BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 08.03.2021

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

W.P.(MD)No.13931 of 2020
and
WMP(MD)Nos.11586 & 11592 of 2020

M/s.Salmag Enterprises,
rep.by its Proprietor N.Saravanakumar ... Petitioner

vs.

The Additional Commissioner of Customs (Adj),
O/o.the Commissioner of Customs,
New Harbour Estate,
Tuticorin - 628 004. ... Respondent

Prayer : Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus, to call for the records connected with C.No.VIII/06/59/2018 Import-Assessment, Order in Original No.28/2018-ADC dated 16.08.2018 passed by the respondent herein and to quash the same, in so far as the said impugned order is passed without jurisdiction and authority of law and in excess of the powers vested with the said respondent and in total violation to the principles of natural justice and also against the provisions of law and the judicial pronouncement and consequently to direct the release of the goods covered under Bill of Entry No.6650145 dated 04.06.2018 as freely importable and also seeking for waiver of the demurrage and detention charges of the subject goods, covered under the above said Bill of Entry No.6650145 dated 04.06.2018 in terms of Regulation 6(1) of the Handling of Cargo in Customs Area Regulations.

For Petitioner : Mr.S.Baskaran

For Respondent : Mr.R.Aravindan,
Senior Panel Standing Counsel.

ORDER

The petitioner is a licensed importer. He had imported the petition mentioned goods and through his customs broker, filed Bill of Entry No.6650145 dated 04.06.2018. The contention of the petitioner is that the goods in question though second-hand are freely importable. The respondent's stand is that since the goods are not capital goods, they cannot be imported without prior authorisation from DGFT. The respondent by the impugned order dated 16.08.2018 directed their confiscation and also imposed penalty.

The petitioner was given the option of paying Rs.6,00,000/- in lieu of confiscation subject to payment of applicable duties.

2.According to the petitioner, he was never served with a copy of the impugned order-in-original. He therefore filed W.P.(MD) No.11687 of 2020 seeking to be furnished with a certified copy of the same. Vide order dated 15.09.2020, the Writ Petition was allowed and the respondent was directed to furnish the petitioner with a certified copy of the said order. It was made clear that the issue of limitation was left open. In compliance with the direction given by this Court, the respondent served a copy of the impugned order on the petitioner and thereafter, the present writ petition has been filed assailing the same.

3.The respondent has filed a detailed counter affidavit controverting the stand of the petitioner. The respondent would contend that the order-in-original was served on the petitioner's customs broker as early as on 16.08.2018. Since the petitioner failed to avail the alternative remedy of appeal and the limitation period had also expired, the present writ petition is not maintainable. The stand taken in the impugned order has been reiterated in the counter.

4.The petitioner has filed a rejoinder in response to the counter along with a typed set of papers.

5.The foremost contention raised by the learned standing counsel is that the present writ petition will have to be dismissed in view of the decision of the Supreme Court reported in ***2020 (36) GSTL 305 (ACCT, LTU, Kakinada vs. Glaxo Smith Kline Consumer Health Care Ltd.,***). In the said decision, the Supreme Court had specifically overruled the decisions of the various High Courts which had held that even if the period for filing statutory appeal has expired, the order-in-original passed by the assessing authority can be challenged in writ petition.

6.Per contra, the learned counsel appearing for the petitioner brought to my notice a host of other decisions pronounced by larger Benches of the Supreme Court to the effect that the jurisdiction under Article 226 of the Constitution of India can never be ousted. My attention was specifically drawn to the decision to the Constitution Bench in ***A.V.Venkateswaran, Collector of Customs, Bombay vs. Ramchand Sobhraj Wadhwani and another, (1983 (13) ELT 1327 (SC***) in Civil Appeal No.388 of 1956 decided on 04.04.1961. He would also place reliance on the decision reported in ***(1997) 3 SCC 261 (L.Chandra Kumar vs. Union of India).*** The Bench which comprised seven Hon'ble Judges of the Supreme Court held that power of judicial review conferred on the High Courts under Article 226 and 227 is a basic and essential feature of the Constitution.

7.The petitioner's counsel is also armed with a recent decision dated 18.02.2021 in W.A.No.493 of 2021 (Mahindra and Mahindra Vs. Joint Commissioner (CT) Appeals and another). The Hon'ble Judges comprising the Division Bench specifically considered Glaxo Smith Kline Consumer Health Care Ltd., decision and held that even if an appeal remedy could not be availed, under certain circumstances, the assessee can always take recourse to writ jurisdiction. Para 7 of the said order reads as follows :

> "...there are certain broad parameters, within which, the Court has to exercise its jurisdiction under Article 226 of The Constitution of India, which read as hereunder :
>
> (i) if there is unfairness in the action of the Statutory Authority;
>
> (ii) if there is unreasonableness in the action of the Statutory Authority;
>
> (iii) if perversity writs large in the action taken by the Authority;
>
> (iv) if the Authority lacks jurisdiction to decide the issue and
>
> (v) if there has been violation of the principles of natural justice, the Court will step in and exercise its jurisdiction under Article 226 of The Constitution of India."

