Devang R. Vora Vs. Cc

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Apr-16-2004

Reported in : (2004)(95)ECC491

Judge : P Chacko, A M Moheb

Appellant : Devang R. Vora

Respondent : Cc

Judgement :

1. These appeals came up before us pursuant to remand by the Hon'ble Bombay High Court as per judgment dated 18.8.2003 in Writ Petition No.1636/2003 vide 2003 (158) E.L.T. 30 (Bom.), The appellant's letter dated 7.1.2004 to the Asstt. Registrar requesting that the appeals be posted before another Bench was already on record. The appellant, who was present, was told that the case as remanded had to be heard only by this Bench duly constituted for the purpose and therefore his request could not be acceded to. It was also pointed out to him that the Hon'ble High Court had not directed the appeals to be heard by a different Bench. The appellant then sought time to engage an advocate to argue his case, whereupon it was pointed out to him that his counsel (who had not relinquished vakalatnama) was still on record and also that it was incumbent on the Bench to dispose of the appeals at the earliest in accordance with the letter and spirit of the Hon'ble High Court's judgment. The appellant was called upon to present his case himself or through counsel, but he would do neither of these. He was then told that his submissions in the memoranda of appeals and any relevant fact alleged in the writ

petition would be considered on merits. We heard the DR who reiterated the findings of the adjudicating authority. The appellant was offered an opportunity to reply, which he declined. He has, however, filed a copy of the writ petition as required by the Bench.

2. This appeal is against the order dated 20.11.87 of the Collector of Customs whereby two consignments, from USA, of Acrylic Plastic Scrap consigned to M/s. Mascot Metal Traders, Jamnagar as per Item No. 85 of Import General Manifest [IGM] No. 2947 and Item No. 341 of IGM No.3069 (Bills of Lading Nos. 13347 and NYC-13613 respectively) were absolutely confiscated under Section 111(d) of the Customs Act r/w. Section 3(2) of the Imports & Exports (Control) Act and penalties were imposed on Shri Devang R. Vora (appellant)/ M/s. Pushpak Chemicals Pvt. Ltd. and M/s. Nuchemo Plast. The impugned order was in adjudication of Show-Cause Notice [SCN] dated 21.10.86 wherein, on the basis of investigations, the Directorate of Revenue Intelligence [DRI] had alleged inter alia that Shri Vora had imported the goods in the name of M/s. Mascot Metal Traders (who, allegedly, did not qualify to be Actual User for claiming clearance of the goods under Open General Licence) with deliberate intent to get the goods cleared subsequently in the name of some nonexistent firm under the provisions of OGL; that, in the absence of any valid import licence covering the subject goods, the importation was unauthorised and the same rendered the goods liable to confiscation under Section 111(d) of the Customs Act; and that Shri Vora as also M/s. Pushpak Chemicals Pvt. Ltd. and M/s. Nuchemo Plast who had allegedly aided and abetted the acts of Shri Vora were liable to penal action under Section 112 of the Act. The Collector found the allegations to have been proved and hence passed the impugned order.

3. The allegations in the SCN were based on facts disclosed by scrutiny of import documents, examination of the goods and statements (recorded under Section 108 of the Customs Act) of the persons named below:- (vii) Shri Suresh Bhatia, Accountant-cum- Manager, Varsha Plastics Pvt. Ltd., (viii) Shri R.K. Gupta, Officer, Bank of Maharashtra (Overseas Centre), (ix) Shri S. Naidu, Officer, Central Bank of India, Bombay.

4. The two consignments had landed at Bombay Port in 1986. The one covered by IGM No. 2947 had been declared to contain 20.52 MTs and the other covered by IGM No. 3069 had been declared as containing 18.695 MTs, both of Acrylic Plastic Scrap. [The declaration as to qualitative description of the goods was, later on, found to be correct in chemical test of samples in the Custom House Laboratory, while marginal excesses of weight were found on weighments.] The import documents showed that both the consignments had been originally consigned to M/s. Mascot Metal Traders [in short, MASCOT], that the Steamer Agents viz. M/s.

Volkart Fleming Shipping & Services Ltd. [in short, VDLKART] applied for change of consignee in the IGMs from MASCOT to M/s. Nuchemo Plast [in short, NUCHEMO] and that subsequently they applied for a change from NUCHEMO to M/s. Pushpak Chemicals Pvt. Ltd. [in short, PUSHPAK] in respect of the consignments. The story would get completed, one way or the other, with the facts stated by the persons named in para (2) above.

