

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 21.08.2020

Date of Verdict : 27 .08 .2020

CORAM

THE HON'BLE MR.JUSTICE M.S.RAMESH

W.P.No.13246 of 2017

and

W.M.P.Nos.14237 & 14238 of 2017

M/s.Green India Enterprises,
No.24-2-1477-A, Old Military Colony,
Dargamitta, Nellore,
Andhra Pradesh - 524 004,
rep.by its authorized signatory Shri K.Jagadeesh.

...Petitioner

Vs.

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

2.The Assistant / Deputy Commissioner of Customs (Group-5),
Custom House, No.60, Rajaji Salai,
Chennai - 600 001.

...Respondents

Prayer: Petition filed Under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, calling for the records of the 1st respondent in File No.C3-II/229/O/2017-Sea leading to issuance of Order-In-Appeal No. C.Cus.II No.346 of 2017 dated 18.04.2017 and quash the same.

For Petitioner : Mr.B.Satish Sundar

For Respondents : Mrs.R.Hemalatha
Senior Standing Counsel

O R D E R

The brief facts of the case are as follows:

The petitioner herein had filed a self-assessed Bill of Entry No. 8621647 dated 17.03.2015 for clearance of goods declared as "BIRD SCARE DEVICE" (for agriculture use only), by classifying the goods under CTH84362900, relating to poultry-

keeping machinery, poultry incubators and brooders. The respondents were of the view that the goods are classifiable under CTH93040000, which are restricted for import under the Arms Act and accordingly issued a show-cause notice dated 30.04.2015, proposing to reclassify the goods under tariff item No. 93040000. By a reply dated 30.05.2015, the petitioner had raised his objections, wherein they had also sought for issuance of a 'Demurrage cum Detention Waiver Certificate' (hereinafter referred as DDWC). Consequently, an Order-in-Original dated 19.06.2015 was passed, reclassifying the goods under CTH93040000 and ordered for confiscation of the goods, together with fine and penalty. The petitioner had filed an appeal as against the same and by an order dated 30.06.2015, the Commissioner (Appeals) had set aside the Order-in-Original dated 19.05.2015 and held that the classification under CTH93040000 was improper, since the goods will not come under the category of Arms / Fire Arms. The Department's appeal against this, before the CESTAT came to be dismissed as infructuous. At the instance of the petitioner, this Court by an order dated 02.09.2016 passed in W.P.No.34599 of 2015 had referred the goods to be examined by Forensic Department and the second respondent was directed to pass appropriate orders based on the Forensic report. Accordingly, orders came to be passed by the second respondent on 17.03.2017, holding that the goods cannot be categorised as Fire Arms as per the Forensic Report and while rejecting the self-assessment under CTH84362900, the goods were reclassified under CTH85318000. However, there was no reference to the petitioner's request for issuance of DDWC.

2. As against the order dated 17.03.2017, the petitioner herein had filed an appeal challenging the reclassification under CTH85318000 and for issuance of the DDWC. By an order dated 18.04.2017, the Appellate Authority has rejected both the petitioner's self-assessment under the CTH84362900 as well as the reclassification done by the second respondent under CTH85318000 and held that the goods fall under the classification CTH93033 which covers "Fire Arms and similar devices". With regard to the petitioner's claim for DDWC, it was held that there was no such request made before the LAA and that, the Appellate Authority cannot entertain a prayer on which no decision or order has been passed by the lower Authority. Challenging these Order-in-Original dated 17.03.2017, as well as the Order-in-Appeal dated 18.04.2017, the present Writ Petition has been filed.

3. The learned counsel for the petitioner initially raised several grounds challenging the reclassification under CTH93033, but however, during the course of arguments, submitted that the petitioner is willing to submit the goods under the reclassification of CTH93033, as held by the Appellate

Authority. As such, the issue with regard to the reclassification is thus settled.

4. Insofar as the issuance of DDWC is concerned, the learned counsel for the petitioner submitted that in their reply dated 13.05.2015 made to the show-cause notice, they had raised a specific request for issuance of DDWC in terms of Regulation (1) (1) of the Handling of Cargo in Customs Areas Regulations, 2009 and therefore, the finding of the first respondent that there was no request made before the LAA for issuance of the DDWC, is incorrect.

