

(2010) 03 BOM CK 0124

Bombay High Court

Case No: Writ Petition No. 1464 of 2010

Ashish Puravankara

APPELLANT

Vs

Commissioner of Customs
(Import)

RESPONDENT

Date of Decision: March 17, 2010

Acts Referred:

- Constitution of India, 1950 - Article 226, 227
- Customs Act, 1962 - Section 28(1A), 28AB

Citation: (2010) 253 ELT 186

Hon'ble Judges: V.C. Daga, J; K.K. Tated, J

Bench: Division Bench

Advocate: V. Sridharan, instructed by PDS Legal, for the Appellant; P.S. Jetly, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

1. Heard.

2. Rule, returnable forthwith. Heard finally by consent of parties.

3. By this Writ Petition under Articles 226 and 227 of the Constitution of India, the Petitioner is challenging the order dated 6th November, 2009 seizing the vehicle imported by him and the provisional order of release passed by the Assistant Commissioner of Customs dated 23-2-2010.

4. A few facts of the case are as under:

The Petitioner imported a Ferrari F 430 car vide Bill of Entry No. 698519 dated 6-2-2008 through Jawaharlal Nehru Port Trust, Nhava Sheva, Mumbai. It is case of the Petitioner that the said transaction was covered under the Dealer's invoice No. 1003 dated 12-12-2007 of M/s. Hyperformance Cars Ltd., No. 162, Union Street,

Dunstable, Bedfordshire, LU6 1HB, United Kingdom. At the time of import of the said car, customs duty of Rs. 82,47,761/- was paid on an invoice value of 92,000 GBP raised by the Dealer-M/s. Hyperformance Cars Ltd., U.K. It is case of the Petitioner that the payment of customs duty to the tune of Rs. 82,47,761/- consequent to the assessment made in the Bill of Entry was made on 6-2-2008. Thereafter, the said car was registered at Mumbai on 15-2-2008 and the registration certificate was also issued by the Registering Authority.

5. The Petitioner further states that the Director of Revenue (Intelligence) issued a letter dated 23-12-2008 directing the Petitioner to furnish documents/information pertaining to the said imported car. During the course of in query with the Director of Revenue (Intelligence), the Petitioner was informed that the concessional duty under the Customs Notification No. 21/2002, dated 1-3-2002 was not available to the Petitioner as the said car cannot be treated as brand new car since it was a second purchase (used car) being already registered in United Kingdom prior to its export. According to the Petitioner, registration of the said car in U.K. was only to comply with the requirement of the local laws so as to facilitate its export. However, the said explanation, prima facie, did not find favour with the Customs Authorities. In the submission of the Petitioner, he has actually paid excess customs duty including penalty and interest to the tune of Rs. 36,92,121/- and the said amount is still lying with the Director of Revenue (Intelligence). The Petitioner also gave the detailed calculations about payment of customs duty, penalty and interest, which read as under:

6. The Petitioner further states that from the above tabulated details it is clear that there is excess payment of Rs. 36,92,121/- made by the Petitioner to the Respondents. According to the Petitioner, on 6-11-2009 the Respondent No. 4 along with certain officers acting under the instructions of the Respondent No. 3 visited the residential premises of the Petitioner at Bangalore and without serving any prior notice on the Petitioner, seized the said imported car. Consequent to the seizure, the seized car was handed over to the Petitioner under the Supurdnama dated 6-11-2009 for safe custody. Thereafter, the Assistant Commissioner of Customs passed the order dated 23-2-2010 directing provisional release of the imported car on the conditions viz. (1) payment of differential duty of Rs. 15,02,239/- plus interest, (2) execution of bond for the full value and (3) bank guarantee for 35% of the redetermined value.

7. Mr. Sridharan, Learned Counsel appearing for the Petitioner submitted that the Customs Authorities erred in coming to the conclusion that the Petitioner imported the used/second hand car vide Bill of Entry No. 698519 dated 6-2-2008. He submitted that the said imported car was manufactured in the month of December, 2007, of which, the delivery/bill of entry was prepared on 13-1-2008 i.e. within one and half month from the date of production, as such, it cannot be said to be a used car merely because it was registered in U.K. as required by the laws of the land. He

further submitted that if a new car is imported the customs duty payable is only @ 116% whereas in case of the second hand car, the same is @ 167%. According to him, in the present case, the authorities treating the said imported car as second hand car have imposed customs duty at the rate of 167% plus penalty and interest etc. which is bad and illegal.

