

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.11.2020

CORAM:

THE HONOURABLE DR.JUSTICE VINEET KOTHARI

&

THE HONOURABLE MR.JUSTICE M.S.RAMESH

C.M.A.No.1135 of 2020

and

C.M.P.Nos.7176 & 9221 of 2020

The Commissioner of Customs (Chennai-II),
No.60, Rajaji Salai, Custom House,
Chennai. ...Appellant

Vs.

M/s.Magal Engg. Tech Pvt Ltd.,
A-3, SIPCOT Industrial Growth Centre,
Oragadam Mathur Village,
Sriperumbudur Taluk,
Kanchipuram - 602105,
Tamil Nadu. ...Respondent

Prayer: Civil Miscellaneous Appeal filed under Section 130 of
the Customs Act, 1962 to set aside the impugned final order
Nos.41039/2019 in Appeal Nos.C/40408/2019-SM dated 09.09.2019 on
the file of the Hon'ble CESTAT.

For Appellant : Mr.R.Sankara Narayanan, ASG
for Ms.Aparna Nandakumar

For Respondent : Mr.S.Baskaran

JUDGMENT

(Made by DR.VINEET KOTHARI, J)

The Revenue has filed the present appeal against the order
of the learned Customs Excise and Service Tax Appellate
Tribunal, Chennai (CESTAT), dated 09.09.2019, whereby the
learned Tribunal allowed the appeal of the Assessee and held in
favour of the Assessee that the condition of re-export could not
be imposed on the assessee, while allowing the assessee to
redeem the goods under Section 125 of the Customs Act. The

relevant part of the order of learned Tribunal is quoted below for ready reference:-

"5. The appellant has mainly contested the order given by the Commissioner (Appeals) to redeem the goods for the purpose of re- export only. He has relied on the decision of Tribunal Mumbai Bench in Final Order No. A/87587-87588/2018 dt. 24.09.2018. In the said case, the Tribunal after referring to Section 125 of the Customs Act, 1962 as well as various decisions have observed that no such condition that the goods can be redeemed only for re-export can be imposed. Further, in the case of HBL Power Systems Ltd. Vs CC Visakhapatnam 2018 (3620 ELT 856 (Tri.-Hyd.)), similar view was taken. The relevant portion of the said decision is reproduced as under:

"11. The scope of Section 125 of the Act is limited by the words in which it is framed and it is not open to the adjudicating authority or the Tribunal (who are creatures of the statute) to stretch, modify or restrict the scope of this Section; they are bound by it. Hon'ble Supreme Court and High Courts can and do examine the validity of the laws and subordinate legislations and pass judgments annulling or modifying them by neither the officers nor the Tribunal, as creations of the statute cannot do so. This position has been explained clearly by the Honble Supreme Court in UOI v. Kirloskar Pneumatics Company 1996 (84) E.L.T. 401 (S.C.) in which it was held as under:

"According to these sub-sections, a claim for refund or an order of refund can be made only in accordance with the provisions of Section 27 which inter alia includes the period of limitation mentioned therein. Mr. Hidayatullah submitted that the period of limitation prescribed by Section 27 does not apply either to a suit filed by the importer or to a writ petition filed by him and that in such cases the period of limitation would be three years. Learned Counsel refers to certain decisions of this Court to that effect. We shall assume for the purposes of this appeal that it is so, notwithstanding the fact that the said question is now pending before a larger Constitution Bench of

nine Judges along with the issue relating to unjust enrichment. Yet the question is whether it is permissible for the High Court to direct the authorities under the Act to act contrary to the aforesaid statutory provision. We do not think it is, even while acting under Article 226 of the Constitution. The power conferred by Article 226/227 is designed to effectuate the law, to enforce the Rule of law and to ensure that the several authorities and organs of the State Act in accordance with law. It cannot be invoked for directing the authorities to act contrary to law. In particular, the Customs authorities, who are the creatures of the Customs Act, cannot be directed to ignore or act contrary to Section 27, whether before or after amendment. May be the High Court or a Civil Court is not bound by the said provisions but the authorities under the Act are. Nor can there be any question of the High Court clothing the authorities with its power under Article 226 or the power of a Civil Court. No such delegation or conferment can ever be conceived. We are, therefore, of the opinion that the direction contained in Clause (3) of the impugned order is unsustainable in law."

12. We also find that not only Section 125 but no Section of the Customs Act, 1962 gives any officer the power to compel anyone to import or export or re-export. This Section also does not give the Adjudicating Authority the right to give a conditional redemption saying "you can redeem only if you agree to re-export". In case of prohibited goods the adjudicating authority has only two options :
(a) to allow redemption on payment of fine;
or
(b) to not allow redemption.

13. In view of the above, we find that the condition in the Order-in- Original that the goods should be re-exported after redemption is liable to be set aside and we do so.

14. Appeal is allowed to the extent that the condition in the Order-in- Original that the

goods should be re-exported after redemption is set aside."

