Dcl Polyesters Ltd. Vs. Cc

Dcl Polyesters Ltd. Vs. Cc

SooperKanoon Citation : sooperkanoon.com/15467

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Mar-23-1999

Reported in : (1999)(84)LC651Tri(Mum.)bai

Judge : S T Gowri, J S Murthy

Appellant : Dcl Polyesters Ltd.

Respondent : Cc

Judgement :

1. The appellant imported a consignment of polyester filament yarn (PFY) and claimed clearance under an import licence which was issued for import of "speciality polyester filament yarn". Since the Custom House found that the goods imported were nothing other than the ordinary yarn it asked the Chief Controller of Imports as to the scope of the licence. That authority referred to the Custom House the application for licence made by the appellant. This application was for super multifilament polyester yarn with fine count and fine filament having normal and profiled cross-section and which has denier per filament less than 1. Since, according to the Custom House, the goods did not conform to this specification, notice was issued; proposing confiscation of the goods under Clause (d) of Section 111 as being imported without a licence and penalty on the importer under Section 112. The importer, in the reply to the notice and at the hearing contended that the goods were made by M/s. EMS Inventa A.G. employing a process different from the process normally employed for manufacture of such yarn. The goods were imported for distribution in the market, to create demand for this type

of yarn which was proposed to be manufactured by the appellant in India in collaboration with M/s. EMS Inventa A.G. It also contended that appellant had suffered a loss in importation and there was, therefore no question of any fine being imposed, and further that the appellant could have imported the goods under Open General Licence (OGL).

2. The Collector did not accept these contentions. He stated that the yarn imported, was not of micro denier or of profile cross-section and was not a speciality yarn permitted for import. He noted that PFY was eligible for import by actual user. The appellant not being an actual user could have imported it as a letter of authority holder for an actual user, in which case it would not have made any profit. He also found that it was the appellant's intention to earn profit on the goods particularly when there was shortage of the yarn in the country, the plant of a major manufacturer, M/s. Reliance Textile Industries having temporarily suspended operation. He held the goods to be liable for confiscation, and in view of the goods having been released on bond, appropriated an amount of Rs. 6.51 lakhs from the bond executed. He also imposed a penalty of Rs. 3.25 lakhs. Hence this appeal.

3. Representative of the appellant contends that the goods imported was speciality polyester yarn manufactured by EMS Inventa according to special technology and hence covered by licence. He contends in the alternative, that appellant had made a loss on the goods and hence no fine is imposable. It is also pleaded that if the appellant imported the goods as a letter of authority holder it would have been entitled to a profit as a trader.

4. We are unable to agree that the goods qualify for consideration as speciality yarn. In the absence of any known definition of such yarn reference has to be made to the details of yarn that the appellant has asked for permission to import; this is what the licensing authority in fact has understood. The correspondence between the appellant and the licensing authority does not indicate the nature of the process employed by M/s. EMS Inventa and how such yarn is to be distinguished from other yarn. The nature of the process would be within the special knowledge of the supplier and appellant, and it is for the appellant to

demonstrate how this yarn could be so identified by laboratory or other tests. This has not been attempted. When we put a question to the appellant's representative he was unable to give details of process and how it can be shown that the yarn imported was speciality yarn. In the facts of the case we are satisfied that it has been shown, according to the tests carried out that the yarn was nothing other than polyester filament yarn, thus the department has shown that it is not speciality yarn.

5. The appellant was in correspondence with the Director General of Technical Development. This authority apart from referring to the special process employed referred to the import of hollow yarn super speciality yarn of fine count and fine filament modified cross-sectional yarn, detailed in the applicant's letter dated 23.1.1989. The yarn in question does not show on test to have modified cross-sections. The appellant does not refers to the yarn being of denier filament of less than 1. The test showed that denier to be much higher about 115 denier for 32 filament. On both these counts, therefore, the goods cannot be considered as speciality yarn and their confiscation under Section 111(d) has to be confirmed.

