IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 27.11.2019
CORAM
THE HONOURABLE **DR. JUSTICE ANITA SUMANTH**
W.P. Nos.20939 of 2017
and
W.M.P. No.21829 of 2017

M/s.Refex Industries Pvt. Ltd.,
Rep. by its Production Manager,
Mr.A.Ravi ...Petitioner

Vs

1.The Chief Commissioner of Customs,
Office of the Chief Commissioner of Customs,
No.60, Rajaji Salai, Chennai - 600 001.
2.The Deputy Commissioners (SIIB),
Office of the Deputy Commissioner of Customs
(Imports-Seaport),
Special Intelligence and Investigation Branch,
Customs House, No.60, Rajaji Salai,
Chennai - 600 001. ... Respondents

....

Prayer: Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ or order of direction or any other Writ in the nature Writ of Declaration to declare to the effect that the act of the respondents in detaining the subject two ISO Tanks bearing Nos.ZFLU2013012 & ZFLU013080 which brought the petitioner company's consigned goods from China on 17.03.2014 and continued to be detained by the respondents in violation of Section 110(2) of the Customs Act, 1962 and hence illegal, invalid, void and non est in the eyes of law.

For Petitioner : Mr.B.Sathish Sundar for
Mr.Velayutham Pichaiya
For Respondents : Mrs.Hema Murali Krishnan
Senior Standing Counsel

O R D E R

Heard Mr.B.Sathish Sundar, learned counsel for Mr.Velayutham Pichaiya, learned counsel for the petitioner and Mrs.Hema Muralikrishnan, learned Senior Standing Counsel for the respondents.

2. The facts as submitted by the petitioner are as follows:

The petitioner had ordered 44000 Kg of Refrigerant gas R142B in two ISO Tanks from Hangzou Yuhang International Trading, China under two Invoice Nos.SK13-65 & SK 13-66 both dated 25.02.2014. The consignments arrived in the Chennai Port on 17.03.2014 and were lodged with the Customs Bonded Container Freight Station, pending clearance.

3. The petitioner sought clearance of the consignment on the basis of two bills of entries, both dated 18.03.2014. The Revenue appears to have been of the view that the goods had been mis-declared and the same should be tested to ascertain the veracity of declaration made.

4. Since there was no testing facility available, it was suggested that a sample may be drawn from the tankers and sent to Singapore for testing. The petitioner was in exchange of correspondence with the respondent in this regard as well as in regard to the submissions of various other details as sought for by the Revenue from time to time. Summons was thereafter issued calling upon the petitioner to appear before the respondents on various dates.

5. On 25.04.2014, the petitioner was asked to appear for examination of consignments and to make arrangements to procure and assemble a mobile pump with motor pressure gauge for drawing a sample for testing. The technicians of the petitioner, on 04.06.2014 when they were setting up the equipments for the drawal of gas samples, are said to have inadvertently cut and removed the wire and seals on the latch doors on the housing of the containers to check if the equipment that they had brought for testing was compatible with the valves on the containers. Not surprisingly, the tampering with the wire and seals upon the containers resulted in emptying of the gas.

6. Thus the process of testing was rendered infructuous, since the containers had been emptied, either advertently or inadvertently, this being a question of fact to be determined by the Revenue after hearing the petitioner in the course of adjudication proceedings, ordered by me at paragraph 17 of this order. Post the emptying of the containers, the petitioner continued to be in communication with the respondent authorities seeking release of containers for the purposes of re-export, since, according to the petitioner, the entire gas had been paid for and the containers had to be returned to the entities from which they had been procured.

7. Since no action was taken by the respondent in regard to the petitioners' requests, it was constrained to file W.P. No.26901 of 2014

seeking a Mandamus for release and re-export of containers and by order dated 15.10.2015, a learned Single Judge of this Court held as follows:

> *'Admittedly, there is no gas available in the containers and petitioner's claim is also to release of the containers. Hence, to give quietus to the issue, though the petitioner claims that all the documents had already being furnished on 08.05.2014 itself and the respondents stoutly denies the same, in the interest of justice, this court directs the respondents to give notice to the petitioner, listing out the documents to be furnished by the petitioner, within a period of one week from the date of receipt of the copy of this order. On receipt of such notice, the petitioner shall produce those documents before the respondents within one week thereafter. On production of documents by the petitioner, the empty containers shall be released by the respondents forthwith. It is always open to the respondents to complete necessary adjudication proceedings as provided under law.'*

8. A notice was issued by the revenue pursuant to the aforesaid order on 28.10.2015 belatedly, calling upon the petitioner to furnish the following three documents,

> *'1.Relevant Permission obtained from the Chief Controller of Explosives, Nagpur for import of the subject ISO containers as required under SMPV(U) Rules, 1981.*
>
> *2.Valid Filling and storage licence in your favour issued by Petroleum and Explosives Safety Organisation.*
>
> *3.Packing list/filler certificate and details pertaining to the testing of the subject ISO containers'*

9. It was the case of the petitioner in its reply, also filed belatedly before the authorities, that the documents at points 1 and 2 above were not required to be obtained by it and thus had not been procured. The details called for at point No.3 had been filed by the petitioner under cover of letter dated 11.03.2016.

