IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 04.03.2015

CORAM:

The Honourable Mr. Justice S.VAIDYANATHAN

Writ Petition No.15103 of 2014
And M.P.No.1 of 2014

M/s.Binny Limited,
Rep. by its Managing Director,
Mr.Arvind Nandagopal ... Petitioner

Vs.

1. The Commissioner of Customs (Imports),
Customs House,
No.60, Rajaji Salai,
Chennai-600 001.

2. The Assistant Commissioner of Customs (Bonds),
Customs House,
No.60, Rajaji Salai,
Chennai-600 001.

3. The Superintendent of Customs (Bonds),
Bonds Department,
Customs House,
No.60, Rajaji Salai,
Chennai-600 001. ... Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India, for the issuance of a writ of Certiorarified Mandamus, to call for the records of the 3rd respondent by proceedings in F.No.S4/308/96-C-Bonds, dated 25.1.2012, quash the same and consequently direct the respondents to grant permission to re-export the machinery covered by Bill of Entry Nos.27969, 27971, 27973, dated 6.6.1996 and Bond Nos.10134, 10135, 10136 and 10137, dated 23.7.1996.

For Petitioner : Mr.Vijay Narayan,SC
For P.Saravana Sowmiyan

For Respondents : Mr.K.Mohana Murali

ORDER

This Writ Petition has been filed, praying for the issuance of a Writ of Certiorarified Mandamus, to call for the records of the 3rd respondent by proceedings in F.No.S4/308/96-C-Bonds, dated 25.1.2012, quash the same and consequently direct the respondents to grant permission to re-export the machinery covered by Bill of Entry Nos.27969, 27971, 27973, dated 6.6.1996 and Bond Nos.10134, 10135, 10136 and 10137, dated 23.7.1996.

2. The brief facts of the case are that the petitioner, though had imported textile machineries with auxiliary equipments and spares during 1996 from Germany, due to financial crunch, unable to clear the goods, instead, it was decided to bond the said goods as per the provisions of the Customs Act, 1962 in Customs Bonded Warehouse without payment of duty pending clearance. Accordingly, the above said four Bills of entry were permitted to be kept in the bonded ware house by the second respondent. Later, the petitioner company was declared as sick unit and since the goods were not cleared, the second respondent issued a detention notice, dated 15.4.2008 under Section 72(1) of the Act. As per Section 61(1) (b) of the Act, warehoused goods can remain in the bonded warehouse for a period of one year until payment of duty with reduced period for the perishable goods and the interest is payable for the period from the expiry of 90 days till the date of payment of duty on the warehoused goods. Thereafter, even after lapse of permitted period of one year, since the petitioner had not cleared the goods, a notice was issued by the second respondent demanding customs duty aggregating Rs.3,78,81,263/- along with interest @ 15% p.a. under Section 72(1) of the Act. However, pursuant to the said notice, it appears that the petitioner sought for extension of warehousing period for further period of one year. Since the bond interest payable under Section 61(2)(i) & (ii) of the Act read with Board's Circular No.47/2002, dated 20.7.2002 was not paid, the request made by the petitioner for extension of the period was not considered and accordingly, a notice dated 15.4.2008 was issued under Section 72(2) of the Act, detaining the said goods for disposal with grace period of 5 days for payment of duties and interest. Thereafter also, the petitioner made requests for extension of the period, which were not considered and in the mean time, the Private Bonded Warehouse Licence granted to M/s.Binny Lorze Ltd., Chennai where the said goods were bonded has not been renewed since 24.3.2009. The imported goods were permitted to be deposited in a public bonded warehouse by the second respondent under Section 60 of the Act as the petitioner had executed a double duty bond, undertaking to pay the duty, interest, etc., and clear the goods within the permissible bonding period and agreed to honour their commitment failing which the petitioner agreed that the said bond can be

enforced by the second respondent for recovery action under Section 142 of the Act. Though, more than 16 years have passed since then, the goods still remained unclear insider the warehouse, which prompted the second respondent to issue notice, dated 25.3.2008 under Section 72(1) of the Act demanding customs duty after applying the rate of duty prevalent on the last date of validity period namely, 22.7.1997 along with interest @ 15% therein, followed by detention notice, dated 15.4.2008. The petitioner failed to discharge its duty by not paying the duty due on the warehoused goods as undertaken by it. Thereafter as could be seen from the records, it appears that the detained goods were sold in e-auction held on 23.12.2011 for Rs.2,26,55,556/- to one Sri Shiva Impex, Chennai, which stood as highest bidder.

