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

RESERVED ON: 09.03.2017

% **PRONOUNCED ON:27.04.2017**

\+ W.P. (C) 2575/2015

M/S DEJERO LOGIX PVT. LTD. ..... Petitioner

Through: Mr. Pradeep Jain with Mr. Shubhankar Jha, Advocates.

Versus

COMMISSIONER OF CUSTOMS (IMPORTS) AIR CARGO, NEW CUSTOMS HOUSE NEAR IGI AIRPORT, NEW DELHI ..... Respondents

Through: Mr. Sanjeev Narula, Sr. Standing Counsel for Resp-1 with Mr. Abhishek Ghai, Advocate.
Mr. Tarun Gulati with Mr. Sparsh Bhargava, Mr. Vinayak Mathur, Mr. Anupam Mishra and Mr. Vipin Upadhyay, Advocates for Resp-2.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

S.RAVINDRA BHAT, J.

1. The present petition under Article 226 of the Constitution claims for directions to payment of the declared value of imported goods that were confiscated, by an order of the respondent customs authorities, and later sold at a vastly reduced price. The confiscation order was later set aside. The petitioner asks for an appropriate restitution of the money equivalent of the goods so sold.

2. The brief facts are that the petitioner is a company incorporated under the Companies Act, 1956 having its registered office at 509, Naurang House,

KG Marg, New Delhi. It had filed Bill of Entry No.7687005 dated 17.08.2012 through CHA, M/s Kinship Agency (P) Ltd. for clearance of consignment - *"Transmitter Broadcasting Equipment Sub-System (Data processing unit with transmitting capabilities for Broadcasting), Software and other Standard Accessories"* (hereafter "the imported articles"). The assessable value of the goods was declared at ₹51,70,619/- and it was submitted by the petitioner, that import under this heading was free as in terms of the policy and no WPC license is required.

3. The articles were imported under Commercial Invoice No.2012-0730 dated 1 August, 2012. Upon arrival in India, the goods were examined under First Check to ascertain the correct nature of the goods. The quantity was found to be compliant with the Invoice and packing list. The Petitioner, had, under cover of its letter submitted to the Assistant Commissioner (Customs), the following information/documents:

(a) Various Modes of Operations;
(b) An overview of the working;
(c) Platform Overview;
(d) Technical Specification Date Sheet;
(e) Features and Advantages.

4. The petitioner had upon being queried by the customs authorities, explained the functioning of the equipment and that it is meant for one to one communication between the field reporter and the studio. It was also explained that the signal that is captured by devices such as Cameras (not part of the equipment), processes the signal and broadcasts to the audience. Thus, the device is merely a communication part using GSM network for transmission

and thus, may be classified under CTH 8517. However, the goods were not cleared by the customs authority and it was alleged by the respondent that on perusal of the catalogue it was found that the goods under import are live transmitted for live television broadcasting type. As per the technical specification, the equipment works on cellular frequency Ethernet and Wifi network connections; that the goods under import are not broadcast equipment subsystem as declared by the imported, but complete equipment in itself which has the facility to transmit live video/ audio and other data for broadcasting; is specifically classifiable under CTH 85255020 and is not permitted to be imported except against the license issued by the WPC wing of the Ministry of Telecommunication and Information Technology.

5. The respondent by its order dated 25.10.2012 directed absolute confiscation of the goods as according to it, the importer had failed to produce the requisite license from the DGFT and the WPC, and imposed a penalty of ₹5 lakh on the petitioner under Section 112(a) of the Customs Act, 1962. The Petitioner aggrieved by the order assailed it by an appeal and stay application before the CESTAT ("the tribunal") in New Delhi. During pendency of the appeal the respondent was restrained from disposing off the goods. However, despite this restraint, the respondent auctioned off the goods. The tribunal allowed the appeal and by order dated 29.01.2014 set aside the impugned order of 25.10.2012.

6. The petitioner submits that no notice was served on it before auctioning off of the goods, and it had not waived the issuance of such notice. The Commissioner in the impugned order had observed that the Show Cause notice was waived by the petitioner's letter dated 28.09.2012, which is denied as false.

It is pointed out that in that letter, the petitioner had specifically asked for personal hearing and not waived issuance of the Show Cause notice. Thereafter, the petitioner by way of numerous letters dated 28.01.2014, 12.02.2014, 24.04.2014, 24.05.2014, 10.07.2014, 20.08.2014, 09.09.2014, made requests for the refund of cost of the goods so declared at the time of import i.e., ₹51,70,619/- along with interest. However, the respondent did not respond to any of the petitioner's requests. The petitioner, aggrieved by such inaction and left with no alternative; has approached this court by way of the present petition to direct the respondents to grant the refund amount to it along with interest.

