IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:
THE HONOURABLE THE AG.CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

FRIDAY, THE 13TH DAY OF MARCH 2015/22ND PHALGUNA, 1936

WA.No. 606 of 2015 IN WP(C).6722/2015
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AGAINST THE JUDGMENT IN WP(C) 6722/2015 of HIGH COURT OF KERALA DATED 9.3.2015

APPELLANTS/PETITIONERS:
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1. **M/S. CHALISSERY KIRANA MERCHANT,**
   XII/163/A, CHALISSERY (P.O.), PALAKKAD DISTRICT,
   REPRESENTED BY ITS MANAGING PARTNER SRI. BASHEER M.A.

2. **M/S. KAY KAY ENTERPRISES,**
   DOOR NO.X/78-A, KUNNATH COMPLEX, VARAVOOR P.O.,
   WADAKANCHERY, THRISSUR - 680 585
   REPRESENTED BY POWER OF ATTORNEY HOLDER MR.GAFOOR

3. **M/S. AL-SHABIB TRADING COMPANY, AYYAPPA ARCADE,**
   NEAR RAILWAY GATE, WADAKANCHERY, THRISSUR - 680 582,
   REPRESENTED BY ITS PROPRIETOR MR.ABDUL SATTAR

BY ADVS.SRI.DEVAN RAMACHANDRAN
SRI.ADARSH KUMAR

RESPONDENTS/RESPONDENTS:
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1. **UNION OF INDIA, REPRESENTED BY THE SECRETARY,**
   DEPARTMENT OF REVENUE, MINISTRY OF FINANCE,
   GOVERNMENT OF INDIA, NORTH BLOCK, NEW DELHI-110 001.

2. **THE COMMISSIONER OF CUSTOMS (SIIB),**
   SPECIAL INTELLIGENCE AND INVESTIGATION BRANCH,
   CUSTOM HOUSE, WILLINGDON ISLAND, COCHIN - 682 009.

3. **DEPUTY COMMISSIONER OF CUSTOMS (IMPORT),**
   OFFICE OF THE COMMISSIONER OF CUSTOMS,
   CUSTOMS HOUSE, COCHIN 682 009.

R1 BY SRI.N.NAGARESH, ASG.
R2 & R3 BY SRI.JOHN VARGHESE,SC,CEN.BOARD OF EXCISE

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 13-03-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JJJ

ASHOK BHUSHAN, Ag. C.J.
&
A.M. SHAFFIQUE, J

W.A. No. 606 of 2015

Dated this the 13th day of March, 2015

J U D G M E N T

A.M.Shaffique, J

This appeal has been filed challenging the judgment dated 9.3.2015 in W.P(C) No.6722/2015. At the time of admission we have heard the learned Standing Counsel appearing on behalf of the respondents as well.

2. Writ Petition has been filed challenging Exts.P30 to P32 orders issued by the Deputy Commissioner of Customs (Import), calling upon the petitioners to furnish Bank Guarantee/Cash Deposit for 35% of the differential duty, while making provisional assessment in respect of certain consignments of Sri Lankan Arecanuts imported by the petitioners.

3. The facts involved in the Writ Petition would disclose that the petitioners have imported Sri Lankan origin Arecanuts by claiming the benefit of Notification No. 26/2000 dated 1.3.2000 (ISFTA Agreement). The Arecanuts are normally leviable to duty @ 108%, but if the benefit of Notification No.26/2000 is claimed, the duty is only 4%. In Exts.P30 to P32 orders, the Commissioner of Customs formed an opinion that in respect of another consignment brought in by another importer, the Directorate of Revenue Intelligence (DRI) has started investigation regarding the origin of the consignment and the investigation is still going on. Therefore, before finally making the assessment, the Department has to undertake some more verification and further enquiry is required regarding the origin of goods. Hence, in terms of Section 18(1)(c) of the Customs Act, 1962, provisional assessment has been made till the completion of required verification and enquiry. On that

basis, provisional assessment has been made and the petitioners were called upon to release the goods on paying or giving guarantee for 35% of the differential duty. The learned Single Judge, by the judgment impugned, after taking into consideration the scope and effect of section 18 (1)(c) of the Customs Act, confirmed the order passed by the Commissioner of Customs with reference to ordering provisional assessment, but modified the condition by reducing the duty to be given as Bank Guarantee/Cash deposit by 20% instead of 35%. Hence, by virtue of the judgment, the petitioner is under obligation to give a Bank Guarantee/Cash deposit for 20% of the differential duty.

4. It is pointed by the learned counsel for the appellants that as far as Exts.P30 to P32 orders are concerned, provisional assessments have been made and the petitioners were called upon to pay 35% of the differential duty only for the reason that in a similar case

DRI is conducting an investigation regarding the origin of the goods. Therefore, an enquiry is being conducted in respect of the origin of goods and the eligibility of the petitioners to avail the benefit of the notification. It is argued that as far as the petitioners are concerned, they have produced all the necessary documents with full information as per the statutory provisions certified by the Sri Lankan authorities and there cannot be any doubt regarding the origin of goods as such. Further, the Commissioner, in the impugned orders, have not expressed any doubt regarding the origin of the goods; whereas the only reason stated is that enquiry is being conducted, for the reason that earlier, a similar consignment was under investigation by the DRI. Hence, it is argued that the condition for providing Bank Guarantee/Cash deposit is unreasonable and arbitrary.

