

Teksons Ltd. Vs. Assistant Collector of Customs

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Court : Mumbai

Decided On : Nov-10-2003

Reported in : 2004(165)ELT17(Bom)

Judge : R.M.S. Khandeparkar and ;J.P. Devadhar, JJ.

Acts : [Customs Act, 1962](#) - Sections 28 and 28(1); [Constitution of India](#) - Article 226

Appeal No. : Writ Petition No. 2059 of 1992

Appellant : Teksons Ltd.

Respondent : Assistant Collector of Customs

Advocate for Def. : Suresh Kumar, Adv.

Advocate for Pet/Ap. : S.P. Kanuga, Adv.

Disposition : Petition allowed

Judgement :

R.M.S. Khandeparkar, J.

1. Heard the Advocate for the parties.

2. The Petitioners challenge the order of less charge demand dated 13th April, 1988 and further communications in that regard dated 24th February, 1992 and 29th April, 1992, on the ground that the same are in violation of provisions of law, as well as of basic principles of natural justice and order being a non-speaking order,

3. Few facts relevant for the decision are that the Petitioners are manufacturers of radiators having their establishment at Thane. Petitioners had imported 25 packages of high pressure hydraulic synthetic rubber hoses from England and the Bill of Entry was filed for clearance of the goods on 22nd February, 1979 which were cleared on 7th March, 1979 and duty was levied on CIF value at Rs. 1,85,751.66. The second consignment was imported on 18th May, 1979 for which import duty was levied at Rs. 1,72,075.75 on 19th June, 1979 and goods were cleared after payment of duty on 5th July, 1979. The third import consisted of 25 packages which was imported on 13th July, 1979 and duty was levied at Rs. 7,90,729.25 and goods were cleared on 3rd December, 1979. On 10th January, 1992 the Respondents directed the Petitioners to pay the less charge amount to the extent of Rs. 4,78,308/- pertaining to the Bills of Entry No. 3549 and 3550, dated 17th April, 1980 and 4807, dated 23rd April, 1980 in terms of demand confirmation order dated 13-4-1998. The Petitioners by letter dated 22nd January, 1992 while expressing surprise, resisted the demand. Further by letter dated 12th March, 1992, it was informed by the Petitioners that they had already paid the appropriate amount of duty pursuant to correct assessment in respect thereof and there was no justification, for the Respondents to issue notice of less charges as was sought to be issued by notice dated 10th January, 1992. The same contentions were reiterated by letter dated 13th March, 1992, 21st March, 1992 and 25th March, 1992. The Respondents by their further letter, dated 29th April, 1992 informed the Petitioners that even though the period of 30 days had elapsed from the date of receipt of the notice dated 10th January, 1992, they had not paid the amount of Rs. 4,78,308/- nor had produced any stay order from the higher authorities and, therefore, the Petitioners were required to pay the said amount immediately, failing which coercive action would follow. The confirmation order dated 13th April, 1988 was undoubtedly an order in relation to the less charges demand by the department. Along with the covering letter dated 7th May, 1992,

the Petitioners were issued with a copy of the confirmation demand notice and detention order. Meanwhile, under letter dated 29th April, 1992, the Petitioners informed the Respondents that they had neither received the show cause notice nor the consequential confirmation order relating to the said less charge demand.

4. While assailing the said order and the demand, the learned Advocate appearing for the Petitioners submitted that Section 28 of the [Customs Act, 1962](#) provides for a show cause notice to be served upon the party before the confirmation of the demand as well as for an opportunity of being heard in the matter. But in the case in hand, neither a show cause notice was served upon the Petitioners, nor the opportunity of being heard was afforded to the Petitioners. Drawing attention to the letters addressed to the Respondents and more particularly to the letter dated 29th April, 1992 and further averments in the petition, the learned Advocate for the Petitioners had submitted that the Respondents had neither controverted those statements of fact made by the Petitioners in that regard, either by way of addressing any letter to the Petitioners nor by filing any affidavit-in-reply denying those facts stated by the Petitioners on oath and revealed from the records. He has further submitted that the demand pertains to three different imports and in terms of Section 28 of the Customs Act, it was necessary for the department to issue three different notices, however, no such notices were issued by the Respondents. He has further submitted that the order of confirmation clearly discloses that the same is absolutely a non-speaking order, apart from the fact that it neither discloses service of the show cause notice upon the Petitioners prior to the passing of the order nor discloses the reasons and justification for arriving at the quantification of the amount of Rs. 4,78,308/- as less charge duty. Lastly, he has submitted that the demand was hopelessly barred by law of limitation as it was made after a period of 12 years from the date of import.

