

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.08.2018

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Civil Miscellaneous Appeal No.1573 of 2017

M/s.Balaji Impex,
Shri Krishnan Mansion, 1st Floor, No.2,
M.M.Lane Cross, Ganigara D Lane,
Jumma Masjid Road,
Bangalore-560 002. Appellant

-vs-

- 1.The Commissioner of Customs (Seaport),
Customs House,
No.60, Rajaji Salai,
Chennai-600 001.
- 2.Customs, Excise and Service Tax
Appellate Tribunal, South Zonal Bench,
Shastri Bhavan, No.26, Haddows Road,
Chennai-600 006. ... Respondents

Civil Miscellaneous Appeal filed under Section 130 (1) of the Customs Act, 1962) against the Final Order No.41361/2016 dated 09.08.2016 in Appeal No.C/40924/2015 on the file of the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant : Dr.S.Krishnaanadh

For Respondents : Mr.A.P.Srinivas,
Senior Standing Counsel

JUDGMENT

[Delivered by T.S.Sivagnanam, J.]

This appeal, by the assessee, is directed against the order of the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as "the Tribunal"), South Zonal Bench, Chennai dated 09.08.2016 in Final Order No.41361 of 2016.

2.This appeal has been filed raising the following substantial questions of law:-

"(i) Is the 2nd respondent Tribunal right in not adverting to the legal pleas raised on behalf of the appellant that the subsequent cancellation of the licenses/scrips will not vitiate the importation under the same availing the benefit of notification anterior to such cancellation?

(ii) Is the 2nd respondent Tribunal right in not even adverting to or give a considered finding as to whether the demand made under show cause notice is barred by limitation inasmuch as rigour of proviso to Section 28(1) does not stand attracted to the facts of the instant case inasmuch as there is no conscious or overt act or omission attributable to the appellant which would partake the nature of suppression, willful mis-statement of fact etc. On the admitted position that the appellant had used the DFRC/DFIA and TRAs thereof on a bonafide belief that the same were valid and subsisting on the date of the clearances which was in fact?"

3.The assessee was issued with a show cause notice dated 10.06.2011 proposing to deny the benefit of duty exemption under Notification No.90/04-Cus., dated 10.09.2004 availed for the import of Raw Silk Yarn imported against Duty Free Replenishment Certificate (DFRC) Scheme licence, which was cancelled by the Joint Director General of Foreign Trade, Bangalore, vide order dated 29.01.2010 and as to why the Customs Duty aforementioned should not be demanded under Section 28(1) of the Customs Act, 1962 (hereinafter referred to as "the Act") along with applicable interest under Section 28AB of the Act; why the goods should not be held liable for confiscation under Sections 111(m) and 111(o) of the Act read with Section 3(3) of the Foreign Trade (Development and Regulation) Act, 1992 and the Rules framed thereunder; and why penalty should not be imposed under Section 112(a) and/or 114A of the Act.

4.The fact, which led to the issuance of the show cause notice is that one Shri.Kuberappa & sons were exporting ready made cotton garments by mis-declaring them as "Natural Silk Mixed Sarees" under Duty Free Imports Authorization (DFIA) Scheme and DFRC Scheme and also over-invoicing their export consignments to claim ineligible duty free import of raw silk yarn, the export consignments, etc.

5.The assessee before us is stated to have purchased the DFIA scrips and has availed exemption from customs duty. The DFRC licence granted in the name of Shri.Kuberappa & Sons was

cancelled by the Joint Director General of Foreign Trade, vide order dated 29.01.2010 on the ground that fraud has been played which has resulted in issuance of show cause notice dated 10.06.2011 to the assessee with the above stated proposal. The assessee submitted their objections and the Adjudicating Authority, vide order dated 16.10.2012, confirmed the proposal and demanded duty. Aggrieved by the same, the assessee has preferred an appeal before the Commissioner (Appeals), who by order dated 28.06.2013, confirmed the order of the Adjudicating Authority. The assessee took up the matter on appeal to the Tribunal, which by the impugned order, rejected the same, as against which, the present appeal has been filed.

6.Learned counsel for the assessee submitted that the Tribunal failed to consider that the extended period of limitation under the proviso to Section 28(1) was not invoked and therefore, the show cause notice and the consequential proceedings are vitiated. Further, it is submitted that none of the submissions made by the assessee were considered by the Tribunal and the Tribunal failed to note that on the date when they utilized scrips, it was valid and the cancellation of the scrips were much subsequent, after the petitioner had utilized the scrips. In support of their contention, the learned counsel placed reliance on the decision of the Hon'ble Supreme Court in the case of Union of India vs. Sampath Raj Dugar & Others reported in 1992 (58) E.L.T. 162 (SC).