5. On the other hand, the learned Standing Counsel appearing on behalf of the respondents supported the stand taken by the Commissioner of Customs and contended that the directions issued by the learned Single Judge is covered by the judgment of this Court in **Mohammed Fariz and Co. v. Commissioner of Customs - 2012 (275) E.L.T. 303 (Kerala)**. That was a case in which the dispute was regarding valuation of Betel nuts imported by the importer, on the basis of which provisional assessment was made under section 18(1)(c) of the Customs Act, wherein this Court held at paragraph 13 as under:

> "13. What is clear from Section 18(1) read with the above Regulations is that the Officer could make provisional assessment and release goods under Section 18 of the Act pending final adjudication only after ensuring that the actual duty that could be levied later will be recoverable from the party. For this purpose, the provisions of the Act and the Regulations above referred provide for determination of duty based on available documents, evidence

and claim made by the party and also estimation of duty which according to the Officer is likely to be levied finally. So much of the duty determined based on the documents and claim of the party is the admitted duty which the party has to straightly remit. The duty provisionally determined is nothing but the duty which the Officer estimates over the duty admitted by the party as payable based on his estimation on the value, classification or the rate applicable, which is essentially a matter to be determined by the Officer. Regulation 2 makes it clear that besides remittance of the admitted duty in terms of the claim of the importer/exporter the officer can demand payment of duty up to 20% of the duty provisionally determined by him which is over and above the admitted duty payable in accordance with the claim of the party and assessed by the Officer. After remitting the duty in terms of the claim made by the party (admitted duty) and up to 20% of the provisional duty demanded by the Officer, the Officer is bound to collect security for the balance of the provisional duty which under Regulation 4 is through execution of bond supported by surety or security or both as the

Officer deems fit. But we feel from the past follies of the Department stated by the learned Standing Counsel that the proper Officers provisionally assessing duty are under misunderstanding on the scope of Regulation (4) which requires surety or security in support of the bond executed which is noting but an undertaking to pay duty on demand. However, a surety bond should be valid only when it is supported by proper security, which may be by way of mortgage of immovable property or bank guarantee in favour of the Department or otherwise, and bond executed without proper security would serve only as a document to claim the amount. The Officer should realise that the best and safest course open to the Department is to demand bank guarantee from the local branch of a Nationalised Bank for balance provisional duty determined, so that recovery is ensured without any necessity for the Department to chase the parties and looking for their assets. In fact, credentials of the importer/exporter and such other matters should weigh with the Department in relaxing the condition for security, which in the normal course should be bank guarantee."

Apparently, the factual situation in the above case is different from the facts of the present case.

6. It is therefore submitted that since necessary enquiry has to be conducted in respect of the origin of the goods, the authorities were justified in calling upon the petitioners to give a Bank Guarantee/Cash deposit. It is submitted that the actual duty payable, if it is not of Sri Lankan origin, is 108% and it is only to protect the interest of the revenue that such a direction had been issued.

7. Having regard to the aforementioned submissions, the short question to be considered is whether the impugned orders are legally sutainable. There is no material in the impugned orders to indicate that the Customs have any doubt regarding the origin of goods. The main reason stated is that another consignment was under investigation by DRI in regard to the origin of the goods. Though, it was argued by the learned Standing Counsel

appearing for the respondents that the intention of issuing Exts.P30 to P32 is to conduct an enquiry with reference to the imported material, no material is produced to indicate that either any samples were taken or the same has been sent for analysis. Under such circumstances, we have no hesitation to come to the conclusion that the only reason stated is regarding an enquiry in respect of another consignment which is pending consideration by the DRI. Whether they have any doubt regarding the consignment imported by the petitioner is not borne out by records. Under such circumstances, the direction to call upon the petitioners to furnish Bank Guarantee/Cash deposit to the extent of 35% or 20% of the differential duty as the case may be, will be too harsh. If at all any liability could be fastened on the petitioners while making the final assessment, it would suffice that the petitioners submit appropriate undertaking in writing in the form of an

Indemnity Bond agreeing and undertaking to pay the differential duty, if any, imposed at the time of final assessment. Under such circumstances, we are of the view that directions issued by the learned Single Judge is to be modified to the following extent and we allow the Writ Appeal, as under:

The petitioners shall be permitted to release the goods covered by Exts.P30 to P32 orders, on condition of their executing Indemnity Bond agreeing and undertaking to pay any amount of differential duty as may be imposed on them by the Customs authorities while making the final assessment, instead of Bank Guarantee/Cash deposit.

Sd/-
ASHOK BHUSHAN,
ACTING CHIEF JUSTICE.

Sd/-
A.M. SHAFFIQUE,
JUDGE.

//True Copy//

P.A. to Judge

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