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Court : Delhi

Decided On : Jul-02-2012

Judge : V.K. Shali

Appeal No. : W.P. (Criminal) No. 985 of 2004 & Criminal M.A. Nos. 6405-6406 of 2004

Appellant : Dinesh Aggarwal and Another

Respondent : Dri

Judgement :

V.K. Shali, J.

1. This is a writ petition under Article 226/227 of the Constitution of India read with Section 482 Cr.P.C. seeking quashing of the Criminal Complaint No.25/1/03 titled V.P. Sharma, Intelligence Officer, DRI vs. M/s. Siddhartha Polymers Ltd. (now known as Siddharth Asia Ltd.) and Ors., under Sections 132 and 135 (1) (a) of the Customs Act, 1962.

2. Briefly stated, the facts of the case are that pursuant to the general investigation carried out by the DRI against the import of Poly Carbonate Sheets (PC Sheets) under Open General License into India being imported by various importers, a raid was conducted on the petitioners. After conducting the raid, a show cause notice was issued against the petitioners on 31.3.2003 in substance alleging that they had mis-declared the goods inasmuch as the importer, namely, the petitioners had

stated on 1.2.2003 that the PC Sheets imported by them were made by extraction process of scrap indicating that the declaration made by them to the Customs was false, that is, the Sheets are made of de-generated scrap, while as they were prepared from fresh polymer of high resin. The second allegation against them was that the international/domestic price of the raw material, that is, polycarbonate resin required to manufacture the imported PC Sheets is more than the declared price of the finished product at the time of its import. Thus, on the basis of these allegations, a show cause notice was issued to which reply was filed by the petitioners. On not being satisfied, the respondent initiated the departmental proceedings of adjudication against the petitioners and filed a complaint against the petitioners under Sections 132 and 135 (1) (a) of the Customs Act, 1962, for mis-declaring the description of imported goods at the time of import and thus, sought their prosecution for various offences under the Customs Act.

3. The petitioners have challenged the said proceedings on the ground that no mis-declaration has been made by them as alleged by the Department and have alleged that the documents which are required for the clearance of goods from the Customs, namely, Bill of Entry, Invoice, Packing Lists and Bill of Lading, clearly showed that the goods declared by the petitioners were PC Sheets and cleared as such. It is also alleged by the petitioners that the respondent, before the High Court of Punjab and Haryana had filed an affidavit in a writ petition filed by the present petitioners wherein they have specifically admitted that they did not suspect the petitioners of mis-declaration of the description of the goods imported by them. On the basis of these allegations, the petitioners prayed for quashing of the complaint and the subsequent proceedings. W.P.

4. During the pendency of the present proceedings, the trial of the criminal complaint against the petitioners was stayed. A new development has taken place, namely, that there has been an adjudication of the departmental proceedings in favour of the petitioners. This final order was passed by the Department on 4.11.2011, holding on merits, that there was no mis-declaration of the imported goods or/and there was no under-valuation of the goods, as alleged by the respondent/DRI. Against the aforesaid order, the Department had not preferred any appeal in the High Court or the Supreme Court. This is despite the fact that

the respondent was given adequate time to obtain instructions as to whether it has appealed against the Tribunal's order or not. Since no concrete information was furnished, the arguments in the main writ were heard and the orders were reserved.

5. The main contention of the learned counsel for the petitioner Mr. Pradeep Jain has been that the petitioners having been exonerated of the allegations of mis-declaration and the under-valuation in respect of the goods imported by them, thus, there was a gross abuse of the processes of law to continue with the criminal complaint against the petitioners for the offence of mis-declaration punishable under Section 132 read with Section 135 (1) (a) of the Customs Act, 1962, inasmuch as this is a finding of fact returned by the competent Tribunal. It was also contended that the said finding of fact has become final as despite the expiry of more than eight months, no appeal or any other proceeding assailing the said order has been filed by the respondent and thereby, the said adjudication has attained finality. Having attained finality, the learned counsel Mr. Jain contended that the Supreme Court in RadheShyam Kejriwal vs. State of West Bengal and Anr.; (2011) 3 SCC 581 has categorically laid down the parameters where a party has been exonerated in the departmental adjudication proceedings on the basis of certain facts and in case, the criminal prosecution of the same party is being conducted by the Department on the same set of facts then, it tantamounts to gross abuse of the processes of law and, therefore, the criminal proceedings are liable to be quashed. This reasoning, the learned counsel contended, has been arrived at by the Apex Court by a majority view on the basis of the fact that in the adjudication proceedings, the quantum of proof, which is required, is only by a preponderance of probabilities while as in a criminal trial, the quantum of proof, which is required to prove the guilt of the accused persons, is beyond reasonable doubt and thus, the quantum of proof, required in a criminal trial, being much higher, it is next to impossible for the Department to establish that the petitioners are liable to be prosecuted and much less to be convicted for the said offence. Accordingly, it has been contended that the continuance of the proceedings against the petitioners is a gross abuse of the process of law and deserves to be quashed.