6. The next issue is the question of margin of profit. The Collector has fixed a redemption fine at 10% of the total value of the consignment. This is disputed on two grounds; the first is that the expenses it actually incurred in the import resulted in loss to appellant; the second, this in any event the appellant could have imported the goods as a letter of authority holder in which case could have made profit at least 10%. It is contended that since the object of redemption fine is to wipe out any profit that the importer makes by unauthorised import, so as to deny the benefit of wrongful importation, no fine is called for.

7. In the course of arguments number of decisions have been cited by both sides on this aspect; such as Miles India Ltd. v. Collector of CustomsIngersoll-Rand (India) Ltd. v. Collector of Customs ; Jain Export Pvt. Ltd. v. UOI 1987 (9) ELT 753 : 1988 (17) ECR 631 (SC) : ECR C Cus 1385 SC; Commissioner of Customs v. Star EnterprisesCollector of Customs v.K. Hargovandas and Co. ; etc. After considering these decisions the position that emerges is that the quantum of redemption fine should depend upon the totality of the facts and circumstances of

the each case and bonafide action of the assessee by itself cannot entitle it to full waiver of fine, although it is a factor to be taken into account in determining the quantum of redemption fine.

8. In Jain Exports Pvt. Ltd. v. UOI 1987 (9) ELT 753 : 1988 (17) ECR 631 (SC) : ECR C Cus 1385 SC Supreme Court said that the quantum of redemption fine should depend upon the fact and circumstances of the each case and no hard and fast rule can be laid down. It did not accept the contention that the demonstration of bonafide action by an importer would not itself entitle into a waiver of full redemption fine.

Decision of the Tribunal in Miles India Ltd. v. Collector of Customs ; and Ingersoll-Rand (India) Ltd. v. Collector of sufficient to waive fine; no longer hold good law in the light of the Supreme Court judgement. Bonafide is only one of the aspect to be considered.

9. There is however, a view that although Section 125 of the Act specifies as maximum redemption fine the market price of the goods less the duty payable, the redemption fine must be fixed with the object of wiping out any profit that the importer would have made by its illegal importation. The Tribunal's decision of the Delhi High Court in Jain Exports Pvt. Ltd. v. UOI; and the Tribunal decisions in Ingersoll-Rand (India) Ltd. v. Collector of Customs view. With the appellant's inconsistency between these views and provisions of Section 125 can be resolved this. While normally redemption fine should operate so as to wipe out the profit, however, there is no bar in law in imposing a higher fine, higher than the limits prescribed in Section 125 in appropriate cases. Since bona fide have been held to justify a fine lower than the margin of profit which it would not be unreasonable to hold the absence of such bonafide may justify a fine higher than the margin of profit.

10. It is not possible to say that bona fides of the appellant are established in this case. The goods imported did not conform to the specifications referred to in the recommendatory letter of the DGTD, which in turn referred to in the appellant's letter. Appellant has been unable to establish that the goods were speciality yarn. The contention that appellant could have imported the goods as a letter of

authority holder for actual users of such yarn is prima facie, correct. But whether the appellant would have acted as such a letter of authority holder and if so, what its profit would have been, are not matters before us and we do not think that they could be taken into account. We agree, however, that Collector presumed wrongly that appellant intended deliberately to take advantage of the closure of factory of Reliance Textile Industries, which created demand for yarn. The reasons for the closure are not indicated. It would be presumably unexpected. Unless the appellant were in possession of knowledge of such intended or impending closure it could not have planned, having regard to the time taken to obtain the licence, to import the goods, at a time when there was a shortfall in production. The Collector's opinion is nothing more than conjuncture. Even so, however, we do not consider that there exists a situation to hold that fine should be limited to the margin of profit. We therefore, decline to interfere with the finding of the Collector on this aspect.

11. The Collector has imposed a penalty of the level of 5% of the value of the goods on the ground that appellant misdeclared the goods as speciality yarn. The notice does not propose the confiscation of the goods under Section 111, Clause (m) of the Act, which would have been invoked if there is misdeclaration. It is difficult to say whether the appellant really believed the goods was speciality yarn or not. The fact that it applied for a licence for this goods thus suggest it to be the case. In view of these facts we do not consider the penalty imposed is justified and therefore set it aside.