

Ms. First Track Traders. Vs. the Commissioner of Customs and ors.

Ms. First Track Traders. Vs. the Commissioner of Customs and ors.

SooperKanoon Citation : sooperkanoon.com/925776

Court : Chennai

Decided On : Apr-26-2012

Judge : R. Banumathi; B. Rajendran, Jj.

Acts : [Customs Act 1962](#) - Section 108, 2(26), 111(d), 2(33), 111(M)

Appeal No. : Writ Appeal (MD) No.207 of 2012 and M.P.(MD) No.1 of 2012

Appellant : Ms. First Track Traders.

Respondent : The Commissioner of Customs and ors.

Advocate for Pet/Ap. : Ms.N.Viswanathan, Adv.

Judgement :

B. Rajendran, J

1. The Writ Appeal has been filed by the writ petitioner challenging the dismissal of the writ petition by order dated 01.03.2012.

2. According to the appellant, he is an importer and he has imported used materials which does not require licence . Therefore, the insistence of the department in asking for the licence and levying penalty does not arise. The facts of the case are as follows:

2.1. The appellant Concern has been engaged in the import and trading of digital multifunction printing and copying machines as also the photocopier machines and

its accessories, parts and consumables. During the course of its business, it has imported a consignment comprising of 104 units of old and used Digital Multifunction Printing and Copying Machines of various models and 10 units of old and used photocopying machines from the overseas supplier viz. M/s. Jade Group Ltd. (Br) Sharjah, UAE, covered by Invoice No.5113 dated 07.04.2011 for a total CIF value of USD 24750 and filed the above stated Bill of Entry bearing No.3394138 as early as on 03.05.2011 with the assessment group concerned at the Tuticorin Custom House and sought the clearance of the same. Even though a Bill of entry was filed by the appellant herein for the clearance of the impugned goods as early as on 03.05.11, the respondents have not assessed the subject bills of entry. A Chartered Engineer, by name Er. P.Senthoo Pandian, Tuticorin, examined the goods and had given his report dated 09.05.2011, confirming to the description of the goods as found in the invoice filed by the appellant herein and valued the goods marginally higher than the one declared by the appellant herein, before the Customs and no diligent steps were initiated by the respondents herein to assess and clear the goods at an early date in terms of the provisions contained in the Customs Act, and the regulations made thereunder, overlooking the circular no.42/2001 issued by CBEC, New Delhi, providing for speedy clearance of goods imported. In the meantime, the Directorate of Revenue Intelligence, the 3rd respondent herein, took up investigation in the matter against the appellant concern, concerning the import of subject goods. He was also summoned by the Directorate of Revenue Intelligence, and a statement under Section 108 of the Customs Act was recorded from him, which was exculpatory in nature. While so, the third respondent arranged for a invoice of higher value, for which, the appellant sent a notice through his advocate. The appellant contends that once the chartered engineer report has been obtained, there cannot be any impediment for the respondent department to get the goods assessed and cleared on payment of appropriate duty. But, the same has not been done by the respondent department for certain extraneous and irrelevant considerations. Hence, the appellant is before this Court. Whereas, the Revenue Department's contention is that as per Section 2(26) of the Customs Act, 1962, importer in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner or any person holding himself out to be the

importer. In the present case, he himself denied his ownership of the goods before the statutory authority by making a statement and he has not retracted the statement given before the Investigating Officer under Section 108 of the Customs Act, 1962. Therefore, he is not entitled to get the goods in question. Further, in as much as the imported goods are attempted to be cleared by undervaluing and also without valid import licence the said goods are liable for confiscation under Section 111(d) and 111(m) of the Customs Act, 1952.

3. The appellant aggrieved by the order of the learned Single Judge mainly on the ground that an importer need not be the owner of the goods, has come forward with this writ appeal. No doubt, he has stated in the enquiry before the authorities under Section 108 of the Customs Act, 1962, that the person who financed for the purchase of the goods who is at Dubai. Whereas, as per the bill of lading everything has been purchased by him in respect of the articles which does not require licence . Therefore, the insistence of the authorities to clear the goods without document is legally not sustainable. According to him, even the alleged confession statement given by the appellant before the authorities concerned under Section 108 of the Customs Act also has been retracted though not by himself but by the legal notice of the Advocate. Under these circumstances, the reliance of the authorities that he has disowned the articles cannot be emphasised. The allegations of the appellant is that he is engaged in import and export trading in second hand digital multifunction printing and copying machine as also the second hand copier machines and its accessories and parts and consumables. According to him, the appellant also was provided with the Importer and Exporter Code viz., I.E.C. issued by the Office of the Zonal JDGFT, Chennai. He has imported a consignment comprised of 104 units of old & used Digital Multifunction Printing and Copying Machines of various models and 10 units of old and used second hand photocopying machines from the overseas supplier viz. M/s. Jade Group Ltd. (Br) Sharjah, UAE, covered by Invoice No.5113 dated 07.04.2011 for a total CIF value of USD 24750.