6. No arguments were addressed on behalf of the respondent. However, after the judgment was reserved by this court, the learned counsel for the respondent has filed an application under Section 482 Cr.P.C. It has been stated in the said application that since the Department is in the process of filing an appeal against the order of the CESTAT passed in Writ Petition M.C. No.620 of 2012, filed by M/s. Mono Acrylic Manufacturing Company Pvt. Ltd. and Ors. Vs. Union of India and Ors., therefore, the order dated 4.11.2011 has not attained finality and the filing of the present writ petition is pre-mature, at this stage. This matter was posted for directions on the basis of the application. But even on the date of direction, no categorical statement has been made that the appeal has been filed, therefore, in my view, filing of this application does not help the respondent in any manner.

7. I have heard the learned counsel for the Department as well as the learned counsel for the petitioners. I am of the view that the application which has been filed by the respondent is a gross abuse of the processes of law. It is very unfortunate that on the one hand, the respondent do not take timely actions against the orders passed by CESTAT, yet they want to ensure that this court is not able to decide the matter on the basis of the facts. Despite having given ample opportunities by this Court to the respondent to obtain instructions or even for that matter to file the appeal before the appropriate appellate forum, it has not been able to disclose any concrete action and tried to create a hindrance in the expeditious disposal of the writ petition and want the matter to be hanging. This writ petition is pending in court for the last more than eight years and the proceedings of the learned trial court had remained stayed during all these years and if the trial of the criminal complaint has to remain stayed for such a long time without any finality, the trial itself, assuming it has to continue, will take at least a decade to get disposed of. I, therefore, deprecate this kind of attitude on behalf of the Department or its counsel, whereby they have tried to prolong the disposal of the present case.

8. Coming back to the legal position with regard to the adjudication of departmental proceedings and its consequences on the criminal trial, the Apex Court in RadheShyam Kejriwal’s case (supra) has by majority, after doing

extensive examination of all the judgments including the judgments which held slightly a different opinion in Standard Chartered Bank vs. Directorate of Enforcement; (2006) 4 SCC 278, Collector of Customs vs. L.R. Melwani; AIR 1970 SC 962, Uttam Chand vs. ITO; (1982) 2 SCC 543, G.L. Didwania vs. ITO; 1995 Supp. (2) SCC 724 and K.C. Builders vs. CIT; (2004) 2 SCC 731, has taken a definite view and culled out the principles which the courts must follow, in case there is a challenge laid to the continuance of the criminal complaint or a trial, in a case where simultaneously departmental adjudication proceedings are also started. These principles are as under :-

“(i) Adjudication proceeding and criminal prosecution can be launched simultaneously;

(ii) Decision in adjudication proceeding is not necessary before initiating criminal prosecution;

(iii) Adjudication proceeding and criminal proceeding are independent in nature to each other;

(iv) The finding against the person facing prosecution in the adjudication proceeding is not binding on the proceeding for criminal prosecution;

(v) Adjudication proceeding by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20 (2) of the Constitution or Section 300 of the Code of Criminal Procedure;

(vi) The finding in the adjudication proceeding in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceedings is on technical ground and not on merit, prosecution may continue; and

(vii) In case of exoneration, however, on merits where allegation is found to be not sustainable at all and person held innocent, criminal prosecution on the same set of facts and circumstances can not be allowed to continue underlying principle being the higher standard of proof in criminal cases.”