7. The Petitioner contends that it succeeded before the CESTAT, and that its order has neither been stayed nor set aside by this court or the Supreme Court, which obliges the respondent to restitute the full value of the imported articles, less the duty payable, and make payment of the auction amount along with interest. The respondents' inaction is contrary to the settled position of law declared by the Supreme Court and the various High Courts. The petitioner relies on *Northern Plastic Ltd. v. Collector of Customs and Central Excise,* 1999 (113) ELT 3 (S.C.), *Kailash Ribbon Factory Ltd. v. The Commissioner of Customs & Central Excise and Anr.,* 2002 (143) ELT 60 (Del.); *Shilp Impex v. Union of India,* 2001 (128) ELT 54 (Del.) and *Ahsan Waris v. Commissioner of Customs (Preventive),* 2014 (305) ELT 78 (Cal.).

8. The Petitioner further alleged that the action of the respondent is also in violation of the customs circular F.No.711/4/2006 - Cus(AS) dated 14.2.2006 wherein it was directed that, *"...that the requirement to issue notice to the owner of the goods shall also obtain in case of goods that have been*

confiscated but in respect of which all appeal/ legal remedies have not been exhausted by the owner of the goods.” This places an obligation to serve a Show Cause Notice on the importer before making sale of his confiscated goods. This encapsulates the principle of natural justice of *audi alteram partem*.

9. The customs authorities in their reply and in their submissions through Mr. Sanjeev Narula, alleged that the petitioner had not approached the court with clean hands as it averred that goods were sold by the respondent whereas, the respondent contends, the goods were sold by the Custodian, M/s Delhi International Airport (P) Ltd, IGI Airport, New Delhi (hereinafter M/s DIAL Ltd) under Section 48 of the Customs Act, 1962. This was done as the petitioner failed to respond to the notices issued to him regarding disposal of his property under Section 48 in the event of his failure to clear the cargo. To this effect, the Customs claims to have taken out advertisements in the *Indian Express,* the *Hindustan Times* and the *Educator* newspapers by the Custodian and thereafter the goods were sold as part of a larger container lot for ₹81,000/- to M/s. Star Traders. In view of these facts, the customs authorities stated that the custodian i.e., M/s DIAL Ltd. was a necessary party to the instant writ petition.

10. Mr. Narula, denies the petitioner’s arguments regarding the customs’ inaction and stated that it had not sold the goods but that they were sold by the Custodian under Section 48 of the Customs Act. The respondent also stated that for all imported goods unloaded in a Customs area, the Commissioner appoints a custodian, under whose custody the goods shall remain till they are cleared for home consumption, or are warehoused or transshipped. The

custodian is entrusted to take charge of the goods, arrange for its proper storage and allow clearance for importers only after they fulfill the Customs formalities. Thus, since the custodian is required to ensure safe custody of the goods, if they are pilfered while in custody, it is he who must bear the duty on such goods.

11. In the present case, on enquiry from the custodian, the Customs contends that due notice of intent to sell the property was sent to the petitioner by legal notices dated, 28.09.2012 and 07.11.2012 at the address "M/s Dejero Logix Pvt. Ltd., 79 Shyam Lal Road Darya Ganj, New Delhi", which elicited no response. Thereafter on the same address, notices for personal hearings were sent to the petitioner on the same address which they duly responded to and attended the personal hearings.

12. Counsel for Customs submitted that the goods were ordered for confiscation after due consideration of the catalogue/ user manual of the goods and it was found that goods under import are live + transmitter type for live television broadcasting and can work on cellular frequency, Ethernet and WiFi connections. It was contended that the articles were not merely broadcasting equipment subsystem as declared by the importer but was complete equipment in itself. Thus, there was a requirement for the petitioner to produce a licence issued by the WPC, Ministry of Telecommunication and Information Technologies. Due to his failure to do so, the matter was adjudicated under Sections 111(d) and (m) of the Customs Act, 1962 and the adjudicating officer ordered confiscation of the said goods u/s 111(d) of the Act. Upon such confiscation, the ownership of the goods lay with the government of India. In these circumstances, no fault lay with the Customs authorities, who made the order on a *bona fide* determination about the goods. The articles were

auctioned off, because the Custodian could not retain them indefinitely and the petitioner did not clear them, nor participate in the auction.

13. The Customs authorities also refute the allegations that their actions were contrary to Custom Circular F.No.711/4/2006-Cus(AS) dated 14.02.2006. Additionally, the custodian as well had issued due notice to the petitioner's address before the auction, which can be verified from the Airway Bill. He has also issued a Press Release with respect to the goods and their auction till February 2014. The goods were only auctioned off after there was no response from the petitioner. Hence, the particulars stipulated in the circular were complied with.