5.1 Shri Kantilal Joshi of MASCOT stated that they were only indentors/commission agents and did not have any factory or Central Excise registration or SSI registration for manufacture of any goods and hence they were not eligible for import of any item as Actual Users under OGL. He had received two arrival notices in respect of consignments of synthetic resin shipped from USA by M/s. Sordelli Plastic Inc., New York. His enquiries with the shippers as to how the consignments happened to be shipped in MASCOT'S name were unanswered.

Shri Joshi expressed the belief that such consignments could be arranged only by Shri Devang Vora through his brother Shri Vijay Vora who was the owner of Sordelli Plastic Inc. Shri Joshi further stated that Shri Devang Vora had told him that he would get the consignee's name in the import documents changed to other importers who could clear the goods as actual users in the normal course. Shri Joshi further stated that, during 1984-85, Shri Vora's firm viz. M/s. Rasiklal Tribhovandas & Co., Bombay, had imported scrap through him and that he had given them a few blank/signed letter heads of his firm (MASCOT)for the purpose of preparing declarations required for such importations.

Shri Joshi added that Shri Vora might have made use of such letter heads for placing orders for import of the subject goods in the name of MASCOT.5.2 Shri Prakash Bhandare of NUCHEMO stated that Shri Devang Vora had approached him with a request to help him by clearing the consignments in the name of NUCHEMO and that he (Sh. Vora) claimed to have duplicate set of documents for offering the goods to NUCHEMO at the same price.

Shri Bhandare further stated that Shri Devang Vora had also asked him to provide final sales contract which was to be predated to show that the subject shipment was pursuant to such contract. Shri Bhandare accordingly signed the sales contract, whereupon the duplicate set of import documents relating to the two consignments were given to him by Shri Devang Vora. Shri Vora also advised Shri Bhandare to contact one Shri Bhatia with whose help Shri Bhandare could clear the goods. Shri Bhandare further stated that Shri Vora had told him that Shri Bhatia would introduce him to some clearing agent. Shri Prakash Bhandare, further, stated that NUCHEMO could not clear the goods as Shri Devang Vora wanted them to bear 50% of the container detention charges.

5.3 Shri G.H. Bhandare, brother of Shri Prakash Bhandare, stated that he had told Shri Devang Vora that he might require acrylic plastic scrap for use either in his factory (Naresh Udyog) or in his brother's (NUCHEMO), that he was told by Shri Vora that some consignments of acrylic plastic scrap were available with him and that he (Shri G.H.Bhandare) asked him to contact his brother (Shri Prakash Bhandare).

Shri G.H. Bhandare further stated that, upon receipt of bank documents, they (the brothers) had informed Bank of Maharashtra that they would be retiring the documents shortly. In the meanwhile, his brother had given the duplicate set of documents to the clearing agents viz. M/s. Express Cargo Movers for preparing Bills Of Entry etc. Shri G.H. Bhandare further stated that his advice was sought by his brother on Shri Devang Vora's demand that 50% of the container detention charges be borne by NUCHEMO. He advised his brother to forego the deal, and afterwards came to know that the consignments had been directed to PUSHPAK.5.4 Shri Venkatesh of VOLKART stated that they had prepared the

IGM on the basis of the Freight Import Manifest received from their principals, that M/s. Express Cargo Movers had produced the foreign supplier's invoices and sought amendment of consignee's name and accordingly they prepared the applications for changing the consignee's name from MASCOT to NUCHEMO. Shri Venkatesh further stated that they later received a letter from NUCHEMO, which said that they were in no way concerned with the consignments. Shri Venkatesh also quoted M/s.

Express Cargo Movers as having stated that they had received the original documents duly discharged in the name of PUSHPAK by Central Bank of India.

5.5 Shri R.N. Parkar of Express Cargo Movers stated that import documents of both the consignments were handed over to them by Shri G.H. Bhandare, representing his brother's firm NUCHEMO, that they prepared Bill of Entry but did not file the same as the original documents were not received from NUCHEMO and that subsequently they received the original documents from PUSHPAK with instruction to file Bill of Entry.

5.6 Shri Shantilal Jain of PUSHPAK stated that, in February 1986, they had received enquiries from the foreign suppliers as to whether they were interested in the goods, that they were in need of the raw material and hence offered to buy the goods, that they were no longer interested in clearing the consignments although they had retired the documents from their bankers, and that he (Sh. Jain) knew Shri Devang Vora for six to seven years.