9. A perusal of the aforesaid principles would clearly show that although there is no automatic closure or quashing of the criminal complaint, in the event, there is a favourable verdict in the departmental or the adjudicatory proceedings in favour of an accused but in case the adjudicatory proceedings culminate into a favourable order in favour of the accused on merits and the criminal complaint is in sum and substance based on the same facts then, obviously the Apex Court has observed that it would be a gross abuse of the processes of law to continue with the criminal complaint. The reasoning, which has been given by the Apex Court, for this view, is not far to seek. It has been observed by the Apex Court that in the adjudicatory proceedings, the quantum of proof which is required for proving the charge or the adjudication against the offending party is by preponderance of probability, that is, a very minor degree of proof is required to establish the allegations against the party concerned. As against, in a criminal trial, where the quantum of proof, which the complainant has to adduce, is beyond reasonable doubt or what we call that the guilt of the accused has to be proved to the hilt, therefore, there is a marked difference in the quantum of proof required in an adjudication proceedings in contrast to a criminal proceeding. Drawing the analogy from the same, in case, the factual matrix in the adjudication proceedings and in the criminal complaint are the same and if the department has not been able to proved by preponderance of probability, the charge or the allegation against the petitioners, it is unthinkable to visualize a situation where they will be able to muster evidence to prove the same charge before a criminal court by a higher degree of proof. In the adjudication proceedings, the two charges which were levelled against the petitioners in the instant case were of mis-declaration and under-valuation. It will be worthwhile to reproduce here as to what the CESTAT Tribunal had to say about the said charges or the allegations levelled against the petitioners.

“41. The Revenue has relied heavily on the fact that prior to March, 1999 the importers had described their goods as “off spec” or “stock lot” polycarbonate sheet while in the Bills of Entry under which the goods in dispute have been imported, the goods have only been described as per Customs Tariff Heading 392061, to support its contention that goods have been misdeclared. However, the tariff heading covers all kinds of polycarbonate sheets whether made out of virgin polymer or out of recycled/regenerated material and therefore non-mention of

sheets being made out of recycled/regenerated material cannot be held to amount to mis-declaration. The contention of the Revenue is that the polycarbonate sheets were not only opal white in colour but also translucent with proper light emission and fit for use in signage and advertising industry as per the statement of the importer and that this fact would establish that what was imported was polycarbonate sheets made out of virgin polymer, as polycarbonate sheets manufactured out of scrap or recycled material were generally dark or black in colour. On the other hand, I note after going though the statement of Shri Dinesh Agrawal, Director of Siddharth Polymers Ltd. and Shri Anand Bhandari, his consignment agent, that they have nowhere stated that the goods were translucent. The submission that polycarbonate sheets manufactured out of scrap or recycled material are generally dark and find use in opaque applications is based only upon the statement of M/s. M.H. Polymers who, as already noted earlier, is a domestic manufacturer and a competitor of the appellants. The further contention that percentage of the recycled material generated is only 5 to 10% of the total raw material and therefore the volume of polycarbonate sheets imported cannot be justified as being manufactured out of scrap or remains of polycarbonate sheets is again based upon the statement of local manufacturers and cannot be accepted as conclusive.

42. No enquiries have been made by the department from the actual user of these sheets in India. On the other hand, samples were shown to the adjudicating authority to establish that the sheets imported are used as a supporting base and are not “glow signed”.

In some cases, advertising material is put on transparent/translucent polycarbonate sheets and the backlit makes the materials glow. In other cases, advertising material is put on opal white polycarbonate sheets which are not transparent/translucent and the material is highlighted when light falls on it from the front. The appellants have been able to show that the imported sheets are of the latter type while evidence of the department is about the former type of polycarbonate sheets.

43. To clinch the matter, I note that in the counter-affidavit filed before the Hon'ble Punjab and Haryana High Court at Chandigarh in the writ petition filed by the importers for release of the goods, the Revenue has clearly stated that M/s. Siddharth has not been suspected of misdeclaration of the goods as they have not declared it to be made out of scrap.

44. In the light of above, I agree with learned Member (Technical) that the finding of the Commissioner that the imported polycarbonate sheets are not made out of recycled polycarbonates is not sustainable.

45. As regards valuation, I find that the charge of undervaluation of goods depends upon the finding as to whether the goods have been misdeclared or not. I have already concurred with the finding of learned Member (Technical) that the goods have not been misdeclared. However, without stopping here, I am going into the question of alleged undervaluation. I find that the learned Member (Technical) has recorded a detailed finding on valuation and then come to the conclusion that there is no merit in the contention of the Revenue that appellants have misdeclared the values of the goods. The goods were cleared after proper examination and, in fact, the value was loaded in the case of M/s. Gayatri Exports from US$ 600 per MT to US$ 1040 per MT meaning thereby that the sample was made at par with the contemporaneous value of sheets imported by other three appellants. Such assessment was not challenged by the department. The Revenue has relied upon the fact that contemporaneous prices of polycarbonate sheets imported through different ports into India suggested a higher price of virgin polymer carbonate sheets, contrary to the declared price of the importers. However, these prices are not relevant in view of the finding that the goods in question are not made out of virgin polymer but out of reprocessed or regenerated resin. Further, the Bills of Entry are for import of clear sheets, compact embossed polycarbonate sheets, multi walled polycarbonate sheets and poly gala sheet. It cannot be disputed that polycarbonate sheets have different applications - clear sheets are used for optical purposes; some sheets have bullet proof applications. Polycarbonate sheets are of several varieties and Customs Tariff Heading 392061 covers all types of polycarbonate sheets. In this view of the matter, no reliance can be placed on the Bills of Entry relied upon by the Revenue. On the other hand, the