The aforesaid decision has been affirmed by Honble Andhra Pradesh High Court as reported in 2019 (367) ELT 154 (A.P).

6. After considering the facts as well as following the decisions cited above, I am of the view that order passed by the Commissioner (Appeals) that the goods can be redeemed only for re-export is unjustified. The impugned order is modified to the extent of setting aside the direction by the Commissioner (Appeals) that the goods can be redeemed only re-export. As already directed by the Commissioner (Appeals), the adjudicating authority shall quantify the redemption fine payable by the appellant within 30 days from the date of receipt of certified copy of this order. No other interference is made in respect of the penalty imposed. The appeal is party allowed in above terms."

2. The brief facts as noted by the learned Tribunal in paragraph 2 are also quoted below for ready reference:

"The brief facts of the case are that the appellants filed Bill of Entry dt. 19.09.2018 for clearance of 6176 kgs. of imported goods declared as "AISI 430 Cold Rolled Stainless Steel Strips in coil". On verification, it was observed by the department that as per the Import Policy the goods "Stainless Steel Plates, Sheets & Strips" require compliance of mandatory BIS standards, and the item under import does not figure in 2 the list of exempted stainless steel grades. Therefore the goods under import need to be of BIS registered and since importer did not possess such a BIS registration certificate for the clearance, it appeared that the appellant has contravened the provisions of FT (DR) Act, 1992 read with the prohibitions imposed under the Steel and Steel Products (Quality Control) Order 2018). After due process of law, original authority passed an order directing absolute confiscation of the goods having assessable value of Rs.10,47,107/- and also directing for safe destruction of the goods at the cost of the importer besides imposing penalty of Rs.10,000/- under Section 112 (a) of the Customs Act, 1962.

Appellant preferred an appeal before the Commissioner (Appeals) and vide order impugned herein the Commissioner (Appeals) modified the order by setting aside the direction for absolute confiscation and destruction of the goods at the cost of the appellant. The goods were allowed to be redeemed on condition of re-export after payment of redemption fine which was directed to be quantified by the adjudicating authority within 15 days of the receipt of the order. The penalty imposed by the adjudicating authority was not disturbed. Aggrieved by such order of Commissioner (Appeals), the appellants are now before the Tribunal."

3. While arguing the present appeal, the learned counsel for the Appellant/Revenue department Ms. Aparna Nandakumar fairly submitted that though Section 125 of the Act does not clearly stipulate any such condition of re-export to be imposed on the importer while redeeming the goods under Section 125 of the Act, but however, since the said condition was imposed, the Assessee ought to have re-exported the goods in question and having failed to do so, the goods in question, namely "AISI 430 Cold Rolled Stainless Steel Strips in Coil", have remained in the bonded customs warehouse until now and therefore, the Revenue has even demanded demurrage from the Assessee/importer, the present Appellant, and on account of failure to pay the same, the goods have not been released so far. Section 125 of the Customs Act is quoted below for ready reference:-

"Section 125 - Option to pay fine in lieu of confiscation.

(1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods [or, where such owner is not known, the person from whose possession or custody such goods have been seized,] an option to pay in lieu of confiscation such fine as the said officer thinks fit:

provided that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the

market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1), the owner of such goods or the person referred to in sub-section (1), shall, in addition, be liable to any duty and charges payable in respect of such goods."

4. Per contra, the learned counsel for the Assessee Mr.S.Baskaran supported the impugned order of the learned Tribunal and urged that the goods in question deserve to be released forthwith to the Assessee and the Assessee is not liable to pay any demurrage charges as the goods have remained in the bonded warehouse causing serious loss to the Assessee for such a long period as the import in question was way back in 2018 and therefore, appropriate relief may be given to the Assessee while dismissing the appeal of the Revenue.

5. Being prima facie satisfied with the contention of the learned counsel for the Assessee, we even directed the concerned Deputy Commissioner of Customs to file appropriate affidavit in the matter with regard to levy of demurrage charges, vide our interim order dated 24.09.2020, which is quoted below:-

"The learned counsel for the Department Ms.Aparna Nandakumar, has filed a brief counter dated 22 September 2020, along with a communication dated 9 September 2020 of Mr.R.Dinakaran, Deputy Commissioner of Customs, Group-4, Chennai II, by which the said Authority has rejected the request of the Assessee to waive the demurrage charges on the goods lying on the Customs Department premises for all this period. One of the facts stated as basis for not waiving of the demurrage in the said communication dated 9 September 2020 is that "the goods were not confiscated by the Officer" under the said Regulations 6(1)(1) of HCCAR, 2009.