3. According to the petitioner, the above said auction proceedings were cancelled due to non-payment of post bid EMD/SD and thereafter, the first respondent again called for fresh e-auction in respect of the petitioner's goods on 17.2.2012

4. Sections 61 and 72 insofar as relevant for the purpose of the case on hand, are reproduced below:

> "61. Period for which goods may remain warehoused.—(1) Any warehoused goods may be left in the warehouse in which they are deposited or in any warehouse to which they may be removed,—
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> (a) in the case of capital goods intended for use in any hundred per cent export-oriented undertaking, till the expiry of five years;
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> (aa) in the case of goods other than capital goods intended for use in any hundred per cent export-oriented undertaking, till the expiry of three years; and
>
> (b) in the case of any other goods, till the expiry of one year,
>
> after the date on which the proper officer has made an order under Section 60 permitting the deposit of the goods in a warehouse:
>
> Provided that—
>
> (i) * * *
>
> (A)-(B) * * *
>
> (ii) in the case of any goods referred to in Clause (b), if they are likely to deteriorate, the aforesaid period of one year may be reduced by the Commissioner of Customs to such shorter period as he may deem fit:
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> * * *
>
> 72. Goods improperly removed from warehouse, etc.—(1) In any of the following cases, that is

to say,—

(a) * * *

(b) where any warehoused goods have not been removed from a warehouse at the expiration of the period during which such goods are permitted under Section 61 to remain in a warehouse;

(c)-(d) * * *

the proper officer may demand, and the owner of such goods shall forthwith pay, the full amount of duty chargeable on account of such goods together with all penalties, rent, interest and other charges payable in respect of such goods.

(2) If any owner fails to pay any amount demanded under sub-section (1), the proper officer may, without prejudice to any other remedy, cause to be detained and sold, after notice to the owner (any transfer of the goods notwithstanding) such sufficient portion of his goods, if any, in the warehouse, as the said officer may select."

5. It is not in dispute that the present case would fall within the scope of Section 61(1)(b) of the Act. The facts of the case would reveal that the machineries and spare parts imported by the petitioner were warehoused initially for a period of one year, i.e. between 23.7.1996 till 22.7.1997. Thereafter, since the warehoused goods were not cleared within the above said permitted period of one year, a notice was issued by the second respondent demanding customs duty aggregating Rs.3,78,81,263/- along with interest at 15% p.a. under Section 72(1) of the Act. However, pursuant to the said notice, it appears that the petitioner sought for extension of warehousing period for further period of one year. Since the bond interest payable under Section 61(2)(i) & (ii) of the Act read with Board's Circular No.47/2002, dated 20.7.2002 was not paid, the request made by the petitioner for extension of the period was not considered and accordingly, a notice dated 15.4.2008 was issued under Section 72(2) of the Act, detaining the said goods for disposal with grace period of 5 days for payment of duties and interest. Thereafter also, the petitioner made requests for extension of the period, which were not considered and in the mean time, the Private Bonded Warehouse Licence granted to M/s.Binny Lorze Ltd., Chennai where the said goods were bonded has not been renewed since 24.3.2009. The imported goods were permitted to be deposited in a public bonded warehouse by the second respondent under Section 60 of the Act as the petitioner had executed a double duty bond, undertaking to pay the duty, interest, etc., and clear the goods within the permissible bonding period and agreed to honour their commitment

failing which the petitioner agreed that the said bond can be enforced by the second respondent for recovery action under Section 142 of the Act. Though, more than 16 years have passed since then, the goods still remained unclear insider the warehouse, which prompted the second respondent to issue notice, dated 25.3.2008 under Section 72(1) of the Act demanding customs duty after applying the rate of duty prevalent on the last date of validity period namely, 22.7.1997 along with interest @ 15% therein, followed by detention notice, dated 15.4.2008. The petitioner failed to discharge its duty by not paying the duty due on the warehoused goods as undertaken by it. Thereafter as could be seen from the records, it appears that the detained goods were sold in e-auction held on 23.12.2011 for Rs.2,26,55,556/- to one Sri Shiva Impex, Chennai, which stood as highest bidder. However, the said sale proceedings came to be cancelled since the bidder had not fulfilled the terms.

