

Collector of Customs Vs. Presto Works

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jan-01-1987

Reported in : (1987)(11)ECC125

Appellant : Collector of Customs

Respondent : Presto Works

Judgement :

1. This is an appeal from the Collector of Customs, Bombay, against the impugned order of the Collector of Customs (Appeals), Bombay. Briefly, the facts of the matter are that the respondents imported certain bearings and bushes, under a Bill of Entry, for warehousing under Import Department Serial No. 002027 dated 6.6.1980. The goods were classified for purposes of assessment Under H. 84.63 of the CIA as it then stood. After the assessment of the Bill of Entry, the goods were allowed to be warehoused under Sections 59 & 60 of the Customs Act, 1962. The importers had imported total 9 cases of goods and removed 4 cases against the Bill of Entry No. 78 dated 24.11.1980 and another Bill of Entry No. 2105 dated 7.1.1981. On 18.6.1981, the importers filed a Bill of Entry for Ex-Bond clearance for home-consumption for the two remaining cases. These goods were also assessed under H. 84.63 CTA and were allowed clearance on payment of duty.
2. Meanwhile, with effect from 1.3.1981, H. . 84.63 of BTN was split into sub-heading (1) & (2). The rate of duty for sub-heading (1) was 60% + 20% whereas for sub-heading (2), the rate of duty was revised .

to 100% + 25%. The department, therefore, issued a L/C memo on 14.12.1981 u/s 28 Customs Act, 1962. The demand was confirmed on 14.10.1982.

3. The respondents - who were the importers - filed on appeal before the Collector of Customs (Appeals). The Collector allowed their appeal after condoning the delay, recording as follows :- "Coming to the merits of the case, it is noticed that the Assistant Collector while confirming the demand originally issued had not given any reasons as to why the imported bushes were liable to be classified under heading 84.63 (2) instead of their original assessment under heading 84.63(1) of the Customs Tariff. The appellants moreover had produced evidence at the time of hearing to the effect that identical bushes imported by them earlier had been assessed to Customs duty under heading 84.63(1) by the Custom House.

The Custom House had not given any cause for suddenly changing this precedent assessment practice.

Therefore, I hold the view that due to lack of any reasoning and due to the precedent practice of assessment as prevalent in the Customs House, the imported bushes were rightly classifiable to customs duty under heading 84.63(1) of the Customs Tariff. The Less charge demand confirmed by the Assistant Collector is therefore set aside and the appeal is allowed." Hence, this present appeal against the order of the Collector of Customs (Appeals).

4. After filing the appeal, the learned Counsel for the respondents filed a miscellaneous application asking for permission to take up an additional point, stated to be a point of law, namely, that the demand notice had been served on the respondents after the expiry of the period of six months from the date of payment of duty. The Bench, by their Order dated 22.7.1986, allowed the same.

5. We heard Shri 3. Gopinath, the learned SDR for the appellant, and Shri V. Lakshmikumaran, Advocate, for the respondents. Shri Gopinath, at length, argued that the goods were correctly classifiable under H.84.63(2). Shri Lakshmikumaran, who initially advanced some arguments that the goods were actually classifiable under H. 84.63(1), gave up the arguments and agreed that the goods were, on

merits, correctly classifiable under H. 84.63 (2), as argued by the learned SDR. We are, therefore, not examining this point further.

6. The other major ground, on which the respondents resist demand and seek rejection of the appeal, is the ground of limitation. It was Shri Gopinath's argument that the demand is on the time-bar in view of the following actual data :-(1) Date of payment of duty (ex-bond) - 19.6.1981.(2) Date of Demand - 14.12.1981.(3) Date of Despatch of Demand Notice - 14.12.1981.

(with a copy to Clearing Agent)(4) Date of receipt by the Respondent - 23.12.1981.

(as stated by the Respondent during(5) Date of receipt by the Clearing Agent.

-18.12.1981.

(as admitted in a letter dated 21.8.1986.) 7. Shri Gopinath argued that under Section 28 of the Customs Act, 1962, the relevant date for the purposes of computation of limitation was the date of payment which, in this case, was 19.6.1981. Shri Gopinath further argued that a reading of Sections 147 & 153 of the Customs Act would show that a notice could be served on the agent and this service would be equal to service on the principal. Shri Gopinath further submitted that the Customs House took all possible precautions by sending the demand notice well in advance of the limitation and, that too, by registered post acknowledgement due. He cited a judgement of the Madras High Court, in the case of B. Bhoormal Tirupati v. The Additional Collector of Customs, Madras, reported in AIR 1974 MADRAS 224', and argued that the ratio of this judgement, especially at paragraph-3, squarely applies to the facts of the present matter. He also sought to support his argument, that the demand in this case was in time, by citing '1978 E.L.T. 3-547 Ker' in the case of 'Chellappan v. Additional Collector of Customs' and '1983 E.L.T. 2350'.

