BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 08.03.2021

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

W.P.(MD)No.15183 of 2020
and WMP(MD)No.12789 of 2020

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

vs.

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

Prayer : Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, to call for the records connected with Order in Original No.25/2019 dated 06.09.2019 in C.No.VIII/10/92/2018-ADJN passed by the respondent herein and to quash the same in so far as the said impugned order has been 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.

For Petitioner : Mr.S.Baskaran
For Respondent : Mr.B.Vijay Karthikeyan,
Senior Standing Counsel.

ORDER

The petitioner is a licensed importer. He had imported the petition mentioned goods and through his customs broker, filed three Bills of Entry. 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 06.09.2019 directed their confiscation and also imposed penalty. The respondent before passing the impugned order had issued show cause notice dated 24.09.2018 and also granted an opportunity of personal hearing on 09.04.2019.

2.According to the petitioner, he was not initially served with a copy of the impugned order-in-original. The petitioner claims to have obtained the order only in December 2019. The petitioner has pleaded health grounds as well as Covid-19 pandemic as the reasons for not immediately approaching this Court.

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 through RPAD on 12.09.2019. 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 :
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> (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 30.03.2019 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. 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 sent by registered post. The standing counsel also relies on the e-mail correspondence between the petitioner and his customs house broker. However, I do not want to probe this issue since on the other question I had answered in favour of the petitioner.

14. 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 petition is closed.

Sd/-

Assistant Registrar(RTI ACT)

// 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,
O/o.the Commissioner of Customs House,
New Harbour Estate, uticorin - 628 004.

+1 CC to M/s.B.VIJAY KARTHIKEYAN, Advocate (SR-9538[F] dated 09/03/2021)

+1 CC to M/s.S.BASKARAN, Advocate (SR-9635[F] dated 09/03/2021)

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