8.Now the question that has to be determined is whether the case on hand would fall within one of those parameters. The facts are fairly clear. The petitioner had imported what are known as refractory bricks. The petitioner had enclosed materials to show that the import of these refractory bricks are being freely allowed by other ports in the country. He claimed that till recently, Tuticorin Port has been permitting their free import and only now they have taken the stand that they are restricted items and prior authorisation of DGFT is necessary.

9.The petitioner in his letter dated 06.08.2018 addressed to the respondent had taken the stand that the goods in question are used as basic raw material by the Industries for their finished products. The manner in which the goods are being used by the manufacturer had also been indicated. More than anything else, he had pointedly contended that there is no policy violation. If the respondents were to still insist that the goods in question are restricted items, then, the onus is on the respondent to get the issue clarified from DGFT. The Customs Act, 1962 is not a standalone legislation. The customs authority is basically an implementing agency. To find out whether the goods can be freely imported or not and whether they are prohibited or restricted, one has to go by the orders issued under the Foreign Trade (Development and Regulation) Act, 1992. Section 3 of the said Act reads as follows :

> "3.Powers to make provisions relating to imports and exports.—(1) The Central Government may, by Order published in the Official Gazette, make provision for the development and regulation of foreign trade by facilitating imports and increasing exports.
>
> (2)The Central Government may also, by Order published in the Official Gazette, make provision for prohibiting, restricting or otherwise regulating, in all cases or in specified classes of cases and subject to such exceptions, if any, as may be made by or under the Order, the 1 [import or export of goods or services or technology]:
>
> [Provided that the provisions of this sub-section shall be applicable, in case of import or export of services or technology, only when the service or technology provider is availing benefits under the foreign trade policy or is dealing with specified services or specified technologies.]
>
> (3)All goods to which any Order under sub-section (2) applies shall be deemed to be goods the import or export of which has been prohibited under section 11 of the Customs Act, 1962 (52 of 1962) and all the provisions of that Act shall have effect accordingly.
>
> (4) Without prejudice to anything contained in any other law, rule, regulation, notification or order, no permit or licence shall be necessary for import or export of any goods, nor any goods shall be prohibited for import or export except, as may be required under this Act, or rules or orders made thereunder."

Chapter V of the Customs Act deals with levy of, and exemption from customs duties. Section 17 provides for assessment of duty. As per the statutory scheme, the importer will have to make only self assessment. It is for the proper officer to make verification. Section 17 of the Act is as follows :

> "Assessment of duty. - (1) An importer entering any imported goods under section 46, or an exporter entering any export goods under section 50, shall, save as otherwise provided in section 85, self-assess the duty, if any, leviable on such goods.
>
> (2)The proper officer may verify the entries made under section 46 or section 50 and the self assessment of goods referred to in sub-section (1) and for this purpose, examine or test any imported goods or export goods or such part thereof as may be necessary.
>
> [Provided that the selection of cases for verification shall primarily be on the basis of risk evaluation through appropriate selection criteria.]
>
> (3)For the purposes of verification under sub-

section (2), the proper officer may require the importer, exporter or any other person to produce any document or information, whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained and thereupon, the importer, exporter or such other person shall produce such document or furnish such information.

(4) Where it is found on verification, examination or testing of the goods or otherwise that the self-assessment is not done correctly, the proper officer may, without prejudice to any other action which may be taken under this Act, re-assess the duty leviable on such goods.

(5) Where any re-assessment done under sub-section (4) is contrary to the self-assessment done by the importer or exporter and in cases other than those where the importer or exporter, as the case may be, confirms his acceptance of the said re- assessment in writing, the proper officer shall pass a speaking order on the re-assessment, within fifteen days from the date of re-assessment of the bill of entry or the shipping bill, as the case may be.

6........"

10. The question that arises for my consideration is how this verification exercise ought to have been carried out in the case on hand. The petitioner's contention is that the goods are freely importable. The stand of the customs authority is that they are restricted items. The issue turns on an interpretation of the policy notification issued by the Director General of Foreign Trade. The customs authority on its own ought not to have interpreted as to whether the goods in question can be called as restricted items. The respondent ought to have sought a clarification directly from the concerned authority in DGFT. In the alternative, the respondent could have mandated the petitioner to move the competent authority under Foreign Trade (Development and Regulation) Act, 1992 and obtain a clarification. Instead of doing so, the respondent applied his own understanding of the policy notification. What the respondent has done is not in accordance with Section 17 of the Customs Act.