appellants have submitted evidence of contemporaneous import at similar price by M/s. Subam Traders and no show cause notice had been issued to them alleging undervaluation. In contrast to the order recorded by learned Member (Technical), on both issues, namely misdeclaration of description and misdeclaration of value, learned Member (Judicial) has given his finding only on the question of misdeclaration of goods. He has come to the conclusion, by necessary implication, that the evidence on record is not enough to give a definite finding on mis-description of imported goods and it is for this reason that he has directed the adjudicating authority to collect samples of virgin material or “Hi-Tech” brand and “Polyglas” brand polycarbonate sheet from Korean manufacturers or “any other authentic source known to law”. His direction of limited remand is contrary to the direction of the apex court to consider de novo two questions, namely (1) mis-description and (2) undervaluation of goods and give a finding thereon. The direction of limited remand for collecting samples would also amount to going beyond the scope of the SCN. Further, the direction of limited remand would be impractical to follow. If it was possible for the Revenue to collect the desired samples from the Korean manufacturers, they would have done it through Consulate General of India in Hong Kong. It is also not clear as what are the other authentic sources known to law and therefore this is a vague direction which is not capable of being implemented. The Chemical Examiner of CIPET Bhopal and CIPET Amritsar have not been cross-examined by the Revenue, which they could have done if so desired, and therefore the direction in the order of the learned Member (Judicial) for Revenue to cross-examine these Chemical Examiners amounts to giving an opportunity to the Revenue which was never asked for by them. Ld. Member (Judicial) has also advised adjudicating authority to take advantage of the detailed discussion on valuation by learned Member (Technical), without recording any independent finding on the valuation issue. Ld. JCDR has also not put forth any plea in support of the order recorded by learned Member (Judicial).

46. In the light of the above discussion, I agree with the order recorded by learned Member (Technical).

The papers are now returned to the original bench for recording majority order.

sd/-

(JYOTI BALASUNDARAM)

Vice President

47. In view of the decision of the majority, the appeals are allowed.

sd/-

(D.N. PANDA) JUDICIAL MEMBER

sd/-

(Rakesh Kumar)

Member (Technical)”

10. A perusal of the aforesaid observations would show that by a majority of 2:1, if the allegations of mis-declaration and under-valued declaration has not been established against the petitioners, I fail to understand as to how the Department would be able to establish the said charge against the petitioners beyond reasonable doubt in a criminal trial except that the trial itself would continue, evidence would be adduced and it will be a futile exercise of wasting time, energy and resources of the court apart from subjecting the accused to a great deal of mental and physical harassment. I feel that it would be tantamounting to flogging only a dead horse, which the Department feels pride in. I, therefore, do not agree with the view taken by the Department that mere contemplation by them now to assail the order dated 4.11.2011 before the Apex Court or any other appellate forum where they have a right to do so, should result in deferring the decision in the present petition. That would be adding insult to the injury and prolonging the agony of not only the accused but also resulting in dilatory tactics on the part of the respondent. I feel that the petitioners have been able to make out a case where the facts of the present case are squarely covered by RadheShyam Kejriwal’s case (supra) inasmuch as having been exonerated in the departmental adjudicatory proceedings regarding both the allegations of mis-declaration and under-valuation, there is no point in continuing with the criminal trial as it is

resulting in abuse of the process of law.

11. Accordingly, Criminal Complaint No.25/1/03 titled V.P. Sharma, Intelligence Officer, DRI vs. M/s. Siddhartha Polymers Ltd. (now known as Siddharth Asia Ltd.) and Ors., under Sections 132 and 135 (1) (a) of the Customs Act, 1962, and the consequent proceedings against the petitioners stand quashed.

12. In view of the aforesaid, the writ petition is allowed and all the pending applications stand disposed of.