

Pradeep Ch. Saha Vs. Additional Collector of Customs

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Court : Kolkata

Decided On : Jul-09-1993

Reported in : 1995(51)ECC110,1993(68)ELT525(Cal)

Judge : Ajit K. Sengupta and ;Mure Alam Choudhury, JJ.

Acts : [Customs Act, 1962](#) - Sections 111, 112, 125, 125(1), 129A(1), 129B(2), 129B(4), 129D, 129D(2) and 129D(4); ;Customs Rules

Appeal No. : Matter No. ... of 1993

Appellant : Pradeep Ch. Saha

Respondent : Additional Collector of Customs

Advocate for Def. : Ashutosh Law, Adv.

Advocate for Pet/Ap. : Somnath Chatterjee, ;Gautam Mitra, ;Asoke Gupta, ;Bidyut Dutta and ;Asoke Ghosh, Adv.

Judgement :

1. Two several consignments of Clove were imported by the appellants. The first consignment arrived on 12th May, 1993 and the second consignment on 19th May, 1993. So far as the first consignment is concerned the Collector of Customs by his order dated 21st May, 1993 allowed release of the consignment upon imposition the redemption fine. He held as follows :-

'Taking the true retail price at Rs. 86/- per kg. and giving therein a wholesale quantity discount of 15%, the wholesale market price comes to Rs. 77.25 per kg. The CIF price of the goods is Rs. 21.50 per kg. on which 85% duty equal to Rs. 1,845/- shall be payable. In addition to this sales tax and other expenses including landing, loading and unloading charges and all other charges equal to about Rs. 21/- per kg. is to be added to it. These expenses altogether come to around Rs. 61 /-Rs. 62/- per kg. Indicating a profit of at least Rs. 10/- per kg. which is required to be mopped up to the maximum extent prior to release of goods'.

2. He therefore imposed a redemption fine of Rs. 6,50,000/- and Rs. 5,80,000/- against B/E Nos. 497 and 498 dated 12-5-1993 respectively. The first consignment was cleared on that basis. The second consignment was also adjudicated along with the first consignment. It was adjudicated on 15th of June, 1993 by the Additional Collector of Customs. The Additional Collector of Customs in his order dated 15th of June, 1993 observed as follows :-

'I have carefully gone through the records of the case. The goods require an import licence. Since the importer has failed to produce the same, the goods become liable for confiscation under Section 111(d) of [Customs Act, 1962](#) and the importer becomes liable for penalty under Section 112 of the said Act, I, therefore, impose a redemption fine of Rs. 8,00,000/- for each of the five bills of entry and impose a penalty of Rs. 80,000/- on each of the five consignments. If the importer desires to clear the goods he should do so within 15 days of the receipt of the order on payment of duties and fine and penalties as imposed above'.

3. In his said order, the Additional Collector has not given any calculation as to how the redemption fine was imposed in respect of the second consignment.

4. It appears that on 18th June, 1993 the Collector of Customs exercised his power under Section 129B(2) of the [Customs Act, 1962](#) for filing an application to the Collector (Appeals) in terms of Sub-section (4) of Section 129B. The said order by the Collector which is found in the records is as follows :-

'On examination of the above mentioned order in terms of Section 129D(2) of the Customs Act for the purpose of satisfying myself as to the legality and propriety of

imposing 100% (approx) fine in lieu of confiscation, I observe that redemption fine of Rs. 8,00,000/- (eight lakhs) under Section 125(1) of [Customs Act, 1962](#) on each of the consignments covered by the five bills of entry has been imposed due to inadvertence without ascertaining the actual margin of profit, which is the most important legal criteria for determining the quantum of fine under the aforesaid provision of the Act.

On the basis of market price prevailing on the date of adjudication, the margin of profit works out to 250% of c.i.f. value against 100% (approx.) taken by the Addl. Collector of Customs as a basis for imposition of fine.

In view of the foregoing, the quantum of fine imposed by Addl. Collector of Customs is not proper and legal. Hence I direct that an application be filed to the Collector (Appeals) in terms of Sub-section (4) of Section 129D of the [Customs Act, 1962](#) with prayer for enhancement of the fine in view of the aforesaid grounds. He should also seek stay of operation of the said adjudication orders during the pendency of appeal.

I also authorise Addl. Collector (A) to file this application to Collector (Appeals) in terms of Sub-section (4) of Section 129D of the Customs Act.'