11.A recent illustration will shed further light. Second-hand Coated paper in rolls was freely importable till recently. However, vide notification No.45/2015-2020 dated 31.01.2020, the Director General of Foreign Trade prohibited import of "stock lot". Issue arose as to what was meant by this expression. Thereafter, clarification was provided by DGFT vide Trade Notice No.8/2020-2021, dated 04.05.2020.

12. The respondent should have adopted a similar approach in this case. He could have contacted the other port authorities and ascertained the position. He could have moved the competent authority in DGFT and obtained clarification. Without doing so, he chose to straightaway pass the impugned order. This is clearly unfair as well as violation of Section 17 of the Customs Act. Thus, more than one parameter set out in Mahindra and Mahindra case is attracted.

13. The impugned order is also violative of the principles of natural justice. The order of confiscation has been passed without issuing show cause notice. The learned standing counsel would point out that the petitioner had sent a letter dated 06.08.2018 calling upon the authority to finalise the matter without issue of show cause notice and personal hearing. The learned standing counsel would rely on the decision reported in ***(2002) 4 SCC 316 (Commissioner of Customs, Bombay vs. Virgo Steels, Bombay and Ors.)*** for the proposition that even though a provision of law is mandatory in its operation, if such provision is one which deals with the individual rights of person concerned and is for his benefit, the said person can always waive such a right.

14. Though there is considerable force in the aforesaid objection raised by the learned standing counsel, I am of the view that in the facts and circumstances of this case the procedure laid down in Section 124 of the Customs Act, 1962 ought to have been followed. Section 124 of the Customs Act reads as under :

> "Issue of show cause notice before confiscation of goods, etc.—
>
> No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person—
>
> (a)is given a notice in writing with the prior approval of the officer of Customs not below the rank of an Assistant Commissioner of Customs, informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;
>
> (b)is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and
>
> (c)is given a reasonable opportunity of being heard in the matter:

Provided that the notice referred to in clause (a) and the representation referred to in clause (b) may, at the request of the person concerned be oral.

Provided further that notwithstanding issue of notice under this section, the proper officer may issue a supplementary notice under such circumstances and in such manner as may be prescribed.”

It is true that the petitioner has called upon the respondent to finalise the issue without show cause notice or personal hearing. But a careful reading of the contents of the petitioner's letter dated 06.08.2018 would show that since according to him there is no policy violation, he wanted the goods to be cleared without any delay. But the respondent had a different perception. They were not on the same page. There was a fundamental divergence in the stand taken by the two. Therefore, the respondent ought to have followed the procedure laid down in Section 124 of the Act. Section 124 is couched in imperative terms. The steps envisaged in this provision could not have been by-passed.

15. There is also yet another controversy. The petitioner would claim that the impugned order was never served in the first instance on him. On the other hand, the respondent would claim that it was served on the petitioner's customs broker. Initially, the petitioner's counsel took the plea that service on the customs broker would not amount to service of the order. He also relied on a host of case laws in support of his contention. However, as rightly pointed out by the learned standing counsel, in view of the amendment made to Section 152 of the Customs Act, 1962, service on the customs broker should be treated as service on the assessee. The decisions rendered prior to the amendment cannot be cited by the petitioner's counsel. The learned counsel for the petitioner even challenged the assertion of the respondent that the impugned order was originally served on the customs house agent. He pointed out that though the order was passed on 16.08.2018, acknowledgment from the customs house agent was taken only on 19.06.2020. This according to the petitioner's counsel undermines the claim of the respondent. Since the customs house agent cannot afford to antagonize the respondent, he had issued an acknowledgment to oblige them. I do not want to probe the issue.

16. In view of my finding that the respondent authority had acted illegally and in violation of the statutory procedure, I am constrained to interfere. The order impugned in the writ petition is accordingly quashed. The matter is remitted to the file of the respondent to pass order afresh in accordance with law. The respondent will take further steps as indicated above and pass final orders within a period of eight weeks from the date of receipt of copy of the order. The contentions of the petitioner as to the nature of the goods is left open. The Writ Petition is allowed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar(RTI)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

skm

Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

The Additional Commissioner of Customs (Adj),
O/o.the Commissioner of Customs,
New Harbour Estate,
Tuticorin - 628 004.

+1 CC to M/s.S.BASKARAN, Advocate (SR-9634[F] dated 09/03/2021)

W.P.(MD)No.13931 of 2020
and
WMP(MD)Nos.11586 & 11592 of 2020
08.03.2021

NA(CO)
TR(15.04.2021) 8P 3C