{Under regulation 6(1)(1) of the Handling of Cargo in Customs Area Regulation 2009, there is a responsibility cast on the Customs Cargo Service provider to defer from charging any rent or demurrage on the goods seized or detained or confiscated by the concerned officer. This Court in Royal Impex vs. Commissioner of Customs, Chennai -II, reported in 2019 (366) E.L.T. 820 (Mad.) had referred to Rule 6 (1) (1) of the said regulations and ordered for waiver and demurrage charges. Similar views have also been taken in P.Perichi Gounder Memorial Charitable Trust vs. The Commissioner of Customs & others in W.P.No.29847 of 2018 and in the case of Isha Exim vs. A.D.G., Directorate of Revenue Intelligence, Chennai, reported in 2018 (13) G.S.T.L.273 (Mad.).}

5. The learned standing counsel for the respondents submitted that though the petitioner had originally made a request before the authorities for issuance of DDWC, pursuant to the orders of this Court, de-novo proceedings were initiated and thereafter, the order in original came to be passed. Since there was no request from the petitioner in the de-novo proceedings for issuance of DDWC, the findings of the first respondent in the appeal cannot be found fault with. He would also submit that even if the petitioner's claim for the DDWC is ordered to be considered, the same will have bearing on the concerned CFS and therefore, it would be appropriate for the authorities to re-adjudicate the issue on the petitioner's claim for DDWC.

6. It is not in dispute that pursuant to the show-cause notice dated 10.04.2015, the petitioner had given a reply on 13.05.2015, in which there was a specific plea, claiming issuance of DDWC. In consideration of the objections raised by the petitioner, the Order-in-Original dated 19.06.2015 came to be passed, reclassifying the goods under 93040000. On appeal, both the petitioner's self-assessment classification under CTH84362900 as well as the reclassification by the LAA under CTH9304000, were held to be incorrect and his request for issuance of DDWC was allowed, holding that the detention itself was not due to the fault of the importer. This Court in its

order dated 02.09.2016 passed in W.P.No.34599 of 2015 had referred the goods to be examined by the Forensic Department and thereafter, directed the second respondent to pass appropriate orders. In conformity of the orders of this Court, the second respondent had conducted de-novo proceedings and accordingly, passed an order on 17.03.2017, wherein, there was no reference to the petitioner's request for DDWC.

7. The basis for de-novo proceedings originated from the show-cause notice dated 30.05.2015 to which the petitioner had raised their objections with the request for issuance of DDWC. The issuance of the show-cause notice is also referred to the order passed in the de-novo proceedings. While that being so, it was inappropriate that the reply given by the petitioner to the show-cause notice has been omitted to be referred in the order passed. The High Court while passing orders in W.P.No.34599 of 2015 had not directed the second respondent to conduct de-novo proceedings, but had only directed the second respondent to consider the Forensic Report and pass orders. The de-novo proceedings itself is a continuation of the original proceedings commencing from the petitioner's self-assessed bill of entry for clearance of goods, the consequential show-cause notice, as well as the reply of the petitioner. Therefore, the proceedings of the second respondent which culminated into the order dated 17.03.2017, cannot be termed as de-novo proceedings at all, but a continuation of the original proceedings. As such, the second respondent ought to have considered the request made by the petitioner for issuance of DDWC.

8. The first respondent herein while passing orders in the appeal, had remarked that there was no mention of the request of DDWC before the lower Authority and that the Appellate Authority cannot entertain a prayer on which no decision or order has been passed by the lower Authority. Such a statement cannot be sustained for two reasons. Firstly, there was a request made by the petitioner before the second respondent in the reply to the show-cause notice. No doubt, such a request could have been given by way of a separate application and not in a reply. Nevertheless, the non-filing of a separate application will not invalidate the request made, since there was a bounden duty cast on the second respondent to consider all the averments made in the reply to the show-cause notice. In view of the request for issuance of DDWC made before the lower Authority, the finding of the first respondent that there was no such request, is incorrect.

9. Secondly, the first respondent was of the view that the appeal cannot be entertained on a prayer in which no decision or order has been passed by the lower Authority. As a matter of fact, the grievance of the petitioner before the first

respondent in the appeal is that though they had made a specific plea for issuance of DDWC, the plea was disregarded and such a disregard was the basis for filing the appeal. I do not find any justification on the part of the Appellate Authority in deferring to consider the petitioner's request for the certificate, on the ground that there was no such prayer before the lower Authority.