The said application was filed before the Collector (Appeals) on 22nd June, 1993. A Stay application was also filed. It is noted in the file by the Appraiser. Appeal Unit that the Collector (Appeals) has expressed 'his kind desire that he wants to hear the appeal in respect of stay application on tomorrow, the 23rd June, 1993'. A note was put up before the Collector (Appeals) wherein it has been noted that prayer for 'immediate grant of stay of due operation of the order and to enhance the quantum of redemption fine from 100% to 250% of the CIF value of the goods', be allowed. The file contains the following noting also : 'As far as interim stay order is concerned, the Collector (A) may like to pass an ex parte order of stay against the said adjudication of Additional Collector. The said order, on merits, may be quashed/set aside/upheld after hearing the appeal'. On that note the Collector (Appeals) made an order on 23rd June, 1993 as under :

'As prayed stay is granted to the operation of the order passed by the Additional Collector (Customs) with immediate effect'.

The order which was communicated to the appellant is as follows :-

'The Additional Collector of Customs, Appraising, Customs House, Calcutta, has filed an appeal under Section 129D(4) of the [Customs Act, 1962](#) against the adjudication order No. 33/93 dated 15-6-1993 seeking enhancement of quantum of redemption fine imposed by that impugned order, taking into consideration the criteria laid down under Section 125(1) *ibid*. The appellant has also submitted a petition in which grant of stay upon the operation of the impugned order pending disposal of the appeal, is sought for.

After careful considerations of the case, I find that there is sufficient force in the grounds of appeal as put forward by the appellant. As such, I grant stay of operation of the order number 33/93 dated 15-6-1993 appealed against; till the disposal of the appeal. The stay petition is accordingly allowed. The appeal proper shall be heard in due course'.

The appellant petitioner has challenged the aforesaid order passed by the Collector (Appeals) granting an *ex parte* ad interim order. He has also challenged the determination made by the Additional Collector by the order dated 15th June, 1993 imposing redemption fine of 100% of the CIF value.

5. The learned Single Judge by his order dated 28th June, 1993 observed that the Collector of Customs being already in seisin of the disputes between the parties. Accordingly the writ application was dismissed giving liberty to the appellant/writ petitioner to raise all points taken in the writ application before the Collector of Customs who must consider and dispose of the same by passing a reasoned order. Liberty was also reserved to the appellant to make an application before the Collector of Customs for release of the goods in question. The Collector of Customs will be at liberty to allow release of the subject consignment to the appellant subject to such security both as to mode and as to quantum the Collector of Customs may think fit.

6. This appeal has been preferred against the said order passed by the learned Trial Judge.

7. Mr. Somnath Chatterjee, learned Senior Advocate has contended that powers under Section 129D of the Customs Act cannot be exercised by the Collector without affording an opportunity of hearing to the importer. It is not an ordinary appeal. This power has to be exercised on objective consideration, upon hearing the party who may be aggrieved by such exercise of power.

8. Section 129D of the Act, so far as material for our purpose is set out hereunder :-

'Section 129D. Powers of Board or Collector of Customs to pass certain orders. -

(1) The Board may, of its own motion, call for and examine the record of any proceeding in which a Collector of Customs as an adjudicating authority has passed any decision or order under this Act for the purpose of satisfying itself as to the legality or propriety of any such decision or order and may, by order, direct such Collector to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by the Board in its order.

(2) The Collector of Customs may, of his own motion, call for and examine the record of any proceeding in which an adjudicating authority subordinate to him has passed any decision or order under this Act for the purpose of satisfying himself as to the legality or propriety of any such decision or order and may by order, direct such authority to supply to the Collector (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Collector of Customs in his order.

(3) No order shall be made under Sub-section (1) or Sub-section (2) after the expiry of one year from the date of the decision or order of the adjudicating authority.

(4) Where in pursuance of an order under Sub-section (1) or Sub-section (2), the adjudicating authority or any officer of customs authorised in this behalf by the

Collector of Customs, makes an application to the Appellate Tribunal or the Collector (Appeals) within a period of three months from the date of communication of the order under Sub-section (1) or Sub-section (2) to the adjudicating authority, such application shall be heard by the Appellate Tribunal or the Collector (Appeals), as the case may be, as if such application were an appeal made against the decision or order of the adjudicating authority and the provisions of this Act regarding appeals, including the provisions of Sub-section (1) of Section 129A shall, so far as may be, apply to such application.'