6. The learned senior counsel, placing reliance on the Circular dated 14.1.2003 would contend that though the Statute fixed the maximum period of warehousing as one year, however the Circular issued by the Board under Section 151-A of the Act, made a clear departure from the provisions of the Act. The Circulars dated 14-1-2003 deals with the special grant of the warehousing period by the Chief Commissioner under Section 61. The said circular reads as under:

> "The matter has been examined in the Board. It has been decided that in case an importer makes a request to permit re-export of the goods under Section 69 of the Customs Act, 1962, such a request may be allowed even if the permitted period for bonding has expired and demand notice has been issued, or it has been decided to put the goods under auction. Before permitting re-export in each such case, however, it will be necessary to extend the period of warehousing under Section 61 of the Customs Act to enable the importer to export the goods within the permitted period of warehousing."

7. A perusal of the above would reveal that the request for re-export of the goods could be allowed even if the maximum period of warehousing had expired and demand notices had been issued and even if it had been decided to put the goods to auction. However, considering the facts and circumstances of the case, I am of the considered view that the above said circular would not apply to the present case, inasmuch as the warehoused goods were not only decided to put on auction, but also they were already put to e-auction held on 23.12.2011 and sold for Rs.2,26,55,556/- to one Sri Shiva Impex, Chennai, which stood as highest bidder. Of-course, it is true that the said sale proceedings were subsequently cancelled, but, this cannot make any favour to the petitioner company to claim

for extension of the period. It is no doubt true that warehousing is permissible even beyond the period fixed by the statute, subject to payment of interest on the amount of duty on the warehoused goods towards permissible period, however, it is to be noted that mere seeking for extension of the period does not serve the purpose and there should be a reasonable cause has to be shown for such extension. In this case, the petitioner company, right from the inception, has been seeking for extension of the warehousing period from time to time though citing reasons that the company was declared sick, etc., but there was no genuineness in its attempt in clearing the goods even after expiry of extended period. Keep on seeking for extension of the warehousing period without sufficient reasons thereof, would only establish that the petitioner company has been dragging on the proceedings in order to frustrate the attempt of the respondents in recovering the duty by stalling the proceedings. In fact, the third respondent, in its order impugned in the writ petition, has categorically mentioned that the petitioner continued to reiterate the request of re-export on 26.9.2011, but no concrete evidence by way of documents such as invoice, agreement, etc., have been produced by the petitioner to prove the claim and that the petitioner has failed to discharge the duty due on the warehoused goods as undertaken by it vide Bond executed by it and delayed the payment of customs duty and other charges for the past 16 years. In para 9 of the impugned order, the third respondent has mentioned to the following effect:

> "9. As regards your request for re-export, it is stated that such request entails extension by the competent authorities concerned in view of the fact that under Section 69 of the Customs Act, 1962 any warehoused goods can be exported to a place outside India without payment of duty subject to conditions as stipulated therein whereas in the instant case, the warehousing period of the said goods has expired wayback in the year 1997 and no application for extension in the prescribed format has been found filed before the competent authorities concerned therein. As stated in the said Apex Court Judgment (M/s.Kesoram Rayon versus Commissioner of Customs, Calcutta 1996(86) ELT 464 (SC)), these goods have ceased to be warehoused goods and as such your request for re-export is not legally tenable. As considerable time elapsed with no proof produced towards payment of bond interest, your above request made to the undersigned is not legally proper. Besides, it has since been ascertained from the Asst.Commissioner of Customs, Warehouse and Disposal unit that the said goods were sold in an e-auction held on 23.12.2011 for Rs.2,26,55,556/-. As such your request to postpone e-auction in this regard

cannot be acceded to at this juncture in view of the same being ultra vires.”

