

General Instruments Consortium Vs. Collector of Customs

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Dec-12-1989

Reported in : (1992)LC413Tri(Mum.)bai

Appellant : General Instruments Consortium

Respondent : Collector of Customs

Judgement :

1. By the present miscellaneous application, the applicants, the original appellants in Appeal No. C/628/88 Bom, have sought for rectification of mistake or modification of this Bench order No. 343 & 344/89 WRB dt. 25-4-1989.

2. The applicants filed appeal No. C/628/88 Bom against the order of the Additional Collector of Customs, Bombay, ordering confiscation of the goods imported, giving them option under Section 125 of the Customs Act to pay, in lieu of such confiscation, fine of Rs. 75,000/- and also imposing a personal penalty of Rs. 20,000/- under Section 112 of the Customs Act. In the appeal against the said order, the appellants raised the following grounds: (a) There is no justification for this view of the Additional Collector. For were that be so, the foreign suppliers would not have written to the Customs Department on 8th September, 1987, informing the Department that the goods had been wrongly shipped and therefore should be returned.

(b) The foreign suppliers are prepared to accept the goods and no payment need be made for the goods. The appellants do not wish to have the goods. In these

circumstances, it would be a serious error and detrimental to the interest of the country to insist upon the clearance of the goods which would involve payment to foreign buyers and utilisation of the country's scarce foreign exchange resources.

(c) Both the foreign suppliers and the appellants on their own came out with the request for reshipment of the goods even before the goods entered the port of Bombay. There was no attempt on the part of the importers to clear the goods clandestinely.

The applicants also prayed for grant of stay and waiver against the implementation of order and payment of penalty amount.

3. When the stay petition came up for hearing, with the consent of both the parties, the appeal was finally heard and vide order No. 343 & 344/89 dated 25-4-1989, the Tribunal accepted the plea of the applicants for reshipment of the goods and ordered accordingly.

Applicants have now come forward with the plea that subsequent to the passing of the said order, when they approached the suppliers to arrange for reshipment of the goods, the suppliers have shown their unwillingness to do the same vide their letter dated 7-7-1989 and hence the present application.

(a) The Hon'ble Tribunal may clarify or modify the order bearing No. 343 & 344/89 dated 25-4-1989 and delete the condition for re-export on payment of fine of Rs. 25,000/-.

(b) With this Hon'ble Tribunal may please permit the appellants to clear the goods under terms and conditions deemed fit.

5. Shri Amit Desai, the learned advocate for the applicants, at the time of hearing, however, submitted that the prayer in this application is for restoration of the order of the Additional Collector and not for deciding the whole matter again. He submitted that, he would confine his arguments only for modification in the relief granted and would not go into the merits, as regards the order of confiscation.

6. Advancing his arguments on the said point, Shri Amit Desai brought out the facts and submitted that as is evident from the letter of the suppliers dated 7-7-1989, the suppliers have backed out from the earlier commitment to receive back the goods on reshipment, only on account of the fact that the goods have become old and that 1 1/2 years time has elapsed after the goods were despatched and that the goods must have deteriorated in quality. Shri Desai submitted that when the rejection is only on account of the delay, it can be presumed that the suppliers were not inclined to receive back the goods, even on the date when the applicants approached the Tribunal and when the Tribunal heard the matter and this being the position existing on the date of hearing, it can be considered that the fact which was available on the date of hearing of the application was not brought to the notice of the Tribunal, and as such the Tribunal is competent to rectify the mistake under the provisions of Section 129-B(2) of the Customs Act. He also submitted that the order of the Tribunal has, by virtue of refusal by the suppliers to take back the goods on reshipment, has become impossible for performance and the same calls for exercise of the inherent powers of the Tribunal to pass an order which is effective and enforceable. He also submitted that he was not asking for the review of the order so far as it relates to holding that the goods imported were not covered under the licence and were liable to confiscation and his only prayer was that instead of reshipment as ordered, the applicants maybe permitted to take the goods for home consumption on payment of redemption fine as was originally ordered by the adjudicating authority. He submitted that virtually he was asking for restoration of the order of the Additional Collector in toto. As regards the power of the Tribunal, the learned advocate submitted that powers of the Tribunal are the same as those of the Civil Courts and the Tribunal is empowered to rectify the mistake even of the present nature and to modify the order passed earlier and cited before us the decision of the CEGAT Special Bench 'A' New Delhi in Collector of Central Excise v. EID Parry (India) Ltd. reported in 1989 (40) ELT 139 (Tribunal) and also the decision of the Bombay High Court in New India Life Assurance Co.

Ltd. v. Commissioner of Income Tax, Bombay reported in AIR 1958 Bombay 143 and the decision of the Supreme Court reported in AIR 1969 Supreme Court 430 (Income Tax Officer, Cannanore v. M.K. Mohammed Kunhi) over which the

Tribunal has placed reliance in the aforesaid decision.

Pleading that such culpable mistake can be cured by recall of the papers by the Tribunal, he relied on the decision of the CEGAT, Special Bench 'D', New Delhi in the case of L.M.L. Limited v. Collector of Central Excise reported in 1989 (41) ELT 534 (Tribunal).

7. Heard Shri K.M. Mondal, the learned SDR. He, however, opposed the said miscellaneous application and submitted that the prayer tantamounts to review of the whole order which the Tribunal has no powers to do. He submitted that the Tribunal is invested with only such powers as have been specified in the Statute where powers of review have not been conferred upon the Tribunal. So far as inherent powers are concerned, he submitted that the Tribunal has no such inherent powers which would entitle it to assume the power of review which is not conferred on it. In support of his submission, he cited one judgment reported in 1987 (29) ELT 904.