Analysis

14. The dispute in the present writ petition is with respect to making payment of the value of the imported goods, to the petitioner. The CESTAT directed the respondent either to return the broadcasting equipment or make refund of value of broadcasting equipment to the petitioner. The equipment was sold in auction for ₹81,000/-, the petitioner contacted the respondent to make payment of cost of goods i.e., ₹51,70,619/- along with interest to the petitioner. The present petition was filed to direct the respondent to comply with the order of the CESTAT made on 29.01.2014.

15. The petitioner was aggrieved by the fact that his goods were auctioned off without its knowledge and before giving it opportunity of being heard. The petitioner contends that this is in violation of this court's judgment in the case of *Shilps Impex* which was followed by this court in *Kailash Ribbon Factory Ltd.* The court had held in the latter case, as follows:

"…7. Therefore, according to the submission of the learned Counsel for the petitioner after confiscation, the goods became the property of the Central Government. During the pendency of the petitioner's appeal, without any permission of the court, the confiscated goods were auctioned in a clandestine manner by the respondents. The respondents are obviously under an obligation to compensate the petitioner for the grave loss which has been caused to him…
…8. We are of the considered opinion that during the pendency of the appeal confiscated goods could not have been auctioned without prior permission of the appellate court…
…10. After obtaining necessary permission if the authorities decide to auction the goods, the individual notice is imperative. We are clearly of the opinion that the respondent have committed a serious blunder by auctioning the goods which were subject matter of appeal without prior permission of the concerned appellate court. The petitioner has to be compensated for this serious lapse of the respondents causing immense financial loss to the petitioner…"

16. The respondents' contentions are that the goods could not be held by the Custodian for an indefinite period; advertisement for sale was given due publicity. Had the petitioner wished, it could have either cleared the goods, or later, participated in the auction. Their actions, according to them, are in consonance with provisions of the Customs Act.

17. In the present case, the order of confiscation was made on 25.10.2012. The customs authorities rely on notices dated 28.09.2012 and 07.11.2012 issued to the petitioner at its address, asking it to clear the goods. Both these notices, in the opinion of the court are to no avail. The customs authorities' stated position during the pendency of assessment and adjudication was that the goods could not be imported and were liable for confiscation. The petitioner could not, during pendency of the show cause notice (proposing confiscation) have cleared the goods. After the order of confiscation too, the notice to clear

the goods and pay duty had no meaning, because the title to the goods vested in the Central Government.

18. Clearly, there was negligence on the part of the customs authorities; they do not deny that an interim order operated during the pendency of the petitioner's appeal, before the CESTAT. This meant that any action towards sale carried with it an inherent risk of exposure to a potential action for restitution. In other words, once the customs authorities were aware that the confiscation order was not final, but subject to the outcome of the appeal, they were accountable to the importer in the event of its success. A notice to the petitioner could have averted a possible risk of liability, because it was to notify the importer to make arrangement for purchase. The customs authorities allowed to sell the goods, at a vastly depressed price, despite their assumption that they were prohibited articles. However, the CESTAT upheld the declared value of the goods.

19. As can be seen from the authorities cited, the goods could not have been auctioned off before due notice of sale is given to the petitioner and without obtaining the consent of the CESTAT during pendency of the appeal. The fact that the respondent authorities auctioned off the goods during the pendency of the appeal is an act which is against the letter of the law. Their subsequent inaction against the communications made by the petitioner for payment of the refund amount, is clear apathy. In *Northern Plastics,* the Supreme Court held, in a somewhat similar situation that:

> *"The applicant has become entitled to the value of the goods as on the date or time when the goods ought to have been cleared by the respondent for home consumption. If the value of the goods in India after importation and payment of duty, in January 1989, was Rs. 33.04*

lakhs only then the applicant, and for that matter any sensible person, would not have imported the goods at all. It would be reasonable to presume that an importer would have imported the goods of the value of Rs. 33.04 lakhs if its value in the Indian market at the relevant time was more than the CIS value of the goods plus the duty payable thereon (Rs. 33.04 lakhs + 47.07 lakhs = Rs. 81.11 lakhs). It is also not the stand of the respondent that such goods were available in the Indian market at that time at a lesser price. Therefore, it is now the obligation of the respondent to return at least Rs. 80.11 lakhs - 47.07 lakhs, the amount of duty payable thereon. As the applicant has been deprived of the use of the goods worth Rs. 33.04 lakhs the respondent is under a legal obligation now to refund that amount to the applicant. The respondent cannot now be permitted to take the advantage of his own wrong and contend that the value of the goods should be determined only at Rs. 48.50 lakhs inclusive of its value and the amount of duty payable thereon because they could be sold at that price only. We also cannot accept the contention of the learned counsel for the respondent that if the applicant has suffered any loss as a result of the wrongful act of the respondent then he should file an action in tort and this Court cannot order payment of any amount in these applications. No doubt it would be open to the applicant to initiate such an action if it feels that the loss suffered by it is more than Rs. 33.04 lakhs. Merely because it is open to the applicant to initiate such an action it would not be just and proper to refuse the claim made in these applications as in any case the applicant is entitled to return of the money value of the goods which were illegally confiscated by the respondent. Even though the applicant has claimed interest @ 21% we do not think it proper to award interest at such a high rate and considering the facts and circumstances of the case it would be in the interest of justice if the respondent is directed to return the amount of Rs. 33.04 lakhs with interest at the rate of 12% from 1-2-1989 till the date of payment as the Collector by his order dated 31-1-1989 had held that the goods were properly described and the import was legal (sic)10. In the result the applications are allowed. The respondent is directed to return the amount of Rs. 33.04 lakhs with 12% interest from 1-2-1989 till the date of payment."