8. Shri Gopinath summed up his arguments saying that having sent a notice by registered post to the principal and having served a copy of the same on the agent, the demand was made in time according to law.

9. Shri V. Lakshmikumaran, the learned Counsel for the respondent submitted that the word 'serve' occurs in Section 28(1) as well as Section 153 of the Customs Act. He argued that Section 153, however, merely prescribes the method of service and does not equate the 'date of service' to the 'date of despatch' of the registered letter, or presentation of such a letter in the Post Office. Referring to the Madras High Court judgment (supra), the learned Counsel argued that the ratio of that judgement does not help the arguments of the Revenue inasmuch as in the case before the High Court the issue was whether the service by registered post, which was returned with the endorsement 'Left', is a sufficient notice. Shri Lakshmikumaran argued that this judgement lays down that under Section 153 of the Customs Act, a notice had to be sent by registered post. He pointed out that the High Court observed in this judgement that "The normal presumption, unless the contrary is proved, is that the service shall be deemed to have been properly effected when a letter is properly addressed, pre-paid and posted by registered post." Shri Lakshmikumaran submitted that in that view of the High Court, the endorsement "Left," was not sufficient to prove the contrary as required by Section 153 of the Customs Act.

10. Shri Lakshmikumaran further argued that the date of receipt of the notice is the date on which the notice is actually received and not the date of registration of the letter containing the notice. In support of this argument, he cited a judgement of the Tribunal reported in '1986 (23) E.L.T. 491' in the case of Jayashree Textiles & Industries, Rishra, v. Collector of Customs, Calcutta.

11. Shri Lakshmikumaran further submitted that service on an agent is not service on the principal. In this context, he relied on a judgment of the Madras High Court in the matter of Pilmen Agents (Private) Ltd., Madras, v. Collector of Customs, Madras reported in 'AIR 1967 MADRAS 124'. The learned Advocate submitted that this judgement dealt with the same Sections, namely, Sections 12, 28 and 147 of the Customs Act and was, therefore, directly relevant to the facts of the present case.

12. Another argument of the learned Counsel was that u/s 146, the clearing agent was not bound to receive notices on behalf of the principal, and such a duty was

not prescribed by the Customs Law. He elaborated that u/s 147, the job of the clearing agent ends after the goods were cleared, and there was no authority or authorisation to the clearing agent to receive notices on behalf of the principal. Under Section 147 (3), when any person is, expressly or impliedly, authorised by the owner, importer or exporter of any goods to be his agent in respect of such goods, for all or any purposes of Customs Act, such a person would be deemed to be the owner, importer or exporter of such goods for such purposes, without prejudice to the liability of the owner, etc. In this case, according to the learned Counsel, the clearing agent was not authorised to receive notices on behalf of the importer who is the appellant. Further, the words 'such goods' occurring in the Sub-section denote that it is only in respect of the goods that are being imported and exported, and in respect of which, the principal has authorised the agent that the agent can do things prescribed by law, and once the goods are cleared, the authority ceases. He further emphasised that under the proviso to Sub-section (3) of Section 147, Customs Act, unless the short levy is due to any wilful act, negligence or default of the agent, the duty was not to be recovered from the agent, unless it is the opinion of the Assistant Collector that the same cannot be recovered from the principal. In this case, the duty cannot be recovered from the agent because there is no allegation of any wilful act or negligence or default and duty can be recovered only from the principal and, for this purpose, a notice has to be issued under Section 28 of the Customs Act, which has not been done. Reiterating that the provisions of Section 147 cannot be invoked against the clearing agent and no demand can be raised against him. the learned Advocate cited a judgement of the Madras High Court reported in '1979 E.L.T. (J 683)' in the matter of 'K.M. Mohamed Ghouse and Co. v. Assistant Collector of Central Excise, IDO, Nagapattinam'. Arguing that the agent had neither a right nor responsibility to receive notices on behalf of the importer, Shri Lakshmikumaran cited an order of the Tribunal in the case of V.V. Dabke & Sons, Bombay v. Collector of Customs, Bombay, 13. Shri Gopinath, the learned SDR, in a brief rejoinder, reiterated that the notice was sent in time and there was a presumption available to the Revenue that the notice was served in time in the light of the decision of the Madras High Court in the matter of 'B. Bhoormal Tirupati, v. Additional Collector of Customs, Madras' reported in 'AIR 1974 MADRAS 224' (supra). He submitted that service on

the agent amounted to service on principal, as laid down in '1983 E.L.T. 2350' in the case of 'Chellapan v. Additional Collector of Customs'.

