Requirement of “No Objection Certificate” from RBI for the re-export of the goods shipped contrary to the instructions of the importers - Regarding.

I am directed to refer to the instructions contained in Board’s letter F. No. 18/1/59-Cus. (CRC), dated 8-6-1959 on the above mentioned subject wherein it was stated that the goods shipped contrary to the instructions of the importer and the importer intends to re-export the same, the Commissioner may use his discretion and release the goods on payment of a nominal penalty or without any penalty as he deems fit, provided that he is satisfied that the goods have been imported as a result of bona fide mistake and contrary to the importer’s instructions subject to production of a “no objection certificate” from the Reserve Bank of

India for re-shipment of the goods. In this regard, trade has expressed difficulties in obtaining the “NOC” from RBI and stated that, at times, it takes a minimum of one week to obtain the certificate. Therefore, they have requested for allowing re-shipment without insisting on the production of “NOC” from RBI.

The matter has been examined in consultation with the Reserve Bank of India who have opined that the “NOC” from RBI need not be insisted for re-export of such imported items. Therefore, the Commissioner may use his discretion and allow re-export without the requirement of a “No Objection Certificate” from the Reserve Bank of India, on payment of a nominal penalty or without any penalty as he deems fit, provided that he is satisfied that the goods have been imported as a result of bona fide mistake and contrary to the importer’s instructions.

Kindly bring the above instructions to the knowledge of all concerned for strict compliance.”

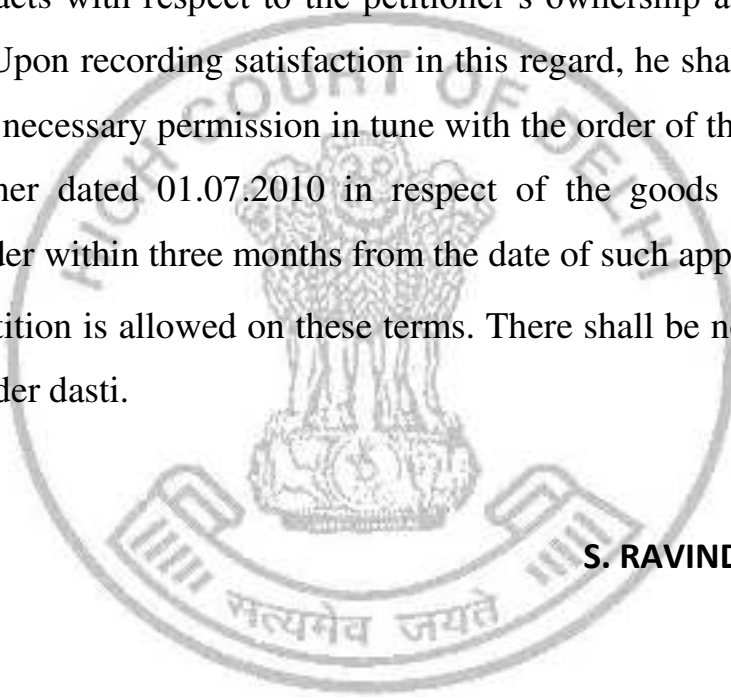
In addition to the above, it can also be seen that Section 71 of the Customs Act, visualizes re-export of the goods brought into India; Section 74 permits draw back.

13. The impugned order fails to note or take into account any of the above considerations. There is nothing on the record indicative of mis-declaration or suppression or wrongful valuation of the goods at the time they were brought in. Clearly the importer in effect abandoned them once it became aware of the liability to pay anti-dumping duty. The importer also averred positively that the petitioner is the owner of

the goods. In the circumstances, like in the case of the goods in *Dugar (supra)*, identically imported and identically abandoned, the goods in question here are entitled to be treated and cleared in the same manner, for re-export.

14. For the above reasons, the petition has to succeed. The writ petitioner shall file an application to the Commissioner, seeking re-export of the goods. The Commissioner is at liberty to examine and verify the facts with respect to the petitioner's ownership and title to the goods. Upon recording satisfaction in this regard, he shall proceed to grant the necessary permission in tune with the order of the Kolkata Commissioner dated 01.07.2010 in respect of the goods and shall make an order within three months from the date of such application.

15. The petition is allowed on these terms. There shall be no order as to costs. Order dasti.



S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

FEBRUARY 18, 2014