9. It will be evident from a plain reading of the said section that it is not an ordinary appeal. The Collector has to be satisfied as to the legality or propriety of any decision or order of an adjudicating authority subordinate to him. Thereupon he may direct such authority to make an application before the Collector (Appeals) for determination of such points arising out of the decision or order as may be specified by the Collector of Customs. Such application will be treated as an appeal made against the decision and order of the Adjudicating Authority. It appears to us that before the said power could be exercised a notice of hearing must be given to the party concerned as to why the matter should not be referred to the Collector (Appeals) for determination on the points and precisely for that reason we find in the record that a draft notice was prepared to that effect, but it was not sent to the importer. In the view we have taken, we need not express any final opinion on the construction of the provisions of Section 129D.

10. It appears from the order which has been passed by the Collector on 18th June, 1993 under Section 129D(2) that the Additional Collector whose order was sought to be challenged, determined the market price prevailing on the date of adjudication. In our view, the date of adjudication is not material. The date of importation is the crucial date for the purpose of assessment of the assessable value as well as for quantifying the redemption fine. The authorities, therefore, proceeded on a wrong premise which cannot be sustained having regard to the relevant provisions of the Act and the Rules.

11. There is another aspect of the matter. Section 125 provides for option to pay fine in lieu of confiscation. The proviso to Section 125 states that redemption fine

shall not exceed the market price of the goods confiscated less, in the case of imported goods, the duty chargeable thereon. This is the maximum penalty which can be levied. There is no warrant for the proposition that in every case the maximum redemption fine has to be imposed.

12. It appears from the records that on the basis of certain allegations made by the South Indian Importers' Association an attempt was made to enhance the CIF price on the basis of the price prevailing on the date of adjudication. The Additional Collector in his order dated 15th June, 1993 has not given any method or mode of calculation of the redemption fine. He had fixed redemption fine by a rule of thumb, whereas the Collector of Customs in his order dated 21st May, 1993 has given the details of the calculation. The basic idea behind Section 125 in imposing redemption fine is to minimise the profit that an importer can make by the unauthorised import. The redemption fine is imposed to mop up the profit to the maximum extent possible. In finding out the price and the percentage of profit, all relevant matters have to be taken into account which in fact had been taken into account by the Collector of Customs in his order dated 21st May, 1993. It has not been disputed that on the date of the importation on 19th May, 1993 the retail price of the subject goods was Rs. 87/- per kg. But the Additional Collector has not stated anywhere what was or could be the market price on that date. He proceeded on the basis of market price on the date of adjudication.

13. Having regard to the facts and circumstances of the case we are of the view that the order of the Additional Collector of Customs dated 15th June, 1993 cannot be sustained inasmuch as he has imposed redemption fine without giving any details as to how the quantum of fine has been arrived at. He also fell in error in taking the market price on the date of adjudication. Accordingly, the order dated 15th June, 1993 is set aside. Since the said order is set aside, subsequent action taken by the Collector under Section 129D(2) of the Act on the basis of the said order will not also survive and accordingly, the order dated 18th June, 1993 passed by the Collector for filing an application before the Collector (Appeals) is also set aside.

14. We, therefore, dispose of the application by the following order:-

(a) The Additional Collector shall adjudicate the matter afresh taking the retail price of the subject goods at Rs. 87/- on the date of importation i.e., on 19th May, 1993.

(b) The Additional Collector will give reasonable opportunities to the importer, the appellant, to produce such documents, papers, bills and vouchers that he may intend to rely in support of his contention as regards the expenditure incurred or any other relevant factors to be taken into account in fixing the quantum of redemption fine.

(c) The Additional Collector in imposing any redemption fine, shall take into account the order passed by the Collector of Customs on 21st May, 1993 being order No. 24 of 1993 in respect of another consignment imported by the appellant. He shall give details of the process of calculation by which he may come to his finding as regards the quantum of redemption fine. The Additional Collector shall pass a reasoned order after hearing the parties and after considering all the evidence within 3 weeks from date. If possible he shall pass the order within 2 weeks as the importer is suffering demurrage.

(d) If any documents are sought to be relied by the Customs Department, such documents shall be disclosed to the appellant so that the appellant can make submissions or produce any other documents in rebuttal.

15. In the event any of the parties is aggrieved by the order that may be passed, liberty is given to the parties to file supplementary affidavit challenging such order in the pending appeal.

The application is thus disposed of.

All parties to act on a signed copy of the dictated order on the usual undertaking.