5. The learned Advocate appearing for the Respondents firstly submitted that he is appearing with Mr. Shah and is without any papers to argue the matter. He further requested for adjournment of the matter on the said ground, whereupon he was informed that considering the records of the case, the matter could be adjourned subject to payment of costs. He expressed inability to agree to pay the costs for adjournment and, therefore, the matter was heard. The learned Advocate for the

Respondents while controverting the arguments advanced on behalf of the Petitioners submitted that the order dated 13th April, 1988 refers to the fact or issuance of show cause notice and there was no reply to the same by the Petitioners and, therefore, no fault can be found with the said order confirming the less charge demand amount to Rs. 4,78,308/-. He has further submitted that the order is an appealable order and there being an alternative efficacious remedy available to the Petitioners, there is no justification for the Petitioners to seek interference of this court in writ jurisdiction.

6. As regards the challenge to the impugned orders on the ground of non-service of the show cause notices, Section 28 of the Customs Act provides that when any duty has not been levied or has been short-levied, the proper officer may, in the case of any import made by any individual for his personal use or by Government or by any education, research or charitable institution or hospital, within a year and in any other case, within six months 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, requiring him to show cause why he should not pay the amount specified in the notice. The proviso to Sub-section (1) provides for limitation of 5 years in case of any collusion or any wilful misstatement or suppression of facts by the importer or exporter or the agent or employee of the importer or exporter, as the case may be, instead of limitation of one year and six months for issuance of show cause notice. Sub-section (2) of Section 28 provides that the proper officer, 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 or interest due from such person and thereupon such person shall pay the amount so determined. The provisions of law comprised under Section 28(1) and (2) of the [Customs Act, 1962](#) obviously disclose that the service of show cause notice is absolutely necessary, as also the opportunity of being heard to the concerned party. It is not an empty formality but it is necessary that the importer exporter gets an opportunity to put forth his say in the matter and the proper officer is able to arrive at a proper decision in the matter. Being so and considering the provisions of Sub-section (2) of Section 28 of the said Act, it is apparent that the proper officer should ensure that the show cause notice is duly served upon the party concerned, before proceeding to adjudicate upon the liability of any such person or

firm in relation to short-levy or non-levy and should not blindly accept the plea of the department that the notice was issued to the party concerned. It is also necessary that such satisfaction of the proper officer regarding the service of the show cause notice should be apparent on the face of record or the order passed by such officer on adjudication of the matter.

7. Perusal of the impugned notice dated 13th April, 1988 undoubtedly discloses the fact of issuance of notice as is sought to be contended by the Respondents. However, it nowhere discloses that such notice was actually served upon the Petitioners and that, they had sufficient opportunity of being heard in order to meet the case of the department.

8. Apart from the fact that order dated 13th April, 1988 on the face of it does not disclose the service of show cause notice upon the Petitioners, as rightly submitted by the learned Advocate for the Petitioners. The correspondence by the Petitioners with the adjudicating authorities before approaching this Court also discloses the clear stand taken by the Petitioners that the Petitioners had never received any such show cause notice in the matter and there was no denial of the said claim of the Petitioners either by way of a correspondence on behalf of the department nor there was any counter affidavit filed by the department denying the allegations on the part of the Petitioners that no such show cause notice was served upon the Petitioners. At this stage, it is pertinent to note certain observations made by this Court in relation to the issue in question in order passed on 4th October, 1999, which reads thus :-

'We have heard the learned Counsel for the Petitioners. There is no affidavit on behalf of the Respondents. It appears that on 28th May, 1992, the recovery was stayed pending admission on the application of the learned Counsel for the respondents. The stay order is operating for the last more than seven years.'

'On the earlier occasion, the matter came up on board for hearing on different occasions. The last date on which it came on board was 28th September, 1999. Mr. Master appeared for the Respondents on that day without any papers.'

'No affidavit has been filed by the Respondents even today. Mr. Master stated that this brief has been assigned to him by the Law Ministry, which is in-charge of all briefs, on 29th September, 1999 without however, any case papers. He says that he has taken copies of the paper-book from the learned Counsel for the petitioners. We fail to understand what is the meaning of handing over the brief to the Counsel in a revenue matter which he is expected to conduct, without papers, without affidavit and without instructions. It is a most unfortunate state of affairs, having far reaching ramifications for the Revenue. This is happening almost every day in most of the cases.'