14. We have considered the arguments of both sides. In view of the (sic)ecital of the facts as summed up, and in the light of the arguments advanced, the question before us is whether the service of notice in this case on the clearing agent amounted to service on the principal. Before proceeding to examine the matter, we have carefully persued the provisions of Section 28 of the Customs Act, which is reproduced below :- "28. Notice for payment of duties not levied, short-levied or (sic)errorously refunded. - (1) When any duty has not been levied or has been short-levied or erroneously refunded, the proper officer may, - (a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year : from the relevant date, serve notice on the person chargeable with the duty which has not been levied or which has been so short-levied or to whom the refund has erreneously been made, requiring him to show cause why he should not pay the amount specified in the notice : Provided that where any duty has not been levied or has been short/levied or has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter, or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words "one year" and "six months" the words "five years" were submitted.

(2) The Assistant Collector of Customs, after considering the representation, if any, made by the person on whom notice is served under Sub-section (1) shall determine the amount of duty due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

(3) For the purposes of Sub-section (1), the expression "relevant date" means :- (a) in a case where duty is not levied, the date on which the proper officer makes an order for the clearance of the goods; (b) in a case where duty is provisionally assessed under Section 18, the date of adjustment of duty after the final assessment thereof; (c) in a case where duty has been erroneously refunded, the

date of refund; 15. This Section requires that a notice should be served on the person . chargeable with the duty which has not been levied or which has been short-levied. In this case, it appears that the provisions of Section 147 directly come into play. Amongst other things, this Section provides that where any duty is short-levied, such duty shall not be recovered from the agent unless, in the opinion of the Assistant Collector of Customs, the same cannot be recovered from the owner, importer or exporter. It is not the case of the Revenue that there has been a finding by the Assistant Collector that the amount due could not be recovered from the owner. Therefore, as pertinently argued by the learned Counsel for the respondents, it is only the owner of the goods, namely, the importer in this case, from whom the money should be recovered. It is an admitted fact that the notice to the owner has been issued after the expiry of the limitation period of six months. It is also admitted that the notice served on the agent was within the period of limitation.

16. Keeping in mind the arguments of the Revenue, we perused the judgement of the Madras High Court in the case of B. Bhoormal Tirupati v. Additional Collector of Customs, Madras (para 7 supra). In this case, the facts were that certain goods were seized and a notice was attempted to be served on the party and could not be served on him within the stipulated period of limitation as the party had left the premises and, later, that notice was served on the appellant's counsel, on a date which was beyond the period of limitation. It was argued on behalf of the party that, as no notice of intention to seize the goods was served on the appellants within six months from the date of seizure, the entire proceedings were void. The High Court, disposing of the matter, held as follows :- "The only point that arises is whether the service by registered post effected on 13.5.1969, which was returned with the enforcement 'left', is sufficient notice. Section 153 of the Act states that any order or decision passed or any summons or notice issued under the Customs Act, shall be served (a) by tendering the order, decision, summons or notice or sending it by registered post to the person for whom it is intended or to his agent; Sub-section (b) of Section 153 need not be referred to as it does not arise in this case. A notice had been sent by registered post duly addressed to the appellant.

The section requires that notice shall be served by sending it by registered post to the person for whom it is intended. The section does not require that effective service should be effected by the appellant receiving it. This position is made clear by reference to Section 27 of the General Clauses Act, which states that where any Central Act requires any document to be served by post, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. The normal presumption, unless the contrary is proved, is that the service shall be deemed to have been properly effected when a letter is properly addressed, pre-paid and posted by registered post. That the notice was sent to proper address, pre-paid and posted by registered post is not under dispute. No other attempt has been made to prove the contrary. The endorsement 'left' is not sufficient to prove the contrary. Apart from it, a reading of the section indicates that the proof to the contrary can only be limited to proving that the service had not been effected at the time at which the letter would be delivered in the ordinary course of post. We find no difficulty in coming to the conclusion that there has been proper service of notice. The writ petition was rightly dismissed. This appeal fails and it is dismissed.