4. According to the respondents, even in the counter affidavit, they have categorically stated as per the report of the Chartered Engineer valuer who has assessed the value of the goods imported, there were two types of photocopier

machines in the said consignment. (It is admitted by the petitioner.) There were 104 numbers of multifunction (print and copying) machines and 10 numbers of photocopier machines. There are two types of classifications involved. The multifunctional (print and copying) machines are classifiable under Chapter Heading No.84433100 and the Photocopier machines are classifiable under Chapter Heading No.84433920 or 84433930. The importer through the CHA classified all the machines under 8443920 which related to photocopier machines which requires import licence . Therefore, to ascertain these, the appellant was called for enquiry under Section 108 of the Customs Act and he has categorically stated that he has not received the invoice, packing list from the said Mohamad Hasan, and he has not arranged CHA for filing the Bill of Entry; that Shri Mohamad Hasan has engaged his relative/friends for the customs documentation and he was totally unaware of the import consignment and documents; that he contacted Shri Mohammad Hasan and informed his intention to appear before the investigating officer; that he also informed his intention that he would disown the consignment; that Shri Mohamed Hasan promised to come to India to appear before the investigating officers of Customs; that except giving IEC, he has no connection with this import consignment. Therefore, even according to the petitioner, the original importer Shri.Mohamed Hasan, who has failed to appear before the Investigating Officer either to claim ownership or to produce the necessary licence to prove the nature of imported goods. The appellant has also not retracted the statement. Therefore, according to the department, the goods are to be treated as abandoned and to be dealt with accordingly. Therefore, they would mainly contend that the goods are not to be assessed in the name of a person who totally denied the ownership of the goods. Inasmuch as the imported goods are attempted to be cleared by undervaluing and also without valid import licence , as he has classified different items of goods as one item, it is liable to be confiscated under Section 111(d) and 111(m) of the Customs Act, 1962.

5. Though the appellant has argued that Section 2 (26) of the Customs Act, 1962, not only recognizes the owner as an importer, but also any person holding himself to be such importer. Even as per the decision cited by the appellant reported in 1992 (58) E.L.T. 163 (S.C.), (UOI Vs Sampat Raj Dugar) in paragraph 19 it has been held that since the second respondent did not pay for and receive the

documents of the title she did not become the owner of the said goods, which means that the first respondent continued to be the owner. How do the aforesaid provisions make any difference to this position? The definition of 'importer' in Section 2(26) of the Customs Act is not really relevant to the question of title. It only defines the expression 'importer'. The first respondent, does not claim to be the importer. The provision upon which strong reliance is placed by the appellants in this behalf is the one contained in Clause 5(3) (ii) of the imports (Control) Order. Sub-clause (1) of Clause 5 specifies conditions which can be attached to an import licence at the time of its grant. Sub-clause (2) says that a licence granted under the Order shall be subject to the conditions specified in Fifth Schedule to the Order. Sub-clause (3) sets out three other conditions mentioned as (i), (ii) and (iii) which shall attach to every¹ import licence granted under the Order. In the same ruling it was also stated as under:

It shall be deemed to be a condition of every such licence that - the goods for the import of which a licence is granted shall be the property of the licence e at the time of import and thereafter up to the time of clearance through Customs.

The idea is to hold the licence e responsible for anything and everything that happens from the time of import till they are cleared through Customs. The exporter is outside the country, while the importer, i.e., the licence e is in India. It is at the instance of the licence e that the goods are imported into this country.