'We have issued notices in many cases to the Chief Commissioner asking him to examine this position and inform this Court who is responsible for this state of affairs. We are awaiting his response.'

8. It appears that the situation has not changed even to this date. Till this date, the department has not bothered to file any counter affidavit or to dispute the contentions of the Petitioners that no show cause notice was issued and served upon the Petitioners, either by filing counter affidavit or placing on record any correspondence or material which can disclose service of show cause notice or which can reveal that show cause notice was in fact served upon the Petitioners. Indeed by the order dated 4th October, 1999, it was also observed that 'in the instant case, the recovery remains stayed for the last more than seven years at the instance of the Respondents and still the Revenue is not prepared to file affidavit and wants time. Obviously, they are not interested in the recovery and the petitioners have no grievance if the stay order continues to operate.' With those observations, time was granted to the Counsel for the Respondents to contact the concerned officers to obtain instructions in the matter, from 4th October, 1999 to 16th November, 1999. It appears that the matter thereafter did not appear on board for a long time. However, the fact remains that till this date, there is no change in the situation and the department continues to be adamant in not coming forward to file any affidavit-in-reply or to produce any material on record which can disclose due service or show cause upon the Petitioners.

9. In view of the above facts, the only conclusion that can be drawn is that the department has no material to disclose the service of show cause notice upon the Petitioners. If so, the Petitioners are justified in contending that the order dated 13th April, 1988 was passed without following the mandatory requirement of Section 28(1) of the Customs Act. In fact, on that ground alone, the order of the less charge demand is liable to be quashed and set aside.

10. As rightly submitted by the learned Advocate for the Petitioners, the order dated 13th April, 1988 apart from confirming the demand to the extent of Rs. 4,78,308/-, nowhere discloses any justification for quantification of the said amount nor it discloses the facts which could reveal short-levy to the extent claimed by the department. Being so, the same is totally non-speaking order. The provisions of law under Section 28 of the Customs Act require an order to be passed, after issuance of the show cause notice and adjudication of the claim of the department regarding short-levy and, therefore, it has to be a speaking order and should disclose the reasons or the order passed thereunder. On this count also, the impugned order is not sustainable.

11. In the absence of any material on record to disclose that the show cause notice dated 13th April, 1988 was in fact served upon the Petitioners within the period specified under Section 28(1) of the Customs Act, the learned Advocate for the Petitioners is justified in contending that the demand is barred by the law of limitation. Undisputedly, there is no allegation of any collusion or mis-statement or suppression of facts by the Petitioners. Hence the period of 5 years was not available to the department. The order of 13th April, 1988 is beyond the period of 5 years from the relevant date of export. Undoubtedly, the order dated 13-4-1988 refers to the issuance of show cause notice dated 13th October, 1980 in relation to the bill of entry dated 17th and 23rd August, 1980. But as already held above, there is no material to show that the said notice of 13-10-1980 was served upon the Petitioners. Considering the same and in the absence of any material on record to disclose that the show cause notice was served upon the Petitioners as per the provisions of Section 28(1) of the Customs Act, the demand is beyond the period of limitation prescribed under the law and, therefore, even the question of remanding the matter to pass an appropriate speaking order after giving

opportunity to the party of being heard in the matter does not arise in the case in hand.

12. As regards the contention of the petitioners that in each case of import, separate notice has to be issued is totally devoid of substance. The provisions of law contained in Section 28 nowhere requires such separate notice for each import. Only requirement is that the notice should be within the period of limitation prescribed thereunder.

13. As regards the contentions of the learned Advocate for the Respondents that alternate efficacious remedy in the nature of appeal against the impugned order was available, the same does not prohibit the Petitioners from seeking interference of this Court as the impugned order apparently on the face of it discloses violation of the provisions of law under Section 28(1) of the Customs Act regarding service of show cause notice to the Petitioners and denial of opportunity of being heard in the matter and, therefore, the entire exercise of powers under Section 28 of the Customs Act was in total violation of the basic principles of natural justice, apart from violation of the statutory provisions and, therefore, the Petitioners were justified in seeking interference of this Court under Writ jurisdiction and availability of the alternate remedy could not bar the petitioners from approaching this Court in the matter.

14. In the facts and circumstances of the case, therefore, we are left with no alternative than to allow the petition with costs.

15. In the result, the petition succeeds. The impugned order is quashed and set aside. Rule is made absolute in terms of prayer Clause 17(a) with costs.