8. So far as the factual position is concerned, the applicants have produced a letter dated 7-7-1989 showing the disinclination on part of the suppliers to receive back the goods. It may, however, be noted that, this is the only document brought on record to show disinclination on the part of the suppliers to take back the goods. The letter is subsequent to the passing of the impugned order by the Tribunal. It is not necessary for us to go into the merits as to the genuineness of the letter, as the main question to be considered by us here is, whether this Tribunal has powers to entertain the prayer of the nature made here.

9. Undisputedly, the Tribunal is not invested with unlimited powers.

The only powers invested in the Tribunal are incorporated under Section 129-B(2). The said provision reads thus: "The Appellate Tribunal, may at any time within four years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1) shall make such amendments if the mistake is brought to its notice by the Collector of Customs or the other party to the appeal." "Save as otherwise provided in Sec. 130 or Sec. 130-E, orders passed by the Appellate Tribunal on appeal shall be

final." 11. It may be noted that Section 130 and Sec. 130-E referred to in sub-sec. 4 reproduced above, are not attracted here and as such except for what has been provided for in sub-sec. 2 reproduced above, the order passed by the Tribunal becomes final. The point then requires consideration is, what are the circumstances under which the Tribunal can re-consider its order. Before considering the same point, it maybe observed that the learned advocate for the applicants, has harped upon the inherent powers of the Tribunal. He submitted that the inherent powers of the Tribunal are as wide as those of the Civil Courts and relied upon the decision of the Bombay High Court in *New India Life Assurance Co. Ltd. v. Commissioner of Income Tax* (supra). Reading of the same decision indicates that what the High Court was considering are powers of the Tribunal vis-a-vis the powers of the Appellate Court under the Civil Courts and that too with regard to the powers of allowing, raising new points in the appeals filed before the Tribunal.

The point before the High Court in the said matter was not related to investing of any other inherent powers in the Tribunal, and the observation made to the effect that the Tribunal enjoy the same powers as those of the Civil Courts was made in the context of the question before the said High Court. The High Court has not intended to hold that all those inherent powers including the power of review invested under the Civil Courts stood automatically invested in the Tribunal.

12. In the case of *Collector of Central Excise v. EID Parry (India) Ltd.* (supra), the Tribunal had before it, a set of facts where, errors was on account of overlooking of the evidence which was already on record. In the judgment of the Supreme Court *Income Tax Officer, Cannanore v. M.K. MohammedKunhi* (supra) Over which the Tribunal has placed reliance also the question was of exercise of powers impliedly invested in the Tribunal by virtue of some specific powers existing. In *L.M.L. Limited v. Collector of Central Excise* (supra) the question before the Tribunal was of a palpable mistake in the order. It was a case of mistake apparent on the face of the record going to the root of the order.

13. Here in the instant case, there is no such error-apparent on record. The applicants at all times, right from the day when the goods were received in India,

till the day the Tribunal decided the matter, were projecting that the goods may be permitted to be re-shipped as they were sent to them on account of some error. If the applicants had any apprehension about the suppliers' unwillingness to receive back the goods after such a time, before pleading accordingly before the Tribunal, they should have ascertained from the suppliers. On such a lapse on their part, it cannot be said that there existed an error apparent on record so as to enable the Tribunal to exercise its inherent powers or the powers invested under Section 129B (2) and hold that the order passed by the Tribunal suffers from infirmity contemplated thereunder and rectify or modify the same. It is also pertinent to note that at all times, during the pendency of hearing of the appeal, the appellants had been opposing the order of the Additional Collector giving them option to redeem the same on payment of redemption fine and at no stage they had shown any inclination to agree with the same. It may be mentioned here that during the course of the arguments, a plea was advanced by the learned advocate who then appeared, that subsequent to the import of the said goods, which were not covered by any valid import licence held by them, the applicants had already procured the licence for import of such goods and that on the date of hearing of the appeal, they were in possession of a valid licence under which they could import these goods and that, therefore, they may be permitted to import the said goods under the said subsequently obtained licence. The said prayer however was not considered by the Bench. The Bench however having felt it justified to permit the applicants to re-export the goods passed the orders accordingly.

14. A plea was raised that the order has become infructuous in view of the fact that the suppliers were not inclined to take back the goods.

The exigency that have arisen making the order infructuous in the eyes of the appellants is not on account of the error on record but on account of subsequent development. In absence of any evidence to the contrary, merely because the suppliers have refused to accept the goods on reshipment on account of long lapse of time, it cannot be considered as the one which existed even on the date when the order was passed. It may be observed that the order came to be passed on 25-4-1989 and was communicated to the appellants on 23-5-1989 but the applicants contacted the suppliers only on 7-7-1989. It therefore cannot be

presumed that even on the date of filing of the appeal, the suppliers were not inclined to accept the goods. It may also be mentioned here that it is not on account of vis major that the implementation of the order has become impossible. It is purely on account of some arrangements between the applicants and the suppliers, who are not the party before us, that the situation has cropped up. We appreciate the difficulty but when the law does not provide for any exercise of any inherent power, the Tribunal cannot now consider the prayer.

15. The modification sought for by the applicants obviously is in the nature of reviewing our earlier order, as the order has to be read as composite one and cannot be bifurcated in the way as is submitted by the learned advocate, and any modification thereon of the nature as pleaded by the applicants would tantamount to the review of the same.

16. Under these circumstances, the miscellaneous application filed by the applicants cannot be entertained and is rejected.

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