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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CUS.AA No. 29/2016

**PRINCIPAL COMMISSIONER OF CUSTOMS
(PREVENTIVE)**

..... Appellant

Through: Mr. Amit Bansal and Mr. Akhil
Kulshreshtha, Advocates.

versus

SUREN INTERNATIONAL LTD.

..... Respondent

Through: Mr. R. Santhanam and Mr. A.P.
Sinha, Advocates.

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE PRATHIBA M. SINGH**

ORDER

02.08.2017

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Dr. S. Muralidhar, J.:

1. This is an appeal by the Customs Department ('Department') directed against an order dated 4th December, 2015 passed by the Customs, Excise and Service Tax Appellate Tribunal ('CESTAT') in Appeal No. C/274/2009-CU(SM) allowing the appeal filed by the Respondent, Suren International Ltd.

2. Admit.

3. The following question of law is framed for consideration:

Whether the CESTAT was justified in holding that the

Respondent was not liable to pay rent/warehousing charges in view of the fact that the ownership of the goods remained with it?

4. The facts leading to the filing of the present appeal are that the Respondent imported 40 containers of Aluminium/Copper scrap. When the goods were examined by the Department they found that there was a grossly erroneous declaration of weight and description of the goods. The seizure effected on 7th August, 2001 was of goods valued at Rs.14,59,101. Additionally, from the premises of the Respondent, goods valued at Rs.145.72 lakhs and Rs.395.22 lakhs were seized. Following the investigations, separately carried out by the Directorate of Revenue Intelligence ('DRI'), a show cause notice ('SCN') was issued by the DRI to the Respondent on 2nd August, 2002.

5. By an adjudication order, dated 30th June 2003, the Commissioner of Customs confiscated the goods, with an option to redeem them on payment of redemption fines of Rs. 4 crores and Rs. 2.5 crores. Penalty was also separately imposed.

6. Aggrieved by the above order, the Respondent filed an appeal before the CESTAT.

7. During the pendency of the appeal, the Respondent approached the Department for release of the confiscated goods after payment of the fine and penalty. The seized goods had been kept in the warehouse of the Central Warehousing Corporation ('CWC') from May, 2003 onwards. Accordingly, the Assistant Commissioner Customs (Preventive) by letter dated 16th

November, 2006 required the Respondent to deposit the warehousing dues of the CWC from May 2003 to 31st November, 2006 in the sum of Rs. 33,99,896. These charges were paid by the Respondent under protest.

8. The Respondent sought refund of the aforementioned sum by way of an application which was rejected by the Assistant Commissioner of Customs by an order dated 5th December, 2008. Against said order, the Respondent filed an appeal which came to be dismissed by the Commissioner of Customs (Appeals) on 16th February, 2009.

9. A further appeal was filed by the Respondent before the CESTAT which, by the impugned order dated 4th December, 2015, set aside the order of both the Assistant Commissioner as well as Commissioner (Appeals). The operative portion of the impugned order reads thus:

“I have gone through the adjudication order. In adjudication order, the appellant is asked to pay redemption fine, penalties and the duty applicable on the goods in question. The appellant has paid the same, therefore, the goods were required to be released to the appellant on payment of the amounts confirmed as per adjudication order. The adjudicating authority has not passed any order for payment of rent by the appellant for the period of seizure of goods. In these circumstances, the appellant is not liable to pay rent. As the appellant has paid an amount on account of rent in favour of Commissioner of Customs (Preventive), NCH, New Delhi under protest, the said amount is refundable to the appellant as the appellant has no liability to pay rent. In these circumstances, the impugned order is not sustainable in the eyes of law. Accordingly, the same is set aside. Appeal is allowed with consequential relief.”

10. It must be mentioned herein that at the first hearing of this appeal on 11th November, 2016 the Court while directing notice to issue in the appeal

stayed the operation of the impugned order.

11. This Court has heard the submissions of Mr. Amit Bansal, learned counsel appearing for the Appellant and Mr. R. Santhanam, learned counsel appearing for the Respondent.

12. It is plain from the impugned order of the CESTAT, that there is no mention of the provision of law in terms of which the CESTAT has granted relief to the Respondent. This is a matter for concern since the CESTAT is a statutory tribunal. It derives its powers and jurisdiction from the specific provisions of the statutes it deals with, one of which, in the context of the present appeal, is the Customs Act 1962 (CA). Likewise, the Assistant Commissioner of Customs (Preventive) and the Commissioner of Customs (Appeals), have all to function within the scope of their powers as conferred by the CA. It is possible that in the exercise of such powers, they may have to refer to and/or apply other relevant statutory provisions. It is also possible that in terms of the specific provisions of the CA, they may have certain discretionary powers. But even these have to be exercised reasonably and within the ambit of the CA. In no instance can they perform their adjudicatory functions outside the scope and ambit of the enumerated powers under the concerned statutes.

13. In the context of the present case, where refund of a sum paid as warehousing charges is sought by an importer, the authority to whom the application is made will first and foremost, have to examine under what provision of the law such a request is made and whether such a request can in fact be entertained. Significantly, in the present case while dismissing the

Respondent's appeal, the Commissioner (Appeals) noted that the Respondent failed to point out the provision of law under which it was seeking refund of the warehousing charges.

14. The same question was posed by this Court to learned counsel for the Respondent. He first referred to Section 27 of the CA. However, Section 27 (1) of the CA begins with the sentence "any person claiming refund of any duty or interest..." Clearly, therefore, Section 27 does not envisage refund of the warehousing charges. Mr Santhanam then referred to Chapter IX of the CA which deals with 'Warehousing'. Here again, he was unable to point out any particular provision in terms of which an importer could seek refund of the warehousing charges after payment of the redemption fine and penalty.