We have extracted the relevant part of the judgement. The learned Counsel for the respondent, Shri V. Lakshmikumaran, argued that the ratio of this judgment is not relevant to the present proceedings as it is an established fact in this case that the notice issued by the Customs reached the respondent beyond the limitation period. When their Lordships of Madras High Court were considering the matter, there was no such proof available whereas, in the present case, there is no dispute that the notice reached the respondent beyond the time of limitation. We, therefore, agree that the ratio Of this judgement is not applicable to the facts of the present case. The other judgement cited by Shri Gopinath pertains to the case of 'Chellappan v. Additional Collector of Customs' reported in '1978 E.L.T. J-547. In this judgement, the Kerala High Court was examining the method of service of summons with reference to Section 153 of the Customs Act, 1962. The High Court observed in the judgement that the methods indicated in Section 153 (a) are alternative methods any of which could be attempted in the first instance. The High

Court added, "To say that an attempt to tender notice must be made in cases where it is not feasible or even possible or that an attempt should be made to serve on an agent when there is no agent or none is known to exist would be to make the section unworkable." 17. The ratio of this judgement also does not help as this judgement deals with the mode of service, and not the legality of serving the notice on the agent at a time when the principal is known. (Cegat)' Jayashree Textiles & Industries, Rishra v. Collector of Customs, Calcutta', cited by the learned SDR before us, the Tribunal clearly observed examining Section 28 of the Customs Act, that a plain reading of the relevant provisions makes it clear that what is required to be accomplished within six months is not the 'issue' of notice but 'service' of notice on the person concerned. In this judgement, it is further held that the Post Office is treated as an agent of the sender and, therefore, the date of mere handling over of the registered letter, containing notice, to the Post Office would not be relevant but the date on which it is served on the addressee. We have noted the contents of this order passed earlier by the Tribunal.

19. We have also perused the order of the Madras High Court reported in '1983 E.L.T. 2350 (Mad.)' in the case of 'Usha Enterprises, Madras, v. Government of India and Anr.'. The Court held therein that show-cause notice served on the agent of the firm was valid and binding on the firm under Sections 110, 124 (a) and 147(3) of the Customs Act, 1962, and Section 229 of the Indian Contract Act. This judgement was cited by Revenue and Shri V. Lakshmikumaran cited another judgement of Madras High Court in the case of 'Pilmen Agents (Private) Ltd., Madras, v. The Collector of Customs, Madras' (paragraph 11 supra). The facts in this case seem to be more akin to those of the present case as, there also, an attempt was made by Customs to recover from the agent moneys due from the importers. The High Court was examining provisions of Section 147 of the Customs Act, read with Sections 12 & 28 of the same. In this context, the Hon'ble High Court observed as follows :- "Section 147 of the Act authorises the agent to do any act on behalf of the principal which the Act requires the owner or importer to do.

Sub-section (3) of Section 147 provides that when any person is expressly or impliedly authorised by the owner, importer or exporter of any goods to be his

agent in respect of such goods for all or any of the purposes of this Act, such person shall be deemed to be the owner, importer or exporter of such goods. According to the proviso to this section, where a duty is not levied for any reason other than wilful act, negligence or default of the agent, such duty shall not be recovered from the agent unless, in the opinion of the Assistant Collector of Customs, the same cannot be recovered from the owner, importer or exporter. According to this section, in the case of non-levy of duty, the duty shall not be recovered from the agent unless the Collector is satisfied that it cannot be recovered from the owner or exporter or importer. But the recovery of duty that had not been levied can only be subject to the provisions of S.28. On a reading of Ss. 12, 28 and 147 together, it is clear that in cases in which duty had not been levied, the owner should be called upon to pay if the non-levy was not due to the wilful act, negligence or default of the agent. If the amounts cannot be recovered from the owner, the Assistant Collector may collect it from the agent. But the collection of the amount not levied can only be subject to the provisions of Section 28, that is the officer should give notice within six months from the relevant date to the person concerned and follow the procedure laid down in that section.

If no notice is issued within six months, the debt becomes time barred and cannot be recovered." Dismissing the plea that the amount could be recovered under the ordinary law of the land, the High Court further observed as follows :- "Mr. Ramanujam, learned counsel appearing for the Customs Department, submitted that by Section 12, the law enables the Customs Department to levy duty on goods imported. In this case, the goods were subject to levy of duty and, therefore, the petitioners are liable to pay the duty. He submitted that Section 147 of the Act made the agent also liable under certain conditions. According to him, Section 28 provides one of the remedies in addition to the right of recovery of duty properly leviable, under the ordinary law of the land, i.e., within 30 years from the date on which the duty became leviable. This contention cannot be accepted, for the Act itself, when providing for the levy of the duty, also specifies the manner in which it can be collected. The Customs Act is a Code which defines the procedure and will have to be followed for collecting the duty which had not been levied and the procedure prescribed under Section 28 of the Act will have to be followed. In order to take advantage of S.28, the Assistant Collector should give notice to the person

