CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL ALLAHABAD

REGIONAL BENCH - COURT No. I

Customs Miscellaneous Application No.70471 of 2019
(On behalf of Appellant)
In
Customs Appeal No.70554 of 2019

(Arising out of Order-in-Appeal No.15-CUS/APPL/LKO/2019 dated 21/01/2019 passed by Commissioner (Appeals) Customs, GST & Central Excise, Lucknow)

Mohd Imran, **.....Appellant**

(S/o Shri Mohd. Sultan

R/o 385/54, Faizil Nagar-226003, U.P.)

VERSUS

Additional Commissioner,

Customs (Preventive) Lucknow **....Respondent**

(5th Floor, Kendriya Bhawan, Sector-H, Aliganj, Lucknow)

APPEARANCE:

Shri Nishant Mishra, Advocate & Shri Vaibhav Krishna, Advocate for the Appellant
Shri B. K. Jain, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

MISCELLANEOUS ORDER NO. - 70090 / 2020

FINAL ORDER NO. - 70240 / 2020

Date of Hearing : 27 February, 2020
Date of Decision : 27 February, 2020

PER: ANIL G. SHAKKARWAR

Heard on Miscellaneous Application. The said Miscellaneous Application is filed in Customs Appeal No. 70554/2019. The said appeal is directed against Order-in-Appeal No.15-CUS/APPL/LKO/2019 dated 21/01/2019 passed by Commissioner (Appeals) of Customs, GST & Central Excise, Lucknow. Through the said Miscellaneous Application appellant has brought to the notice to this Tribunal that the goods impugned in the present case i.e. 1235 grams of gold valued at Rs.36,55,600/- at the time of seizure dated 10/07/2017 were sold by Revenue to State Bank of India and the said disposal of gold was informed to the appellant on 08/07/2019 and in respect of such disposal of gold during the period allowed by law to the appellant to file appeal before learned Commissioner (Appeals) the appellant filed Writ Petition No.21783 (M/B) of 2019 before Hon'ble Allahabad High Court and Lucknow Bench of Hon'ble Allahabad High Court through its order dated 08/08/2019 passed following directions:-

> *"6. We are of the considered opinion that because on related issue cross appeals are pending and the issue of confiscation and other related issues would be adjudicated by the Appellate Authority viz. CESTAT constituted for Allahabad region, it would be appropriate that the petitioner makes all prayers before the said authority. Any order passed by the writ Court in this regard is likely to reflect on the jurisdiction of CESTAT.*
>
> *7. The petition is disposed of with liberty to the petitioner to file an application before Customs Excise & Service Tax Appellate Tribunal Allahabad."*

So in terms of the said direction the appellant has filed the present application.

2. During the hearing of the said Application both the sides agreed that for proper appropriation of the issue main appeal needs to be heard. Therefore the main appeal was heard.

3. Brief facts of the case are that the appellant was travelling from Abu Dhabi to Lucknow by Jet Flight No.9W-511 and landed at Lucknow Airport on 10/07/2017. Revenue recovered 1235 grams of gold concealing in the frame pipe of trolley bags carried by the appellant. The said bag was recovered on account of

scanning of the said trolley through X-Ray machines. The appellant had not declared that he was carrying said gold in disembarkation slips therefore the seizure was effected. The appellant was issued with a show cause notice dated 08/01/2018 with proposal to confiscate gold and imposition of penalty on the appellant. The said show cause notice was adjudicated through Order-in-Original dated 13/09/2018. The Original Authority ordered absolute confiscation of 1235 grams of gold valued at Rs.36,55,600/- under Section 111 Customs Act of 1962 and imposed penalty of Rs.2.50 lakhs under Section 112 (b) and Rs.25,000/- under Section 114AA of Customs Act, 1962. Aggrieved by the said order appellant preferred appeal before Commissioner (Appeals). Learned Commissioner (Appeals) through impugned Order-in-Appeal has set aside absolute confiscation and allowed redemption of said quantity of gold on payment of redemption fine of Rs.7.50 lakhs and set aside penalty imposed under Section 114AA of Customs Act, 1962. Aggrieved by the said order both Revenue and appellant have filed appeal before this Tribunal. The appeal filed by Revenue was Bearing No.70117/2019 and the same was dismissed by this Tribunal under Litigation Policy through Final Order No.71214/2019 dated 28/06/2019.