Finally, it concluded as follows:

It cannot be employed to attribute ownership of the imported goods to the importer even in a case where he abandons them, that is, in a situation where he does not pay for and receive the documents of title. It may be that for such act of abandonment, action may be taken against him for suspension/cancellation of licence . May be, some other proceedings can also be taken against him. But certainly he cannot be treated as the owner of the goods even in such a case. Holding otherwise would place the exporter in a very difficult position; he loses the goods without receiving the payment and his only remedy is to sue the importer for the price of goods and for such damage as he may have suffered. This would not be conducive to international trade. We can well imagine situations where for one

or other reason, an importer chooses or fails to pay for and take delivery of the imported goods. He just abandons them. (We may reiterate that we are speaking of a case where the import is not contrary to law). It is only with such a situation that we are concerned in this case and our decision is also confined only to such a situation. Condition (ii) in sub- clause (3) of Clause 5, in our opinion, does not operate to deprive the exporter of his title to said goods in such a situation.

6. From a reading of this very judgment itself it is very clear that here is a case where the appellant who claims to be the importer abandoned the goods to suit his convenience and does not choose to identify the actual importer. The actual importer does not appear before the authorities and he also does not claim. Under those circumstances, the interpretation as claimed by the appellant as stated that he is an importer cannot be accepted especially, when the Hon'ble Supreme Court has categorically held that such a situation will arise to many when they abandon the goods.

7. Similarly, in the judgment cited by the respondent, which is also extracted in the judgment of the learned Single Judge viz., 2003 (155) E.L.T.423, Om Prakash Bhatia Vs. Commissioner of Customs, Delhi, when import is permissible on satisfaction of certain conditions, the violation of the same will make the goods imported as prohibited goods within the meaning of Section 2(33) of the Act, which reads as follows:-

2(33) ' Prohibited goods' means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with.

After hearing both sides and after considering the statutory provisions, we do not think that appellant, as a matter of right, can claim release of the goods on payment of redemption fine and duty. Even though gold as such is not a prohibited item and can be imported, such import is subject to lot of restrictions including the necessity to declare the goods on arrival at the Customs Station and make payment of duty at the rate prescribed. There is no needs for us in this case to

consider the conditions on which import is permissible and whether the conditions are satisfied because the appellant attempted to smuggle out the goods by concealing the same in emergency light, mixie, grinder and care horns etc., and hence the goods so brought is prohibitory goods as there is clear violation of the statutory provisions for the normal import of gold.

8. Here is the case where the appellant declares that it is one particular type whereas in the inspection it was found that it is not the same and it is two different types of consignment imported. One can be imported without licence and another has to be imported only with the licence and in the inspection they found that he has chosen to give a false declaration. Therefore, when the condition is violated the authorities definitely can have the recourse under law.

9. Yet another argument was made by the appellant that on the ground when his declared value of the goods and the value assessed by the departmental Engineer was of very marginal difference it is not open for the department to fix a higher value of Rs.1,00,00,000/- and seek to levy a huge amount of duty. This argument also will not be open to the appellant admittedly when there are two types of goods the value has to be fixed by the department independently and here they have themselves stated that it will be reassessed in the light of the finding of two different materials. Therefore, if at all he has to go only before the authorities and definitely the authorities can refix the value since they cannot assess the liability on the person who has disowned the ownership. As it is rightly stated the goods are attempted to be cleared by undervaluing and also without valid import licence the said goods are liable for confiscation under Section 111(d) and 111(m) of the Customs Act, 1952. It is rightly pointed out by the learned Single Judge that the appellant's statement is that he has only IEC and has no connection with the imported consignment as in the manner known to law and as rightly pointed out that settled legal position under Section 108 of the Act, the appellant's claim for assessment or provisional assessment cannot be considered. Therefore, the learned Single Judge has rightly held that a person is unable to establish the ownership of the goods the respondent is vested with the power to reject the claim of the appellant and ultimately, correctly held that it is for the appellant to go before the authorities concerned after retracting confession and take all necessary steps

to prove that he is the person holding out to be an importer and rightly stated if the appellant proves his ownership by retracting the statement before the authorities concerned, if he is able to establish his right as a person holding out to be an importer, he can go before the authorities concerned for assessing the consignment and release of his goods. It is needless to say, the burden is on the appellant to prove his ownership and release the goods as required by law. Therefore, We do not find any reason to set aside the reasoned order passed by the learned Single Judge. Hence, the writ appeal is dismissed. Consequently, connected miscellaneous petition is closed. No costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com