10. During the earlier round of litigation, the first respondent herein had, in the order dated 30.06.2015, held that the petitioner would be entitled for issuance of DDWC, since the detention was not due to the fault of the importer. However, I find some force on the submission of the learned standing counsel that the issuance of the certificate may cause some prejudice to the CFS, who are not a party in this Writ Petition. Thus it would be appropriate to entrust the issue of grant of the certificate to the authorities, who shall take into account the observations made in this order with regard to the petitioner's entitlement for the DDWC.

11. For all the forgoing reasons, I uphold the findings passed in order in appeal C.Cus II No.346/2017 dated 18.04.2017, insofar as it classifies the goods in the Bill of Entry No.8621 647 dated 17.03.2015 under CTH93039000. Insofar as the issuance of 'Demurrage cum Detention Waiver Certificate' is concerned, the petitioner is granted liberty to make a fresh application to the second respondent herein and on receipt of the same, the second respondent herein shall take into consideration all the observations made in this order and accordingly pass appropriate orders in accordance with law, after giving due opportunity of personal hearing to the petitioner or any other persons, who may be affected by issuance of such a certificate and pass appropriate orders in accordance with law, atleast within a period of twelve (12) weeks from the date of receipt of a copy of this order.

12. With the above direction, this Writ Petition is disposed of accordingly. No costs. Connected miscellaneous petitions are closed.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

To

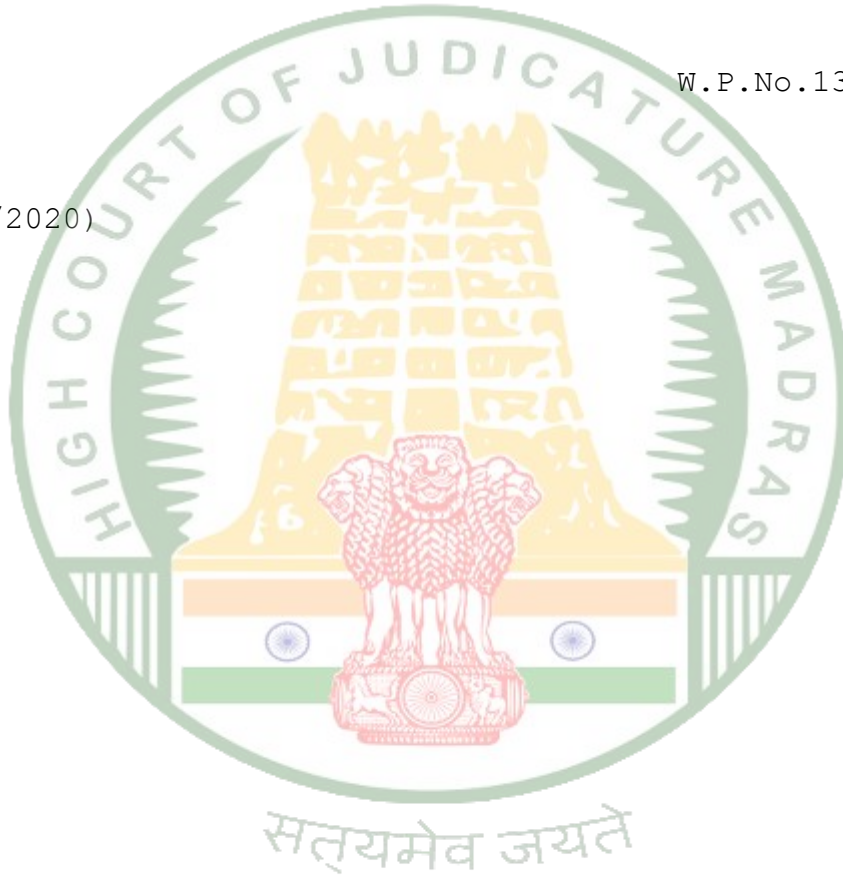
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+lcc to Mr.B.Sathish Sundar, Advocate in SR.28205

+lcc to Mr.R.Hemalatha, Advocate in SR.28206

W.P.No.13246 of 2017

VG-II(CO)
RV (15/09/2020)



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