4. Heard Shri Nishant Mishra learned counsel for the appellant alongwith Shri Vaibhav Krishna learned counsel on behalf of appellant. Shri Nishant Mishra has submitted that the issue that was raised before the Hon'ble High Court was that the entire amount of sale proceeds of goods i.e. gold should be refunded to the appellant without imposition of redemption fine applicable duties and penalties imposed on the appellant. In view of the fact that during the pendency of limitation period of filing of appeal before learned Commissioner (Appeals) Revenue had sold the impugned goods and that the Hon'ble Allahabad High Court has not passed any order on merits and therefore that issue is subject matter of this appeal. He submitted that appellant had filed Application under Right to Information Act,

2005 and was informed under the said Act through letter dated 08/07/2019 by Central Public Information Officer/ Deputy Commissioner of Customs (Prev.) Division Lucknow working under Customs Preventive Lucknow that the seized gold of 1235 grams was deposited by them in New Customs House New Delhi on 27/09/2018 and the gold in question was sold to State Bank of India by New Customs House New Delhi for Rs.38,62,524/-. He has submitted that learned Commissioner (Appeals) has allowed redemption of gold on payment of redemption fine of Rs.7.50 lakhs and penalty of Rs.2.50 lakhs and they have challenged both imposition of penalty and imposition of redemption fine through this appeal and that the gold is not available for redemption therefore the question of payment of redemption fine and duty has become redundant. He has relied on ruling of Hon'ble Supreme Court in the case of Shilps Impex vs. Union of India reported as 2002 (140) E.L.T. 3 (S.C.). He has submitted that the said decision was dated 18/01/2002 and the said decision was an interim order further finalized on 05/04/2002 and 12/04/2002 in the said SLP (Civil) 6558/2001. He further stated that the law is laid down by Hon'ble Supreme Court that when the goods are not available for redemption then Revenue has to refund the entire sale proceeds and also refund Customs duty paid and redemption fine paid. He has submitted that in the present case they have not paid Customs duty nor paid redemption fine so far since the issue is still under litigation. However, he has submitted that since the goods are not available the ruling by Hon'ble Supreme Court in the case of Shilps Impex should be applied and he should not be insisted upon to pay redemption fine and duty and sale proceeds may be refunded to him. Further learned counsel for the appellant has submitted that maximum penalty under Section 112(b) is 10% of the amount of duty evaded. Such amount works out to Rs.1,33,429/- and penalty imposed is Rs.2,50,000/- which is beyond statutory provisions.

5. Heard Shri B. K. Jain learned Assistant Commissioner on behalf of respondent. He has submitted that under Section 125 of Customs Act envisages upon option to pay fine *in lieu* of confiscation as Commissioner (Appeals) has ordered for redemption fine *in lieu* of confiscation under Section 125 of the Customs Act the same should be applied in this case. In the case of Yakub Ibrahim Yusuf vs. CC, Mumbai reported as 2011 (263) E.L.T. 685 (Tri.-Mum.) it is held at Para-5.7 that "In the result, as direct to Department to return the entire sale proceeds after deducting there from, the fine and penalty." So it is prayed that the sale proceeds may be returned to the appellant after deducting redemption fine and penalty.

6. At this stage learned counsel for the appellant has submitted that ruling of Hon'ble Supreme Court in the case of Shilps Impex supra was relied on and followed by Hon'ble Delhi High Court in the case of Kailash Ribbon Factory Ltd. vs. Customs & Central Excise, New Delhi reported as 2002 (143) E.L.T. 0060 (Del.). He has submitted that in Para-11 of the ruling by Hon'ble Delhi High Court in the case of Kailash Ribbon Factory Ltd. supra it was directed to Revenue to refund the amount of Rs.26,28,904/- declared as a value of the confiscated goods to the petitioner and Revenue was also directed to pay interest at the rate of 9% *per annum* from the date of unauthorized auction of confiscated goods.