concerned within six months from the relevant date, and if he fails to do so he cannot fall back on the general law and try to collect the amount. It is futile for him to contend that even though the remedy under Section 28 is barred, he can avail himself of the general law and proceed against the petitioners." 20. It is in this context that we recall the arguments of the learned Advocate for the respondent, that the clearing agent was not authorised by the importer to receive notices on his behalf. This argument of the Advocate was not disproved by the Revenue who could not show us any evidence that, either according to an agreement or according to the provisions of the Customs Law, the Customs House agent, who was appointed to clear the goods on behalf of the importer, continued to be the agent for the importer even after the goods were cleared, and that the agent had the legal duty of receiving notices on behalf of the importer after the clearance of the goods was completed. The case law cited by the learned Advocate, in the case of *V.V. Dabke & Sons Bombay v. Collector of Customs, Bombay*, reported in '1983 E.L.T. 583 (CEGAT)', does not have direct relevance, but this order did hold that the Customs clearing agent had no locus standing to file an appeal.

21. Another order of the Madras High Court cited by the learned Advocate : in the case of '*K.M. Mohamed Ghouse And Co. Nagapattinam v. Assistant Collector Central Excise, IDO, Nagapattinam*' reported in '1979 E.L.T. (J 683)', has more relevance as that judgement also dealt with a situation in which the agent was threatened with the collection of dues which could not be recovered from the principal. The High Court observed, as follows, in this order :- "Admittedly the primary liability to pay the differential duty is on the importer under S.28. But that liability can be fastened on the clearing agent as a result of the special provision contained in Section 147. Therefore, unless the condition in Section 147 is satisfied, the clearing agent will not be liable for the duty. The proviso to Section 147 (3) which has been extracted above says that the differential duty payable by the importer shall not be recovered from the agent unless in the opinion of the Assistant Collector the same cannot be recovered from the owner, importer or exporter. In this case, the demand made on the petitioner on 30.5.1977 indicates that as the amount has not been collected from the importer the same is sought to be recovered from the agent. This stand has however been given up when we came to the stage of the counter affidavit. In the counter affidavit the respondent

has stated that as the importer could not be served by post the demand is made as against the petitioners. Even assuming that the amount has not been factually collected from the importer or that the importer cannot be contacted by post, those circumstances will not be sufficient to attract the proviso to Section 147(3). The proviso seems to suggest that the liability of the importer can be passed on to his agent only if in the opinion of the Assistant Collector of Customs the same cannot be recovered from the owner. The expression "cannot be recovered from the owner" would indicate that all steps for realisation of the differential duty should have been taken against the importer but it could not be recovered for some reason or other. It is clear from the expression used in the proviso that all possible steps for recovery of the differential duty have to be taken as against the importer and only when it is not possible to realise any amount from the importer the same cannot be recovered from the agent. But in this case the respondent has not averred that all steps to recover the amount from the importer had failed and they are left with only the agent. The fact that there is some difficulty in contacting the importer by post will not, in any sense, mean that the amount could not be realised from him. According to the learned counsel for the petitioner, the importer continues to be in the import business even in the identical place where he was living at the time of import. In support of this statement, the learned counsel has produced a registered letter sent by them to the importer on 30.11.1977, which appears to have been refused by the importer and the registered cover contains endorsements 'always absent' and 'not claimed'. In view of the circumstances explained above, I am clearly of the view that it cannot be said that it has been shown that the amount cannot be recovered from the importer. As I am upholding the contention of the petitioners that Section 147 cannot be invoked as against them unless and until it is clearly shown that the amount could not be recovered from the importer, the impugned demand issued against the petitioners has to be quashed".

22. In the light of the above discussions, and in the light of the judgements cited before us and for the reasons discussed in detail, we hold that, to begin with, there is no proof that the Customs House agent is an agent of the importer even after clearance of the goods.

Further, it is not established that either by law or by an agreement, he has been authorised or empowered to receive notices on behalf of the importer. The various judgements cited, show overwhelmingly that the amount due from the importer can be recovered from the agent only if, according to the proviso to Section 147 (3) of the Customs Act, 1962, it is the opinion of the Assistant Collector of Customs that the amount due cannot be recovered from the owner/importer or exporter. In the matter before us, there is no record of such a finding by the Assistant Collector. The majority of the decisions cited by both the sides support the view that, in this case, the importer, to whom the notice was issued beyond the period of six months, cannot be made to pay the duty under Customs Law merely because a copy of the notice was sent to the clearing agent in time.

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