5.7 Shri Suresh Bhatia of Varsha Plastics stated that he had introduced M/s. Express Cargo Movers to Shri P.H. Bhandare for clearing the subject consignments, that he knew Shri Devang Vora who very often visited Shri Shantilal J. Jain, Director of both VARSHA and PUSHPAK, and that he had retired the import-documents from Central Bank of India as directed by Shri Jain and submitted the same to Shri Jain.

5.8 Shri R.K. Gupta of Bank of Maharashtra stated that they had received two sets of import documents drawn on NUCHEMO, from the foreign supplier's Bank at Singapore, that they subsequently received instructions from the collection Bank to replace the documents with revised set of documents drawn on PUSHPAK, that they also received 'no objection' letter from NUCHEMO and that, accordingly, both sets of documents were sent to Central Bank of India. Shri S. Naidu of Central Bank of India confirmed receipt of the documents from Bank of Maharashtra. He also stated that the bank had sent intimation to PUSHPAK for retirement of the documents, that one Shri Bhatia representing PUSHPAK came to the bank and retired the documents on payment of bills and that the bank had endorsed the Bills of Lading in the name of PUSHPAK.5.9 Shri Devang Vora stated that he knew Shri Kantilal Joshi of MASCOT.When questioned as to whether he had discussed with Shri Joshi regarding import of any consignments of acrylic plastic scrap or had booked any such consignments in the name of MASCOT, Shri Vora gave evasive answers. To the question whether he had received blank/signed letter heads of MASCOT for the purpose of import or any other purpose, his answer was : "to the best of my knowledge, no".

6. We have examined the impugned order and the grounds of the appeal.

We have also perused the writ petition for the limited purpose of ascertaining the grievance of the party against the earlier order in the appeal. In the Writ Petition, it was alleged that "The Tribunal has also completely ignored and/or overlooked, though cited, the earlier orders of the Tribunal wherein on the same sets of facts, allegations and evidences the Tribunal upheld the plea of breach of principles of natural justice and set aside the orders passed by the same Collector of Customs on the same lines." The earlier orders cited by the writ petitioner were annexed to the petition as Exhibits A and B. We have scanned the entire record and we did not find any evidence of any of the above orders having been cited by the party at any stage of this appeal. In fact, it is from the memorandum of writ petition that we have got the dates of the orders, going by which the Tribunal's Registry has located the orders and supplied copies thereof to us. Be that as it may, we shall examine whether we have a precedent in those orders, for the instant appeal.

7. Shri D.R. Vora (appellant) has challenged the Collector's order mainly on the ground of violation of the principles of natural justice.

The appellant states that his requests for adjournments of personal hearing "for valid reasons" were disregarded by the Collector and that he had not been given any opportunity to cross-examine witnesses. The appeal, however, does not spell out the reasons for seeking adjournments, nor is it discernible from the appeal as to whether and when the appellant had asked for any opportunity to cross-examine any witness. These were not the facts in the appellant's earlier cases remanded as per order dated 24.1.2000 (Exhibit A in Writ Petition) and order dated 1.6.2000 (Exhibit B in Writ Petition). In appeal Nos.

C/99/88 etc. disposed of by order dated 24.1.2000, it was found that the Collector of Customs had passed ex parte order against the present appellant after rejecting his request for adjournment, despite the fact that the request was on the ground of appellant's illness supported by medical certificate. The Tribunal, therefore, remanded the case for fresh adjudication by affording to the appellant an opportunity of being heard. The Tribunal did so, after recording the appellant's undertaking to co-operate with de novo adjudication of the case. In appeal No. C/739/88 disposed of by order dated 1.6.2000, the DR had conceded an error in the Collector's order and it was also found by the Tribunal that the Collector had misread the evidence in the case. Hence the remand of that case for fresh adjudication. The facts and circumstances considered in the above orders of the Tribunal do not exist in the instant case. In this case, upon receipt of notice of hearing from the Collector, Shri Vora's counsel by letter dated 14.3.87 requested for adjournment saying that the inspection and copying of documents by the party were not yet complete. Accordingly hearing of the case originally fixed for 18.3.87 was adjourned to 4.6.87. Further adjournments to 21.7.87, 10.8.87, 24.8.87 and 21.9.87 were also given.

But the party did not submit any reply to the show-cause notice of October '86. The Collector granted a last chance to the party on 10.11.87. But again the party asked for further time for filing written submissions. The Collector noted that reasonable opportunity had already been given to the party for the said purpose, and accordingly he proceeded with the case. We do not think that the Collector denied natural justice to the party. The appellant's plea of negation of natural justice is, therefore, rejected.