15. Section 49 provides for warehousing of imported goods pending clearance. The Customs authorities can permit the importer, on his making an application, to deposit the goods entered for home consumption in a private or public warehouse for a specified period pending clearance. Sections 59 to 73 A in Chapter IX are general provisions under which the importer may warehouse imported goods. Section 61 (2) of the CA talks of exemption being granted from payment of interest on the customs duty in certain circumstances, where the detention is beyond a period of 90 days. Section 64 spells out the owner's right to deal with the warehoused goods. Section 68 of the CA concerns 'clearance of warehoused goods for home consumption and Section 69 concerns "clearance of warehoused goods for export' do not envisage refund of warehouse charges. Significantly, Section 73 of the CA, the cancellation of the warehousing bond is conditional upon

payment of “all amounts due on account of such goods.” The expression “all amounts” is obviously not restricted to the customs duty, penalty, fine etc. It would include the warehousing and/or demurrage charges. Section 141 of the CA states that goods in the customs area would be subject to the control of the officers of Customs in such manner as may be prescribed. None of these provisions mention anything about the owner seeking refund of warehousing charges.

16. Indeed there appears to be no specific provision in the CA or the rules thereunder which contemplates refund of warehousing charges. The Court has also not been shown any regulation or circular which permits an application to be made to an officer of the Customs exercising powers of adjudication powers, to entertain and grant the prayer for refund of warehousing charges.

17. In somewhat similar circumstances, in the context of demurrage charges, this Court in *S.K. Metal & Co. v. Commissioner of Customs 2016 (338) ELT 383 (Del)* held that there is no scope for the Customs authorities themselves to grant the request for waiver of demurrage charges. After referring to the decisions of the Supreme Court in *International Airport Authority of India v. Grand Slam International (1995) 3 SCC 151* and *Shipping Corporation of India Limited v. C.L. Jain Woollen Mills (2001) 5 SCC 345* this Court in *S.K. Metal & Co. (supra)* summarised the legal position as under:

“i. There is no provision in the Act that enables the customs authorities to direct a carrier of goods to waive demurrage charges or container charges even in terms of Section 45(2) (b) of the Act. That would be governed

entirely by the contract between the importer and the carrier and the terms and conditions of the bill of lading, if any.

ii. Where the carrier is a corporation incorporated by a statute like for instance, the CWC, or the CCI or SCI then it would be bound by the provisions of the Act as far as its right to recover demurrage or container charges is concerned.

iii. Section 45(2) (b) of the Act, which enables the customs authorities to issue a detention certificate, cannot extend to directing the carrier or the owner of the container to waive the charges even where an order of confiscation or levy of penalty is ultimately held to be illegal by the courts.

iv. The only option is for the Central Government to make a request to the owner of the container or the space where the goods were stored to waive demurrage charges and if it is so conceded then to that extent the importer would be able to get some relief.”

18. In *S.K. Metal & Co. (supra)*, the Court also took note of the decision of this Court in *Trip Communication Pvt. Ltd. v. Union of India (2014) 302 ELT 321 (Del)*, in which after analysing the Handling of Cargo under Customs Area Regulations, 2009 the Court held that it is only in cases “where on conclusion of the adjudication proceedings there is no imposition of any fine, penalty, personal penalty and/or warning by the customs authorities”, that the policy of waiver from payment of demurrage charges would apply and that to subject to other compliances. The above decisions may not directly apply to the facts of the present case where the question concerns refund of warehousing charges. Nevertheless they highlight the legal position that the right to seek waiver of demurrage charges is only when there is a policy in that regard and that too is conditional upon the adjudication proceedings concluding in favour of the importer without imposition of fine or penalty. Even then, the discretion in that regard is not

with the adjudicating authority under the CA.

19. The CESTAT in the present case failed to refer to the CA and ascertain if there was any provision therein that permitted the adjudicating authority under the CA to entertain, much less grant, the Respondent's application for refund of warehousing charges. The Respondent's liability to pay the warehousing charges was independent of its liability to pay the customs duty, interest, fine and penalty. This is made explicit in Section 73 of the CA as well. The question before the CESTAT was not whether the order requiring the Respondent to pay the warehousing charges was lawful. The question was whether it had the power to grant refund of the said charges. It therefore was of no consequence that there was no specific order passed by the adjudicating authority in the first place directing the Respondent to pay the warehousing charges.

20. Mr Santhanam then contended that in the present case the warehousing of the imported goods was itself illegal since it was without any application made by the Respondent. It was the unilateral decision of the Customs authorities. Therefore, the respondent paid those charges under protest. He contended that since the warehousing charges were illegally collected from it, the Respondent cannot be without a remedy.

21. In the present appeal the Court is concerned with the question whether the CESTAT could have allowed the prayer of the Respondent for refund of the warehousing charges. The Court finds that the said question has to be answered in the negative. In other words, there is no provision in the CA or any other law that enabled the CESTAT to grant such a relief. If the

Respondent has any other remedy available to it, in accordance with law, this order will not prevent it from seeking such remedy.

22. For the above reasons, the question framed is answered in the negative i.e. in favour of the Appellant Customs Department. The impugned order dated 4th December, 2015 of the CESTAT is set aside. The appeal is allowed but, in the facts and circumstances, with no order as to costs.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

AUGUST 02, 2017
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