CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 34 of 2009

(Arising out of Order-in-Original No. 150/2008/CAC/CC(I)SR/Gr. VA dated 04.11.2008 passed by Commissioner of Customs (Import), Mumbai)

M/s Villayati Ram Mittal **.... Appellant**
B-33, Defence Colony, New Delhi-110024.

Versus

Commissioner of Customs Import-Mumbai **.... Respondent**
New Customs House, Ballard Estate, Mumbai-400001.

WITH

Customs Appeal No. 35 of 2009

(Arising out of Order-in-Original No. 150/2008/CAC/CC(I)SR/Gr. VA dated 04.11.2008 passed by Commissioner of Customs (Import), Mumbai)

Shri Rohit Mittal **.... Appellant**
B-33, Defence Colony, New Delhi-110024.

Versus

Commissioner of Customs Import-Mumbai **.... Respondent**
New Customs House, Ballard Estate, Mumbai-400001.

Appearance:

Shri V. M. Doiphode, Advocate for the Appellant

Shri Ashwin Kumar, Authorized Representative for the Respondent

CORAM:

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85486-85487/2023

Date of Hearing: 31. 01.2023

Date of Decision: 31.03.2023

Per: Anil G. Shakkarwar

Above stated two appeals are taken together for disposal since they are arising out of common impugned Order-in-Original.

2. Brief facts of the case are that M/s Villayati Ram Mittal (hereinafter referred to as appellant company) imported two piling rigs and got them cleared through Bill of Entry No. 371784 dated 10.07.2003 by claiming exemption at Serial No. 230 of Notification No. 21/2002-CUS dated 01.03.2002 wherein the effective rate of duty was NIL and the availment of notification benefit was with condition specified at Serial No. 40 at the end of the said notification. The condition at Serial No. 40 can be summarized that the imported goods should be imported by a person who has been awarded the contracts for construction of roads in India either by Ministry of Surface Transport or by National Highway Authority of India or by Public Works Department of State Government. As per the condition of the said notification the importer was required to use the imported goods exclusively for the construction of roads and was prohibited from sale or otherwise disposal of the imported goods within a period of five years from the date of importation. The appellant company had imported two piling rigs as stated above, and above stated conditions were applicable for the imported goods. Both the appellants were issued with the show cause notice dated 13.05.2008 wherein it was stated that the appellant company had violated the said conditions of the said notification and that the rigs were not even sent to NHAI site after importation and at the time of importation the appellant company had claimed that the appellant company was awarded with a road construction contract by NHAI and that the rigs were not found in the possession of the appellant company inasmuch as one rig was in the possession of M/s QUIPPO and was lying in the yard of M/s QUIPPO at Taloja, Navi Mumbai, when it was seized on 15.11.2007 and the other rig was in the possession of M/s Bhumi Developers

and was lying in the yard at Goodwill Dharmkata, Mundka, New Delhi, at the time of its seizure on 16.11.2007 and that the said rigs were disposed of by the appellant company. It was further alleged in the show cause notice that the appellant company had violated the condition of notification and therefore, customs duty of Rs. 2.78 crores was demanded from the appellant company and the other appellant was propose to be imposed with penalties. Both the appellants contested with the show cause notice. They stated before the original authority that except the statement of Shri Mittal there is no evidence brought on record to prove that the rigs in question were used for DMRC Project and also stated that they were awarded contracts for construction of roads by the NHAI and they have used the rigs in question for the construction of roads and that they have not sold or otherwise dispose the said rigs. They further stated that taking loans against rigs for payment of installments to M/s Citicorp Finance Limited does not amount to sale or disposal of rigs and therefore, the demand is not sustainable. The show cause notice was adjudicated through impugned Order-in-Original wherein the learned original authority has held that through the statement the noticee has already admitted that the conditions of the notification has been violated by them. He further held in his Order-in-Original that the possession of the imported rigs was not with the importer and the goods in question were given for use to other persons for some consideration and the said act was treated as disposal in some manner and therefore, condition of notification was violated. The original authority further observed "spirit of the said condition is that the goods should be used by the importer himself for specific purpose as mentioned therein". He has confirmed the duty demanded. He ordered the appellant company to pay duty and interest and he has imposed penalty on the appellant company. Further he has confiscated both the rigs and gave option to pay redemption fine of Rs. 1 Crore to redeem the confiscated goods. The original authority imposed a personal penalty of Rs. 5 lakhs on the other appellant. Aggrieved by the said order, both the appellants are before this Tribunal.