8. From the peculiar facts and circumstances of the case as discussed above, I am of the view that the petitioner company had no intention, whatsoever to clear the goods, but has been attempting throughout one and half a ‘decade’ long period to ‘stall’ the disposal of these uncleared time-expired bonded goods.

9. Further, in a very similar set of facts and circumstances, the Hon’ble Supreme Court in “Union of India v. Shakti LPG Ltd., (2008) 4 SCC 496, has ruled out the applicability of the so-called Circular, dated 14.1.2003 on which, the learned senior counsel has placed reliance, in the circumstances where the goods were already put on for sale by way of e-auction. The Hon’ble Supreme Court has held as under in para 18 to 21:

> “18. Mr Sunil Kumar, the learned Senior Counsel has, however, submitted that though the statute did indeed fix the maximum period of warehousing to be of one year, yet the various circulars issued by the Board under Section 151-A of the Act had made a clear departure from the aforesaid provisions. He has in particular placed reliance on Circulars dated 14-1-2003 and 29-7-2002 which dealt with the special grant of the warehousing period by the Chief Commissioner under Section 61. The Circular dated 14-1-2003 is prefaced by referring to the Circular dated 29-7-2002 and the remarks that clarifications had been sought whether goods imported and bonded in a warehouse could be permitted to be cleared for export under Section 69 of the Act even though demand notices under Section 72 had been issued upon expiry of the initial or the extended period of warehousing. The circular then goes on to read:
>
>> “The matter has been examined in the Board. It has been decided that in case an importer makes a request to permit re-export of the goods under Section 69 of the Customs Act, 1962, such a request may be allowed even if the permitted period for bonding has expired and demand notice has been issued, or it has been decided to put the goods under auction. Before permitting re-export in each such case, however, it will be necessary to extend the period of warehousing under Section 61 of the Customs Act to enable the importer to export the goods within the permitted period of warehousing.”
>
> “19. The Circular dated 29-7-2002 is, however, a general circular advising the Chief Commissioner to be liberal in

granting extension under Section 61 of the Act. Relying on the aforequoted paragraph of the Circular of 14-1-2003, Mr Sunil Kumar has argued that the maximum period visualised under Section 61 of the Act could, therefore, have been exceeded.

"20. Mr Gaurav Agrawal has raised a larger issue—whether the circulars aforesaid could authorise a deviation from the statute itself but in the light of the peculiar facts of the case we are not called upon to answer this question.

"21. We note from the perusal of the Circular dated 14-1-2003 that the request for re-export of the goods could be allowed even if the maximum period of warehousing had expired and demand notices had been issued and even if it had been decided to put the goods to auction. This circular obviously would not apply to a situation where the goods had already been put to auction. It is clear from the record that the first auction of the goods had been fixed on 28-9-2005. However, vide letter dated 22-9-2005 the respondent had requested the Department to stop the auction and to allow it to clear the goods on payment of all charges and promised to file the various documents in one day but did not do so and on the contrary once again vide letter dated 28-9-2005 moved another application for re-export of the goods. The auction of 28-9-2005 was also challenged by the respondent in CWP No. 6907 of 2005. This petition was dismissed on 19-10-2005 with a direction that the application for re-export filed by the respondent be disposed of by the Chief Commissioner by a reasoned order."

10. Having regard to the above decision and in the light of the above discussion, I am of the view that the writ petition is liable to be dismissed for want of merits.

In the result, the Writ Petition is dismissed. No costs. Consequently, connected MP is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

Suk

TO

1. The Commissioner of Customs (Imports),
   Customs House,
   No.60, Rajaji Salai,
   Chennai-600 001.

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   Customs House,
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   Bonds Department,
   Customs House,
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+1cc to Mr.P.Saravana Sowmiyan, Advocate, S.R.No.12422
+1cc to Mr.K.Mohana Murali, Advocate, S.R.No.12078

W.P.NO.15103 OF 2014

RSY(CO)

CA(13/03/2015)