8. Mr. Sridharan mainly pressed into service Section 28(1A) of the Customs Act and relied on the judgment of the Customs, Excise and Service Tax Tribunal, Bangalore in case of *Abbas Kuramputhoor v. Commissioner of Customs, Cochin* in Appeal No. C/413/2008, dated 3-10-2008, 2009 (240) E.L.T. 98 (Tri. - Bang.) wherein the imported car was registered in October, 2007 and shipment of the same was made in January, 2008; in spite of that, the Tribunal held that the car imported therein was a new car. The relevant paragraph of the said judgment reads thus:

On a very careful consideration of the issue, we find that the benefit of Customs Notification for import of new car cannot be denied simply on the basis of its prior registration before shipment to India. The Board's Circular has also clarified the point. It is also seen from the impugned order that the car was registered in October, 2007 and the shipment was made in January, 2008. Further, from the Examination Report, it is seen that the car has run only for 16 km. From this, it is very clear that the registration is only a formality. Taking into account the facts and circumstances, we cannot come to the conclusion that the car is a used one. Hence, there is clear case here for extending the benefit of the said Customs Notification.

9. On the other hand, Mr. Jetly, Learned Counsel appearing for the Respondents/Revenue submitted that the Petitioner imported a second hand car and therefore, the same will attract customs duty @ 167%. He submitted that the Petitioner had purchased the said car from the third party and not from the manufacturer itself as such importer is liable to pay customs duty @ 167% plus penalty and interest thereon.

10. On behalf of the Respondents, Mr. Akshay Joshi, Assistant Director, Directorate of Revenue (Intelligence), Ahmedabad filed an affidavit dated 4-3-2010 pointing out that the said imported car was actually sold by the manufacturer to M/s. Hyperperformance Cars, UK and thereafter, M/s. Hyperperformance Cars, UK transferred it to the Petitioner. Relevant paragraph of the affidavit dated 4-3-2010 reads thus:

18.1 As regards para (B) of the grounds, I say that in the instant case from the investigations, it appears that the vehicle (Ferrari F 430 Spider Car) was actually sold by the manufacture to M/s. Hyperperformance Cars UK and thereafter, M/s. Hyperperformance Cars Ltd., UK has made a subsequent sale of the same car to the petitioner, which brings out the fact that the said vehicle was actually sold once prior to its importation into India. Hence the said vehicle falls under the definition of a "Second Hand Vehicle" as provided in the Import Licensing Notes of Chapter 87, whereas the same was categorised under the definition of "New Vehicle" at the time

of filing of Bill of Entry for importation. Accordingly, the benefit of Notification No. 21/2002-Cus., dated 1-3-2002 as amended, which provides concessional rate of duty to "New vehicle, not registered prior to importation" would not be available to the petitioner. Hence the judgment of the CESTAT quoted by the petitioner is not relevant to the instant case.

11. On the basis of the above submissions, Mr. Jetly urged that the adjudication proceedings are still pending. In the circumstances, provisional order dated 23-2-2010 is legal, proper and reasonable and that the Petitioner is not entitled for any relief in the present Writ Petition especially in the writ jurisdiction.

12. Having heard both the sides at length, the adjudication proceedings are still pending as such the petition is premature so far as challenge to the order of seizure is concerned. So far as the provisional order dated 23-2-2010 is concerned, the Respondents are claiming payment of differential duty of Rs. 15,02,239/- plus interest with execution of the bond for the full value together with bank guarantee for 35% of the re-determined value. As stated the adjudicating proceedings are still pending. Final adjudication order is yet to be passed, however, till then the Petitioner's car is required to be provisionally released protecting the interest of the Revenue.

13. The Petitioner has already executed an undertaking dated 6-11-2009 stating that he will not move or remove, transfer, lease, sell, dispose of, tamper, part with or in any manner deal with the said car without the prior permission of the Director of Revenue (Intelligence), Bangalore. The copy of undertaking is annexed at Exhibit-S to the petition. Even the tentative calculation stated herein above shows that the Petitioner paid excess amount of Rs. 36,92,121/-.

14. Taking overall view of the matter and considering the fact that the Petitioner has already given an undertaking dated 6-11-2009 to the Revenue and as the adjudication proceedings are still pending for final disposal before the competent authority and that the car is hypothecated to the financier; the order of provisional release dated 23-2-2010 under challenge needs slight modification in the interest of justice since the conditions put therein are somewhat harsh.

15. Hence the following order:

(a) The Respondents are directed to provisionally release the Ferrari F 430 car imported vide Bill of Entry No. 698519 dated 6th February, 2008 subject to the Petitioner executing the bond for full value and furnishing the Bank guarantee of any nationalised Bank for Rs. 15 Lacs. The Petitioner shall not create any third party right, title or interest in the said imported car hereinafter till the adjudication proceedings achieve finality.

(b) Subject to compliance of the above conditions, the Respondents shall handover all original documents pertaining to the subject car within two weeks thereafter.

(c) The provisional order of release dated 23-2-2010 stands modified to the extent mentioned herein above.

16. Rule is made absolute in terms of this order with no order as to costs.