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IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
<u>ORIGINAL SIDE</u>

APOT/170/2021
IA NO: GA/1/2021
JOINT COMMISSIONER OF CUSTOMS (PORT), SPECIAL INVESTIGATION BRANCH
VS.
VINOD KUMAR JAIN AND ORS.

OCOT NO. 2 OF 2021
WPO/874/2021
JOINT COMMISSIONER OF CUSTOMS (PORT) SPECIAL INVESTIGATION BRANCH
-Versus_
VINOD KUMAR JAIN

COMMISSIONER OF CUSTOMS (P0RT) & ANR.

BEFORE :
THE HON'BLE JUSTICE T.S.SIVAGNANAM
A N D
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
DATED : NOVEMBER 24, 2021.
[*Via Video Conference*]

<u>Appearance</u> :
Mr. K.K. Maity, Advocate
Mr. Abhradip Maity, Advocate
...for appellant
Mr. Sudhir Mehta, Advocae
Mr. Anurag Bagaria, Advocate
...for respondent

The Court :- With consent of the parties, the cross-objection is treated as on the day's list and the same is taken up for consideration along with this appeal.

The appeal has been filed by the revenue namely Joint Commissioner of Customs (Port), Special Investigation Branch, Kolkata challenging the order dated 29th September, 2021 in WPO 874 of 2021. The said writ petition was filed by the first respondent praying for a direction upon the appellant to allow the first respondent to destaff the container and permit warehousing of the goods under Section 49 of the Customs Act, 1962 (the Act) and to draw fresh samples in presence of the first respondent and send the sample for retesting to any accredited laboratory in terms of the order passed by the Commissioner of Customs (Appeal) dated 11th August 2021. The first respondent also prayed for a consequential relief for directing the department to enquire and investigate on the retest sample of the goods as the first respondent alleged that when the sample was initially drawn they were swapped. Further consequential direction was sought for by the first respondent to reimburse the warehousing charges and container rent suffered on the goods. The first respondent imported a consignment of Fabric vide Bill of Entry dated 5th September 2020. The product which was imported was stated to be hundred per cent Polyester Knitted Fabric, the country of origin of the goods was declared as China. On 22nd September, 2020 the appellant department examined the consignment stated to be in presence of the importer's representative and the appellant's officers. The outcome of such inspection led to the prima facie conclusion that the product which was imported as Tufted Textile Fabric and not the product which was declared in the Bill of Entry. This led to the issuance of the show cause notice dated 5th November, 2020 to which the first respondent submitted the reply and the Commissioner of Customs took up the matter for adjudication and vide order dated 15th June 2021 passed the following order:-

> "38. In view of the discussion & findings, I pass the following order:
>
> (i) I reject the declared classification of goods covered under Bill of Entry No. 8819186 dated 15.09.2020 and order for classification under Customs tariff 58023000.
>
> (ii) I order to assess the goods at declared unit value against Commercial Invoice bearing reference no. BHRJ102 dated 19.08.2020 in terms of Rule 14 of Customs Act, 1962 read with Rule 3 of Customs Valuation (Determination of Value of imported Goods) Rules 2007.

(iii) I order to assess the goods under CTH 5802300 and I confirm the BCD @ 150/Kgs, SWS @ 10% and IGST @ 12% amounting to total duty Rs.30,52,005/- (Thirty Lakhs Fifty Thousands and Five only) along with applicable interest, if any.

(iv) I order to confiscate the entire consignment imported under Bill of Entry No. 8819186 dated 15.09.2020 having assessable value Rs. 18,72,916/- under provisions of Section 111 (f) and Section 111 (m) of the Customs Act, 1962. However, I give an option to the importer to redeem the goods covered under Bills of Entry No. 8819186 dated 15.09.2020 on payment of Redemption Fine of Rs.3,00,000/- (Rupees Three Lakhs only) under section 125 of the Customs Act, 1962.

(v) I impose a penalty of Rs.2,50,000/- (Rupees Two Lakhs Fifty Thousands only) on M/s R.K. Impex & Co. under provisions of Section 112(a)(ii) of the Customs Act, 1962 for their acts of omission and commission."

