OD-13

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION
ORIGINAL SIDE

CUSTA/7/2023
IA NO:GA/1/2023
COMMISSIONER OF CUSTOMS (PORT), KOLKATA
VS.
M/s. NEO CARBONS PRIVATE LIMITED

BEFORE :

THE HON'BLE THE CHIEF JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 17th May, 2023

Appearance :
Mr. Kaushik Dey, Adv.
Mr. Tapan Bhanja, Adv.
...for the appellant

Mr. Sudhir Mehta, Adv.
Mr. Anurag Bagaria, Adv.
...for the respondent

The Court :- This appeal filed by the revenue under Section 130 of the Customs Act, 1962 (the Act) is directed against the order dated 7th March, 2023 passed by the Customs, Excise and Service Tax Appellate Tribunal, East Zonal Bench, Kolkata.

The revenue has raised the following substantial questions of law for consideration :

A) Whether in the facts and circumstances of the case the Learned Tribunal is justified in dismissing the appeal of the Revenue when the goods (Raw Petroleum Coke) imported by the respondent admittedly having sulphur content in excess of 7% does not conform to Indian Standard 17049 and violated the import condition ?

B) When the import of Raw Petroleum Coke under the CTH 27131100 needs to mandatorily comply with the policy condition and any violation of these stipulation would render the import, which is otherwise restricted in nature, as prohibited, whether, the direction of the Learned Tribunal for provisional release of the said goods (RPC) having sulphur content more than 7% is violative of import condition and liable to be set aside and/or quashed or not?

C) Whether the direction of the Learned Tribunal to release the goods provisionally is perverse and contrary to law when the import conditions prescribed for the Raw Petroleum Coke (RPC) under ITC HS 27131100 are required to be complied with by the importer in respect of the goods they are importing (i.e. RPC) and not for the goods they are manufacturing (CPC) by using imported RPC ?

D) Whether in the facts and circumstances of the case the order passed by the Learned Tribunal for provisional release of the goods (RPC) is sustainable when the same is contrary to the policy condition and not in conforming to the relevant criteria of Indian Standard 17049?

The order impugned in this appeal has been passed by the learned Tribunal confirming the order passed by the Commissioner of Customs (Port), Kolkata granting permission for provisional release of Raw Petroleum Coke (RPC) imported by the respondent. The revenue is on appeal by contending that in terms of the license granted by the Director General of Foreign Trade, Delhi (DGFT), the respondent was permitted to import Petroleum Coke - Raw Petroleum Coke for Anode Making in Aluminium industries conforming to IS Standard 17049. The Standard states that the total Sulphur, percent by Mass, maximum should be 4% for Raw Petroleum Coke and 3.5% for Calcined Pet Coke. The Standard further states that based on the availability of RPC with varying sulphur content, RPC with sulphur content more than 7 percent is not permitted for making RPC of sulphur content 4 percent, maximum.

According to the appellant/revenue, the import of Raw Petroleum Coke for Anode Making in Aluminium Industries conforming to IS Standard 17049 is a prohibited item and the relevant policy condition is No.6 of Chapter 27, which provides percentage of the total Sulphur content. The case of the respondent importer is that they are a calcination plant, for which no sulphur percentage has been fixed under the BIS Guidelines and in this regard the respondent would refer to the decision of the Hon'ble Supreme Court in M.C.Mehta Vs. Union of India in WP Nos. 13209 of 1985 dated 9.10.2018, wherein the Hon'ble Supreme Court after taking note of the report given by the Central Pollution Control Board (CPCB) dated 4.10.2018 has quoted the said report which reads as follows;-

> *"i. Raw Petroleum Coke is feed stock for producing calcinated petroleum coke which is a raw material for anode making in aluminium industries. Therefore, calcination of Raw Petroleum Coke is a pre-requisite to produce anode grade calcined pet coke having sulphur content less than 3.5%.*

ii. As per BIS guidelines, calciners are permitted to use high sulphur containing raw petroleum coke for making CPC having sulphur content less than 3.5%. There will be emission of SO2 in high concentration (para 1 of results) which needs to be treated in Flue gas desulphurisation system having efficiency of sulphur removal more than 90%."

Thus according to the respondent the product imported by them being used in the Calcination Plant, the restriction on the sulphur content in terms of the BIS standard, will not be applicable. The learned Tribunal while considering the correctness of the order passed by the Commissioner after setting out the arguments placed before it by both sides has recorded the submissions of the revenue that the goods should not be provisionally released as admittedly the sulphur content is more than four per cent and the same cannot be used by Aluminium Manufacturing Industry. The learned Tribunal has not rendered a specific finding on this submission, takes note of the fact that the respondent importer is a calciner and they would use the imported product as feed stock for making CPC from RDC for their customer with sulphur content ranging 0.8% to 3.5%. The question would be as to whether there was a violation of the license condition can be examined by taking note that the product that will be manufactured by the respondent importer or should the importer satisfy that the import effected by them is in accordance with license condition. In our prima facie view, since the product is a prohibited item the test would be to examine whether the imported product satisfy the license condition rather to examine whether the import was justified based on the end product that would be produced. The Commissioner of Customs, (Appeals) as well as the learned Tribunal has proceeded based upon the ultimate end product which is being manufactured by the respondent. Thus in our view, it would be an incorrect manner of examining as to whether the import was provided and whether it satisfies the conditions of licence. Furthermore, the Tribunal opined that no harm will be caused by provisionally releasing the goods. We are unable to persuade ourselves to accept such a finding as the question would be as to whether when admittedly the sulphur content is in excess of 7% will it conform to ISI 7049 as mentioned in the licence and if it does not conform to the said standard, is there a violation of the conditions of import? Furthermore, the goods being prohibited item, there is a mandatory requirement to comply with the policy condition and the Tribunal was required to examine as to whether there has been any violation of the stipulations under the policy. Before considering as to whether the goods have to be provisionally released when admittedly the sulphur content is more than 7%. Therefore, we are of the view that this question, which is a mixed question of fact and law is required to be decided by the Tribunal before approving the order passed by the Commissioner of Customs (Appeals) granting provisional release. Therefore, we are of the view that the matter requires to be reconsidered by the Tribunal by deciding the above referred questions.

In the result, the appeal is allowed. The order passed by the learned Tribunal is set aside and the matter stands remanded to the learned Tribunal to decide the aforementioned questions and the parties are at liberty to make their submissions before the Tribunal and fresh decision has to be taken on merits and in accordance with law. Taking note of the submission of Mr. Mehta that the goods are lying in port and incurring damages, we would request the learned Tribunal to give an early hearing in the matter preferably before July 2023.

(T.S. SIVAGNANAM)
CHIEF JUSTICE

(HIRANMAY BHATTACHARYYA, J.)

SN/pkd/GH.