3. Heard the learned Counsel for the appellants. The learned Counsel for the appellants has submitted that at the time of clearance of the goods, the customs authorities have verified that the importer is having contract for construction of highway by National Highway Authority of India and therefore, the goods were cleared under Serial No. 230 of the said notification and therefore, that question does not arise as to whether the appellants were awarded with the contract for construction of roads or not. He has further submitted that the conditions of the notification are that the goods should be used for the purpose of construction of roads. In respect of that he has submitted that a certificate is available at page no. 53 of the appeal paper book certifying that the subject goods were used for piling for foundation of the R.O.B. from March 2004 to October 2004. In respect of other condition that the goods should not be sold within a period of five years, he has stated that the Revenue has not brought forward any document establishing that the goods had changed the title from the importer to any other person. He has submitted that due to the financial constraints, the possession of goods were given to some other person for availing the finance and the said action does not amount to disposal in any manner, since the ownership of the said goods at the time of seizure was with the appellant. In so far as the condition that it should not be used for any other purpose in view

of the use of words "exclusively used for", he has said that the contention of Revenue is that the goods were used by DMRC. He has submitted that said contention is based on the basis of statement of Shri Mittal, however, the Revenue has not recorded any statement from any officials of DMRC to establish that the goods in question were used for any other purpose by DMRC and therefore, there is no evidence with Revenue to establish that the subject goods were used for any other purpose. He has submitted that Revenue had relied only on the statement of Shri Mittal, however, the original authority has neither examined Shri Mittal in chief nor cross examination of Shri Mittal was allowed and therefore, statement of Shri Mittal recorded either on 13.11.2007 or on 14.11.2007 cannot be considered as evidence under the Evidence Act. There is no other basis relied on by the original authority for arriving at the conclusion in the impugned order. Therefore, he has requested to set aside the impugned order. He has further stated that at the time of issue of Notification No. 21/2010-Cus dated 27.02.2010, CBEC had observed that the goods should be exclusively used for the construction of roads was being interpreted to mean that the imported machinery may be used only for the project for which it was initially imported and such interpretation was resulting in idling of machinery. Therefore, the CBEC had clarified that it is permissible to relocate or redeploy the machinery imported under the exemption to another road construction project and further stated that liberal interpretation of condition of notification was expected by CBEC.

4. Learned AR has submitted that the appellant company had violated the condition of the notification inasmuch as that Shri Rohit Mittal in his statement dated 14.11.2007 had stated that he

had to deploy the piling rigs to the DMRC site at Pusa Road, New Delhi, and Commissioned the same there and that it became very difficult to Shri Mittal to pay the installment company in time and he approached another finance company with whom he deposited the piling rigs and in the said manner disposed of the goods. He summed up that the appellant company has used goods for other purpose at DMRC and also disposed of the goods as stated by Shri Mittal in his statement and therefore, the finding of the original authority is reasonable.

5. This Bench has carefully gone through the records of the case and submissions made. The issue is to be decided as to whether the imported goods were used for construction of roads, whether they were used for any other purpose than construction of roads, whether the imported goods were sold within a period of five years from the date of importation and whether the imported goods were otherwise disposed of.

6. It is clear from the record and submissions of learned Counsel for the appellants that there is no dispute that the imported goods were used for construction of roads from March 2004 to October 2004. Though the goods were shifted to DMRC site there is no statement on record from any official of DMRC that the goods were utilize for any other purpose than construction of roads. Had the goods been used for any other purpose than construction of roads then it was possible for Revenue to lay their hands on such evidence. From the case records, such evidence is not forth coming. Therefore, it is not proved that the goods were used for any other purpose than construction of roads. Revenue has not established that the goods were sold by the appellants.

The only issue remaining is whether the goods were otherwise disposed of by the appellants. From the case records, it appears that though at the time of seizure the goods were in custody of other person than the importer, however Revenue has not established that the goods were disposed off to other person forever and importer did not have any control over the goods. Further, the control was with the appellant that is why the installments were being paid for the finance raised by the appellant. Above discussion establishes that the importer company has not violated the specified conditions of exemption notification and therefore, the impugned order is not sustainable.

7. In view of the foregoing, this Bench sets aside the impugned orders and allows both the appeals.

(Order pronounced in court on 31.03.2023)

(Anil G. Shakkarwar)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

Sinha