7.With regard to the aspect relating to limitation, reliance was placed on the decision of the Hon'ble Division Bench of the High Court of Gujarat at Ahmedabad in the case of Commissioner of Customs vs. Binani Cement Ltd. reported in 2009 (238) E.L.T. 33 (Guj.).

8.The learned Senior Standing Counsel while seeking to sustain the order of the Tribunal, submitted that fraud vitiates every act and the Adjudicating Authority, the Commissioner (Appeals) as well as the Tribunal concurrently held that fraud has been committed and the benefit under the licence was obtained and therefore, the appellant cannot plead any equity in their favour. In support of such contention, the learned counsel placed reliance on the decision of the High Court of Punjab & Haryana at Chandigarh in the case of Friends Trading Co. vs. Union of India reported in 2011 (267) E.L.T. 33 (P & H).

9.We have heard Mr.S.Kirshnaanadh, learned counsel for the appellant and Mr.A.P.Srinivas, learned Senior Standing Counsel for the respondents.

10.The first aspect of the matter, which has to be considered, is with regard to the interpretation sought to be given to Section 28 of the Act, as it stood at the relevant time. In terms of Section 28(1) of the Act, when any duty has not been levied or has been short-levied or erroneously

refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital may demand the same within one year and in any other case, within a period of six months.

11. Proviso to sub-Section (1) of Section 28 states that when the duty has not been levied or erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of sub-Section (1) of Section 28 shall have effect as if for the words "one year" and "six months", the words "five years" were substituted. In the instant case, the appellant would undoubtedly fall within the definition of 'importer' as defined under Section 2(26).

12. The appellant steps into the shoes of the importer in the sense that they have purchased the advance licence, which was granted to the importer. If it is being that the licence obtained by the importer was obtained by fraud nothing further, remains to be done as fraud vitiates every solemn act and goes to the root of the matter and therefore, the assessee cannot be allowed to contend that on the date when they utilized the licence, it was not cancelled.

13. Furthermore, the show cause notice has been issued invoking Section 28(1) of the Act, which is well within the period of six months from the date on which the offence was deducted and the licence was cancelled by the Joint Director General of Foreign Trade. Therefore, the power of the Customs Authority to initiate action shall at best commenced from the date on which the offence report is received by them and not earlier. Therefore, the contention raised by the assessee in this regard, is rejected.

14. So far as the decision in the case of Sampath Raj Dugar (supra) is concerned, it was totally on different facts and circumstances and cannot lend any support to the case of the assessee.

15. So far as the decision in Binani Cement Ltd. (supra) is concerned, the Division Bench was of the view that the authorities, viz., Commissioner (Appeals) as well as the Tribunal, have concurrently held that there is no misrepresentation or suppression of fact. This factual finding led to the Division Bench granting relief in favour of the assessee. However, in the case on hand, both the authorities, viz., the Adjudicating Authority as well as the Commissioner (Appeals) as well as the Tribunal, concurrently held against the assessee and therefore, on facts, the decision in Binani Cement Ltd. (supra) cannot be applied.

16. In our considered view, the correct legal position has been spelt out in the decision in Friends Trading Co. (supra), wherein also somewhat identical issue arose for consideration and the Court held that fraud or suppression continues, if document is not genuine and contrary interpretation defeating legislative intention will not enable perpetuation of fraud and a purchaser or successor of fraudulently obtained licence stands in the same position as the predecessor. The said decision squarely would apply to the case on hand, as the petitioner is a purchaser of licence, which was fraudulently obtained.

17. Thus, for the above reasons, we find no good ground to interfere with the order of the Tribunal.

18. Accordingly, the appeal is dismissed and the substantial questions of law, framed for consideration, are answered against the assessee and in favour of the Revenue. No costs.

Sd/-

Assistant Registrar (CS-IX)

//True Copy//

Sub Assistant Registrar

abr

To

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

2. Customs, Excise and Service Tax
Appellate Tribunal, South Zonal Bench,
Shastri Bhavan, No. 26, Haddows Road,
Chennai-600 006.

+1cc to Mr. A.P. Srinivas, Senior Counsel Advocate, S.R.No. 56598

C.M.A.No.1573 of 2017

RSK (CO)
GN (07/09/2018)