7. I have carefully gone through the record of the case and submissions made. Section 125 of Customs Act, 1962 has given right to the importer to redeem the goods on payment of redemption fine. Due to action of Revenue of selling impugned goods during the period of filing appeal before learned Commissioner (Appeals) the goods are not available for redemption therefore Revenue has rendered right of appellant under Section 125 of Customs Act, 1962 as non-enforceable. Therefore the contention of learned A.R. for Revenue that redemption fine should be recovered cannot be enforced because

by payment of redemption fine, Revenue is not in a position to return the impugned goods. In the circumstances that the goods are not available for redemption the ruling by Hon'ble Supreme Court in the case of Shilps Impex is to be followed. For the sake of ready reference the ruling by Hon'ble Supreme Court through interim order dated 18/01/2002 is reproduced below:-

> *"**2.** After hearing the Counsel for the parties, it is quite evident that the petitioner-firm was entitled to receive from the respondents Rs. 4,35,000/-, being the price of the goods, Rs. 1,80,000/- which he had paid as duty, Rs. 2,00,000/- for the redemption fined which was paid and a sum of Rs. 50,000/- which was levied as penalty which has also been paid by the petitioner-firm. The petitioner having paid the duty, redemption fine and penalty was entitled to the return of the goods but as the goods had disappeared they were not returned. It is for this reason that the petitioner has become entitled to get back what he had paid and, in addition thereto the value of the goods. Mr. Mukul Rohtagi, the learned Additional Solicitor General states that some money has already been paid to the petitioner-firm. The balance amount will be paid within a period of four weeks.* "

The matter was further heard by Hon'ble Supreme Court on 05/04/2002. On 05/04/2002 Hon'ble Supreme Court has ordered as follows:-

> *"As per the order dated 18.01.2002 passed by this Court, Mr. Mukul Rohatgi, the learned Addl. Solicitor General appearing for the respondents has handed over three cheques totaling to Rs.4,35,000/- to the learned counsel appearing for the petitioner. With regard to the balance amount, matter is kept for hearing next week."*

Subsequently Hon'ble Supreme Court heard the matter once again on 12/04/2002 and passed following order:-

"Learned counsel Mr. K. Kumar appearing on behalf of the petitioner had made submissions that his client had not received the full amount and in affidavit-in- rejoinder it is stated that averments made in paragraph 2 of the counter was not factually correct. He has further stated as under:

> *The Dy. Commissioner of Customs in his order dt. 18.3.2000 had ordered for the refund of the duty amount of Rs.1,80,000/- and R.F. amount of Rs.2,00,000/- only thus leaving the penalty amount of Rs. 50,000/-. However, even the duty amount of Rs. 1,80,000/- and the R.F. amount of Rs.2,00,000/- was again deducted from the assessable value of the goods i.e. Rs.6,44,997/- in terms of the Hon'ble High Court's order dated Nov. 8th, 2000. Thus only Rs.2,64,977/- has been effectively paid to the petitioner as against the assessable value of Rs.6,44,997/-.*

For verifying the aforesaid facts, we have asked the learned counsel appearing on behalf of the Union of India on the last occasion. Today he has clarified that the entire amount is already paid. Despite this statement, learned counsel appearing on behalf of the petitioner has argued out the matter and wasted our 15 minutes and subsequently he had stated that his client had already received the entire amount as directed by this Court. In this view of the matter, appropriate action is required to be taken for filing false affidavits. We, further, depricate the insistence of the learned counsel for the petitioner, even though it was known to him that the entire amount was received by the petitioner, that the petitioner had not received the same. This conduct is not accepted from an advocate. However, the learned counsel for the petitioner tenders apology for the same, hence we do not propose to take any further action. Petitioner is directed to pay a sum of Rs.10,000/- as costs and deposit the same within one *month from today with the Supreme Court Legal Services Committee. The petition stands disposed of accordingly."*

8. On perusal of aforesaid ruling by Hon'ble Supreme Court it is very clear that if goods are not available for redemption on account of disposal of the same by Revenue appellant is not required to pay redemption fine and Customs duty and also eligible for refund of sale proceeds. On examination of provisions of the Section 112(b) of said Act I reduce the penalty to Rs.1,33,429/-. As per record the amount of sale proceeds is Rs.38,62,524/-. I therefore in the circumstances of the matter order for payment of Rs.38,62,524/- Minus Rs.1,33,429/- personal penalty to the appellant by Revenue. The refund may be paid to the appellant by 31 March, 2020. Further, I order for release of two trolley bags. In above terms the appeal is partially allowed. Miscellaneous Application also gets disposed of.

(Dictated and pronounced in open court)

Sd/-
(Anil G. Shakkarwar)
Member (Technical)

Lks