8. The gist of allegations against the appellant in the show-cause notice was that he had deliberately caused unauthorized importation of the subject goods thereby rendering the goods liable to confiscation under Section 111(d) of the Customs Act. The appellant has no case that he did not receive the notice. Admittedly, he never replied to the notice. The above allegation against him will, therefore, be held to have been conceded. This context reminds us, of the Tribunal's larger Bench decision in C.C. v. R.K. International [2003 (159) E.L.T. 961] wherein it was held that, where show-cause notice was not replied to, adverse inference could be drawn against the noticee at appellate stage even though the adjudicating authority did not deal with the aspect specifically. The law on the point was settled by the Hon'ble Supreme Court long back vide Rowjee v. State of A.P. [AIR 1964 SC 962]. The apex Court held that, where the respondent in a writ petition did not file counter affidavit, there was no opposition to the petition and the averments contained therein would be taken to have been admitted.

Virtually this ruling was followed by the Hon'ble High Court in the appellant's petition and after noting that there was no counter affidavit on behalf of the Revenue to controvert the allegations of the writ petitioner, it was held that there was substance in the petitioner's counsel's complaint that the Tribunal had omitted to consider its earlier orders dated 24.1.2000 and 1.6.2000 which had allegedly been brought to the notice of the Tribunal. Following the Hon'ble Supreme Court and High Court, we hold that the allegations in the show-cause notice, against the present appellant, are sustainable in toto.

9. The goods viz. acrylic plastic scrap was undisputedly an industrial raw material freely importable by actual (industrial) users. However where the importer did not satisfy the actual user condition, any importation of the goods without specific licence was unauthorised in law and attracted Section 111(d) of the Customs Act for confiscation.

The allegation was that the appellant had rendered the goods liable to confiscation under Section 111(d). The allegation was mainly based on the uncontroverted statements of witnesses which we have referred to in paragraphs (5.1) to (5.8) of this order. The oral evidence was never rebutted. We have also examined the evidence and we note that the Collector's finding on the appellant's nexus to the goods in question is supported by the evidence. In any case, as the above allegation (that the appellant had rendered the goods liable to confiscation) stands undenied, he is liable to penalty under Section 112 of the Act.

In this appeal, there is no challenge as to the quantum of penalty either. In the result, appeal No. C/614/88 is dismissed.

10. The appellant has challenged another order passed by the Collector of Customs, wherein a penalty of Rs. 3,88,000/- was imposed on Shri Vora under Section 112 of the Customs Act on the ground that he had rendered himselves liable to such penalty by effecting unauthorised importation of three consignments of High Density Polyethylene (HDPE) attracting the confiscation provision of Section 111(d) of the Act. We have examined the grounds of this appeal vis-a-vis the Collector's findings. We have also noted the relevant grounds raised in the writ petition.

11. The show-cause notices (SCNs) which were adjudicated upon as per the above order of the Collector had alleged that the appellant had imported three consignments of HDPE and sought clearance thereof under OGL under Bills of Entry filed in the name of M/s Naresh Udyog who had no facility to use the goods and did not fulfill the actual user condition for the importation under OGL. It was further alleged that the appellant's intention was to sell the goods in the market after clearance at the Customs. The SCNs held the goods to be liable to confiscation under Section 111(d) and the appellant to be liable to penalty under Section 112 of the Customs Act. The allegations were denied. The adjudicating authority found, on the basis of statements recorded under Section 108 of the Act, that the goods were actually imported by the appellant. It was found that placing order for the goods, effecting shipment, making payment for retiring import documents, giving the documents to CHA and directing him to warehouse the goods were all done by the appellant. It was further found that M/s. Naresh Udyog, in whose name the Bills of Entry were filed, were not an actual industrial user of the goods.

12. One of the main grounds of challenge in this appeal is that natural justice was denied to the appellant by not considering his request to cross-examine the persons whose statements were relied on in the show-cause notice. On examining the records, we find that there is substance in this grievance of the party. The finding of the Collector that the appellant was the real Importer of the subject consignments is based on the statements relied upon in the show-cause notice. The appellant had requested for opportunity to cross-examine the persons concerned--a fact noted in the impugned order itself. We find that the said request was not considered by the ld. Collector, though it was incumbent on him to take a reasoned view on the party's request. We are of the view that the jurisdictional Commissioner should consider the party's request on its merits and take a reasoned view thereon, and then proceed to adjudicate the case afresh. Accordingly, we set aside the impugned order and allow this appeal by way of remand directing the Commissioner to adjudicate the case afresh as above in accordance with law and the principles of natural justice.