(2015) 04 SC CK 0039

SUPREME COURT OF INDIA

Case No: Civil Appeal No. 6989 of 2004 with CA Nos. 7593 of 2004 and 5142 of 2005.

Gerson Da Cunha - Appellant
@HASH Commissioner of Customs — APPELLANT

Vs

RESPONDENT

Date of Decision: April 22, 2015

Citation: (2015) 319 ELT 611 : (2015) 16 SCC 682

Hon'ble Judges: A.K. Sikri and Rohinton Fali Nariman, JJ.

Bench: Division Bench

Advocate: S/Shri Rajiv Dutta, Sr. Advocate, U.A. Rana, Ms. Mrinal Alkar Mazumdar, M/s. Gagrat and Co., Ms. Daniel George, Siddhartha Dutta, Kumar Dushyant Singh and R. Nedumaran, Advocates, for the Appellants; S/Shri K. Radhakrishnan and Ashok Kumar Panda, Sr. Advocates, P.K. Mullick, Ms. Rashmi Malhotra, B.V. Balaram Das, Ms. B. Sunita Rao, S.K. Gupta, B.V. Niren and Ms. Disha Singh, Advocates, for the Respondents

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Civil Appeal No. 6989 of 2004; Civil Appeal No. 7593 of 2004

1. Though the dispute which is involved in these appeals is in a narrow compass, we would like to mention those facts leading to the filing of these appeals by the present appellants.

2. One Mr. S. A. Futehally (hereinafter referred to as applicable to Service Tax importer) was the sole proprietor of M/s. Ashiya Motors which was the franchise of M/s. Volkswagen AG, Germany. During the period from 1987-1999, a total of about 71 Audi cars manufactured by M/s. Volkswagen were imported by him into India through Bombay (now Mumbai) and Nhava Sheva Ports. In the Bills of Entries which were filed by said importer, he mentioned that the engine capacities of these cars were less than 1600 CC. On this declaration, the cars were assessed and cleared.

However, investigation into these imports were taken up by the Directorate of Revenue Intelligence in November, 1989 when it was noticed that the cars were actually of higher engine capacity. It was also noticed that the prices declared in the invoices was lower than the actual purchase price/commercial prices. On this basis, show cause notices were issued against the said importer. The show cause notices were also issued against these two appellants namely, Mr. Atul H. Mehta and Mr. Gerson Da Cunha and the reasons for issuance of notice against these persons shall be recorded at a later stage. After adjudication of the matter, a common order was passed by the Collector confiscating these cars and penalties were also imposed on the said importer as well as the aforesaid appellants. The said importer Mr. S. A. Futehally challenged the order of the Commissioner by filing appeals before the Customs, Excise and Service Tax Appellate Tribunal, Mumbai (hereinafter referred to as CESTAT). The appellants also challenged the orders. The CESTAT dismissed all these appeals.

3. Mr. Futehally had filed appeals against the orders passed by CESTAT in this Court being Civil Appeal Nos. 6598-6600/2005 and Civil Appeal Nos. 7048-7071/2004. These appeals have been dismissed as abated by separate orders passed on 22-4-2015 because of the reasons that Mr. Futehally died during the pendency of the appeals and his legal heirs have decided not to continue with the matters and therefore, did not bring themselves on record.

4. Now we come to the role of two appellants. Insofar as Mr. Atul H. Mehta is concerned, he was in some employment in Singapore from September, 1984 to January, 1988. He was interested in importing one Audi 80 Car on his return to India for which he had filed import licenses. He, thus, imported that car and for clearance thereof, he engaged the services of M/s. Ashiya Motors, Mumbai, sole proprietorship concern of Mr. Futehally. Mr. Futehally filed the bill of entry in which he committed the same mischief by disclosing the engine capacity of the said car to be below 1600 CC.

5. It is for this reason that in the adjudication order, while confiscating the cars which were imported by Mr. Futehally including the car of Mr. Mehta and imposing penalty upon Mr. Futehally, the adjudicating authority also imposed a penalty of Rs. 1 lakh upon Mr. Mehta. The reason given in the impugned order passed by the Collector is that Mr. Mehta conspired with Mr. Futehally leading to making of wrong declaration. We find from the impugned order that the main reason attributed for the alleged conspiracy is that it was done to earn commission. In support of this, one letter dated 12-12-1988 written by M/s. Ashiya Motors to one Mr. Vergese is relied upon in which M/s. Ashiya Motors has stated that they would be paying commission of Rs. 10,000/- to Mr. Vergese.

6. We do not understand as to how such a letter written by M/s Ashiya Motors to Mr. Vergese would rope in Mr. Mehta into the charge of conspiracy. Apart from that letter, there is no evidence worth the name against Mr. Mehta. We may also record

at this stage that Mr. Mehta was not to gain anything by the said misdeclaration inasmuch as he was entitled to import the car even with higher engine capacity as he was armed with the import license for the same. We, accordingly, are of the opinion that no penalty could have been imposed upon Mr. Mehta and the same is hereby set aside.

7. We are informed at this stage that as a consequence of aforesaid penalty imposed on Mr. Mehta, the Revenue has lodged prosecution which is pending before Chief Metropolitan Magistrate, Esplanade, Mumbai. Those proceedings are also quashed.

8. The circumstances in which another appellant namely Gerson Da Cunha is impleaded are identical as in the case of Mr. Mehta. Penalty of Rs. 1 lakh imposed against him also stands quashed including prosecution, if any.

9. These appeals stand allowed and disposed of in the aforesaid terms.

Civil Appeal No. 5142 of 2005

10. After the import of car by Mr. Atul H. Mehta which was custom cleared on 4-7-1988, Mr. Atul H. Mehta had sold his car to the appellant M/s Hindustan Dorr Oliver Limited on 11-7-1988. This car was seized on 11-7-1990 by the custom authorities. But thereafter released on 16-7-1990 when the appellant gave the bank guarantee for payment of differential amount of duty. Thereafter show cause notice was issued to the appellant on 21-1-1991 which has resulted in demand of the aforesaid differential duty and that order has been upheld by the CESTAT. It is against the order of the CESTAT, the present appeal is preferred. The only argument raised by the learned counsel for the appellant is that the show cause notice is beyond the period of limitation prescribed under Section 28 of the Customs Act inasmuch as the car was cleared from the customs on 4-7-1988 and the show cause notice was issued on 21-1-1991, i.e., more than two and a half years thereafter, whereas the normal period of limitation prescribed under Section 28 is one year at that time.

11. We however, find that the customs authorities invoked the provisions of proviso to Section 28 and therefore, took the benefit of extended period of limitation of five years.

12. This is challenged by the appellant stating that insofar as the appellant is concerned there was no misdeclaration by it as it is the bona fide purchaser of the car and therefore, the extended period of limitation cannot be claimed by the customs authorities against the appellant. We are not impressed with this argument of the learned counsel. Obviously, when the appellant had purchased the car, which was got cleared from the customs after import, it is not the appellant who would have filed any declaration. However, what we find is that as a purchaser, the appellant is fastened with the liability of differential amount of duty and there is no dispute that it has to be paid by the appellant as he is the owner of the car. In such

circumstances insofar as misdeclaration is concerned which was an act of Mr. Futehally, would be imputed in the present case. As the car got cleared on the basis of misdeclaration, therefore, the extended period of limitation would be available to the custom authority. Thus we find no merit in this appeal, which is accordingly, dismissed.