2. The said fact is apparently incorrect and contrary to the facts on record, because the goods in question were confiscated on the ground that the goods imported by the Assessee did not bear the BIS registration and were confiscated and were directed to be returned by First Appellate Authority in favour of the Assessee on the condition of re-export, which condition could not have been imposed U/s 125 in law by the

concerned Appellate Authority and the Tribunal set aside the condition of re-export, which is under challenge in the present CMA by Revenue. During the period of the proceedings pending with the Department, the Tribunal and this Court, the goods in question have remained in the premises of the Customs Department, for no fault of importer but, for which, the Department sought to levy demurrage charges on the importer. A waiver application, as permitted in law, was therefore moved by the Assessee importer vide his communication dated 21 August 2020, under the directions of the court. However, that waiver application has been rejected by the said Authority Mr.R.Dinakaran, on a wrong premise and which is factually incorrect. Apparently, there was no fault on the part of the Importer in goods lying there and because of illegal confiscation earlier and condition of re-export imposed later by the First Appellate Authority, the Assessee had to litigate further and is required to continuously do so, having been dragged by Revenue in this CMA filed by Revenue.

3. Therefore, Mr.R.Dinakaran, Deputy Commissioner of Customs, Group4, Chennai-II, is directed to file his own Affidavit and appear in court and show cause as to why proceedings for perjury should not be initiated against him, for taking a factually incorrect stand in his letter dated 9 September 2020 before the Court about the goods having not been confiscated and therefore, levy of demurrage was justified and could not be waived, whereas prima facie, no case of demand of such demurrage from the Importer is made out.

4. Let Affidavit of the said authority be filed before the court on the next date of hearing and let him also be present in person in Court to show cause why appropriate proceedings should not be initiated against him and why the demurrage charges be not recovered from him."

6. However, the said authority does not appear to have understood the letter and spirit of the said order and again submitted before us the communication dated 09.09.2020, rejecting the said request of the assessee for demurrage charges to be waived. Since the factual basis taken by the said authority in the communication dated 09.09.2020 was incorrect,

we summoned the said authority's affidavit, vide Court order dated 24.09.2020. The communication of said authority dated 09.09.2020 is also quoted below for ready reference:-

F.No. S.Misc.306/2018-Gr-4. Dated: 09.09.2020

DIN:

To

Magal Engg.Tech Private Limited,
Plot No.A-3, SIPCOT Industrial Growth Centre,
Oragadam Mathur Village,
Sriperumbudur Taluk,
Kanchipuram - 602105,
Tamil Nadu.

Sir/Madam,

Sub: Request for issuance of detention certificate for waiver of storage/warehouse charges-bill of entry no.8111398 dated 19.09.2018 - reg.

Please refer to your letter dated 21.08.2020 on the above mentioned subject wherein it was requested to issue detention certificate for waiver of storage/warehouse charges in respect of the goods covered under subject bill of entry.

2. As per Regulation 6(1)(1) of HCCAR, 2009 - "The Customs Cargo Service provider shall, subject to any other law for the time being in force, shall not charge any rent or demurrage on the goods seized or detained or confiscated by the Superintendent of Customs or Appraiser or Inspector of Customs or Preventive officer or examining officer, as the case may be". In the instant case the goods were neither seized nor detained by the officers as stated in the above regulation. Under such circumstances, when the goods are not detained/seized/confiscated by the officers mentioned in the regulation 6(1)(1), the customs cargo service provider need not waive any rent or demurrage on the subject goods; and the importer is liable to pay the storage charges. Since the onus of submission of the mandatory documents ("BIS Registration Certificate" in this case) lies on the importer, the importer is liable to pay the storage charges for storing the cargo until the documents required for clearance of the cargo are produced.

3. In view of the above, it is informed that your request for issuance of detention certificate for waiver of storage/warehouse charges cannot be considered.

(R.DINAKARAN)

DEPUTY COMMISSIONER OF CUSTOMS

GROUP-4, CHENNAI - II

7. Upon this, an apologetic Affidavit has been filed by the said authority and the learned Additional Solicitor General Mr.Sankaranarayanan has appeared in the matter. The learned ASG fairly submitted that there seems to be no merit in the contention of the Revenue that demurrage charges were so leviable in the present case and therefore, the Court may set aside the levy of demurrage charges and the goods in question may be released to the importer without any condition. However, a lenient view with regard to the conduct of the said officer may be taken by the Court, in view of Court order dated 24.09.2020 quoted above.

8. Having heard the learned counsel for the parties and upon a fair request made by the learned ASG, we dismiss the present appeal of the Revenue and taking a lenient view of the matter against the officer concerned, we do not take any further action against him in the matter. We hold that the imposition of condition of re-export under Section 125 of the Act was not justified and the imposition of such a condition is not envisaged in law and therefore, the order imposing such condition is liable to be set aside. The same is accordingly set aside and we direct that the demurrage, if any imposed on the assessee, will be treated as quashed and set aside and the goods in question may be released to the respondent/assessee forthwith without any condition.

9. The Civil Miscellaneous Appeal filed by Revenue is accordingly dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CCC)

/True Copy/

Sub Assistant Registrar

To

The Commissioner of Customs (Chennai-II),
No.60, Rajaji Salai, Custom House, Chennai.

+1cc to Mr.S.Baskaran, Advocate SR.NO..38345

AKM/30.03.21/10P- 3C/

C.M.A.No.1135 of 2020
and C.M.P.Nos.7176 & 9221 of 2020