The appellant department have preferred an appeal to the CESTAT (the Tribunal) stated to be filed on 29th October, 2021. Soon after the order was passed by the Commissioner, the first respondent filed the writ petition before this Court for the aforementioned direction. When the writ petition was pending, the appellant department conceded to that portion of the relief granted by the Commissioner by permitting warehousing of the goods. However, it appears that warehousing could not be done by the first respondent/importer since the container charges and demurrages have not been waived as no detention certificate has been issued by the appropriate authority of the Customs Department. The learned Writ Court, by the impugned order, disposed of the writ petition by directing the appellant department to allow retesting of the goods in question within a timeframe and the charges for testing to be borne by the first respondent.

Learned Counsel appearing for the first respondent/writ petitioner submitted that the goods were detained at the instance of the department and not permitted to be warehoused and they are entitled to issuance of detention certificate which will enable them to get the charges waived. In this regard the learned Counsel has referred to Regulation 10(a) of the Sea Cargo Manifest and Transhipment Regulation 2018 as well as Regulation 6(l) of the Handling of Cargo in Customs Area, Regulations 2009. Those regulations have been referred to by the learned Counsel for the submission that charge are neither rent nor demurrage on the goods seized or detained or confiscated by the department shall not be levied in terms of the said regulation. The learned Counsel has also relied upon the decision in the case of *HLG TRADING VS.COMMISSIONER OF CUSTOMS, CHENNAI-II* reported in 2018(18) G.S.T.L. 430 (Madras) in support of the submission that first respondent is entitled for detention certificate and consequential waiver of the demurrages and other charges.

Aggrieved by the same the revenue is before us by way of this appeal. We have elaborately heard Mr. Maity, learned Counsel for the appellant and Mr. Sudhir Mehta, learned Counsel for the respondent and carefully considered the materials placed before us. The first respondent/writ petitioner has filed a cross-objection as against that portion of the relief which was not granted to the first respondent by learned Writ Court namely the relief to cause investigation and also for waiver of the detention charges. In our considered view, the Writ Court or much less this Court cannot be converted into an Executing Court to execute the order passed by the Commissioner of Customs which is admittedly now been challenged before the Tribunal. In any event, we are of the view that a workable solution needs to be worked out as the goods have been imported in September 2020 and still lying in the Customs area. It may be true that the appeal as against the order of Commissioner of Customs was filed by the department only on 29th October 2021 but the filing of the said appeal was very well within the period of limitation and for such reason the first respondent cannot compel for execution of the order passed by the Commissioner that too by filing the writ petition well within the period of limitation prescribed for filing an appeal to the Tribunal by aggrieved person against the order of the adjudicating authority. Be that as it may, now the goods have been accepted to be warehoused by the department itself conceding to such portion of the order of the Commissioner and we are of the view that following order and directions would protect the interest of the revenue as well as that of the importer.

Accordingly, the writ appeal is allowed in part and the portion of the order and direction passed by the Writ Court stands modified as follows :-

i) The appellant department is directed to draw representative sample in the presence of the first respondent/importer and in accordance with the relevant procedure and send the samples for testing to the accredited laboratory in Kolkata and the charges be payable by the first respondent. It is made clear that drawal of the samples and sending the same for testing to the laboratory shall be without prejudice to the rights and contention of the appellant in appeal which was filed by the department before the Tribunal challenging the order passed by the Commissioner of Customs dated 11th August, 2021.

ii) We are informed that the department has agreed that the first respondent can warehouse the goods but the same could not be complied with because there is a huge demand of detention charges. We find that there is no formal request made by the first respondent for waiver of these charges. Therefore, there will be a direction to the first respondent to submit the request of waiver of detention charges and issuance of detention certificate within three days from the date of the receipt of the copy of demand which shall be considered by the appropriate authority within ten days therefrom.

iii) Subject to the orders that may be passed on the representation for issuance of detention certificate, the goods shall be permitted to be warehoused so as to comply with the direction issued in sub para (i) for drawal of samples and testing.

Since we have allowed the appeal filed by the Revenue in part and modified the order and direction, nothing would survive for adjudication in the contempt proceedings and the same may be brought to the notice of the Hon'ble Single Bench for appropriate orders.

The Tribunal is requested to give an early hearing of the appeal since the test report which has been directed to be obtained is without prejudice to the contention that may be raised by the department before the Tribunal and therefore, the Tribunal can also consider by way of an interim relief as to what needs to be done pursuant to that test report.

The stay application also stands disposed of.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

GH/RS.