Similarly, the Calcutta High Court had also by its judgment in *Ahsan Waris v. Commissioner of Customs (Preventive),* 2014 (305) ELT 78 (Cal.), ruled:

"…By applying the ratio as laid down in the above noted reports the respondent authorities are bound to pay the value of the goods assessed at the time of seizure and not the value which it fetched from the sale of said goods after the seizure is declared to be illegal by the CESTAT. The authorities are thus directed to pay the petitioner the differential amount within eight weeks from the date of the communication of this order…"

In *Shilps Impex* (supra), the court held that:

"…The petitioner having paid the duty, redemption fine and penalty was entitled to the return of the goods but as the goods had disappeared they were not returned. It is for this reason that the petitioner has become entitled to get back what he had paid and, in addition thereto the value of the goods…"

20. Thus, it is apparent from both the above judgments that the amount payable to the petitioner, is that which was assessed to be the value of the goods at the time of seizure i.e., ₹51,70,619/- and not the amount for which the respondent sold the petitioner's goods for i.e., ₹81,000/-. Furthermore Circular No.711/4/2006-Cus (AS) dated 14.02.2006 mandates the customs authorities to give due notice of sale to the petitioner before making the auction and states, *"…that the requirement to issue notice to the owner of the goods shall also obtain in case of goods that have been confiscated but in respect of which all appeal/ legal remedies have not been exhausted by the owner of the goods."*.

21. In the case of *Rang Birajgi Sarees (P) Ltd. v. Additional Commissioner of Customs,* 2011 (265) ELT 26 (Cal.), the court, with respect to the aforementioned circular, stated that, *"…Circular No. 711/4/2006-Cus (AS) dated 14.02.2006 the authorities are to be reminded that law interpreted and laid down is for strict compliance and circulars issued by the authorities themselves are for adherence in letter and spirit."* From the above cited judgments and the custom circular, it is clear that in any case, the petitioner

was to be given notice by the customs authority before proceeding for selling the goods or even for giving permission for selling of goods by the custodian of the goods as has been alleged by the respondent.

22. The customs department has tried to shrug off its responsibility upon the custodian of the goods i.e., M/s DIAL for selling the goods under Section 48 of the Customs Act, 1962. From reading that provision, it is apparent that only after obtaining permission by the proper officer, the goods can be sold. In this case, the proper authority empowered to give such permission is the customs authority as only on the declaration of this authority, that the goods are not what they have been described as in the Bill of Entry, the petitioner's goods were not cleared. Further, Section 48 of the Customs Act 1962 deals with goods not cleared, warehoused or transshipped within 30 days after unloading. However, in the present case, the goods were stopped from being cleared only on the basis of allegation made by the customs authority which allegation was ultimately rejected by the CESTAT, New Delhi, by its order dated 29.01.2014. Thus, giving permission for auction at an advanced stage of the matter while it is still being adjudicated does not set a good precedent.

23. Clearly, the customs authorities wrongly disposed off the petitioner's property during the period when the petitioner's appeal was pending. Furthermore, in terms of the order of 25.10.2012, the goods were absolutely confiscated by the customs authority, so the goods ending up in the custody of M/s DIAL Ltd could not have been without the respondent's consent as M/s DIAL Ltd had no jurisdiction over the goods, let alone authority to sell. In these circumstances, the petitioner's claim has to succeed. The first two respondents are accordingly directed to pay the amount of ₹51,70,619/-, i.e.,

the declared value of the confiscated goods to the petitioner, after deducting the customs duty payable on it, in accordance with law. The said amount shall carry interest at the rate of 9% per annum from the date of unauthorized auction of the confiscated goods till payment. The writ petition is allowed in the above terms; no order as to costs.

S. RAVINDRA BHAT
(JUDGE)

NAJMI WAZIRI
(JUDGE)

APRIL 27, 2017