10. The containers were not released even thereafter, perhaps for the reason that the complete documentation was sought for had not been produced by the petitioner. A show-cause notice was finally issued by the respondent on 11.07.2017 that is the subject matter of W.P. No.20940 of 2017, dismissed by me today as 'not pressed', vide a separate order. However the show cause notice is alive, by virtue of an order of stay granted by this Court on 10.08.2017.

11. The short point raised by the learned counsel for the petitioner is that the provisions of Section 110 (2) of the Customs Act, 1962 (in short 'Act') extracted below, mandates the customs authorities to return the seized goods to the person from whose possession they were taken, if no notice thereof has been issued under Section 124(a) of the Act within a period of six months from date of seizure of the goods:-

> *'SECTION 110. Seizure of goods, documents and things. –*
>
> *(2) Where any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized :*
>
> *Provided that the aforesaid period of six months may, on sufficient cause being shown, be extended by the Commissioner of Customs for a period not exceeding six months.'*

12. Reliance in this regard, is placed on the Judgements of the Supreme Court in the cases of *Assistant Collector of Customs and Superintendent, Preventive Service Customs, Calcatta and others Vs.Charan Das Malhotra,* [AIR 1972 SC 689], *Chaganlal Gainmull Vs. Collector of*

Central Excise [1999 (109) E.L.T.21 (SC)], *A.S.Enterprises Vs. Commissioner of Customs, Chennai,* [2016 (337) ELT 321 (Mad.)] and *Harbans Lal Vs. Commissioner of Central Excise & Customs,* [1993 (67) ELT 2 (SC)].

13. Per contra, Mrs.Hema Muralikrishnan, learned Standing Counsel for the respondents points out the conduct of the petitioner from day one is that of procrastination, of delaying the process of testing as well as the submissions of documents, materials and details sought for by the Department and thus the Department is well justified in not having issued the notice even earlier. She points out that the petitioner has not disputed the position that it was the tampering of the containers by the petitioners' technicians that led to the loss of the gas from the containers. According to her, the burden of establishing that the gas contained in the containers was not a prohibited commodity, that is R-22, and not R-142B as alleged by the respondent, would fall on the petitioner.

14. As far as the first argument is concerned, no doubt, the factual aspect of the matter in regard to the classification of the Gas itself as well as any consequence thereof, if the commodity were found to be prohibited, would have to depend on an exercise of fact finding, which is yet to commence. However, the provisions of Section 110 (2) of the Customs Act, are absolute and have been held to be so by the Supreme Court in the cases of *Charan Das Malhotra, Chaganlal Gainmull and Harbans Lal* (supra). The

settled position of law is thus that seized goods are required to be returned to the owner unless a show-cause notice has been issued within six months in that regard. In fact, the Supreme Court has also held that extension of time for issuing a show cause notice beyond the period of six months should be preceded by notice issued to the petitioner prior to such extension.

15. Moreover, the provisions of Section 62 of the Act specifically stipulate that all warehoused goods shall be subject to the strict control of the Proper Officer. Section 62 is extracted hereunder:

> *' SECTION 62. Control over warehoused goods. –*
>
> *(1) All warehoused goods shall be subject to the control of the proper officer.*
> *(2) No person shall enter a warehouse or remove any goods therefrom without the permission of the proper officer.*
> *(3) The proper officer may cause any warehouse to be locked with the lock of the Customs Department and no person shall remove or break such lock.*
> *(4) The proper officer shall have access to every part of a warehouse and power to examine the goods therein.'*

16. Thus the persuasion of the learned Standing Counsel to the effect that the goods should be permitted to be retained in the custody of the respondents as, in her submission, it is the tampering by the petitioners' technicians that has laid to the dissipation of gas, does not impress. There is an overriding control over the warehoused goods to be exercised by the Proper Officer, which begs the question as to what the Proper Officer was doing at the time when the technicians were in the warehouse and what

measures were taken by him to ensure that the technicians were carrying out the procedures legitimately, safely and legally.

17. Learned counsel for the petitioner, on instructions confirms, that duty in relation to the two containers being sums of Rs.14,46,806/- and Rs.14,46,805/- in terms of Sections 28(4) and 28AA of the Act will be deposited, upon deposit of which, the containers shall be released forthwith to the petitioner. Simultaneously, the petitioner shall appear before the Respondent on 11.12.2019 at 10.30 a.m without expecting any further notice in that regard and after hearing the petitioner and considering all/any of evidences that may be filed by it, an order-in-original shall be passed by the respondent within a period of four weeks from date of conclusion of personal hearing.

18. This Writ Petition is disposed in the above terms. Connected Miscellaneous Petition is closed. No costs.

27.11.2019

Index : Yes/No
Internet : Yes/No
Speaking Order/Non speaking Order
rkp/ska

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Dr.ANITA SUMANTH,J.

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