Reportable

* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ WP (C) No. 8271 of 2007

% *Reserved on: September 03, 2009*
Pronounced on: October 30, 2009

M/s. Atlas Interactive India Pvt. Ltd. . . . Petitioner

through : Mr. Amit Sibal with
Mr. Siddharth Silwan and
Mr. Vinay Tripathi, Advocates

VERSUS

Union of India & Ors. . . . Respondents

through : Mr. A.S. Chandhiok,
Additional Solicitor General
Mr. Amit Bansal, Mr. Ritesh
Kumar, Mr. Sandeep Bajaj and
Ms. Manisha Singh, Advocates

CORAM :-
THE HON'BLE MR. JUSTICE A.K. SIKRI
THE HON'BLE MR. JUSTICE VALMIKI J. MEHTA

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. The brief factual matrix transpires as under :

2. The petitioner had entered into a franchisee agreement on 20.4.2004 with the Bharat Sanchar Nigam Ltd. (hereinafter referred to as BSNL). As per this agreement, the petitioner was to provide broadband connection to landline subscribers of BSNL in Ghaziabad, Noida, Faridabad and Gurgaon. For this purpose, the petitioner was

to supply broadband and triple play equipment. It decided to procure the same through its supplier ZTE Corporation, China (hereinafter referred to as the 'supplier'). In order to fulfil this obligation with BSNL, the petitioner entered into two sales contracts with the supplier to supply ADSL port and related broadband equipment for a total capacity for 10,000 subscribers. These agreements were entered into on 2.12.2004 and on that basis the petitioner imported the aforesaid equipment which reached India between 23.12.2004 and 24.6.2005. The petitioner got the equipments cleared on payment of requisite customs duty of Rs.5,72,86,977.79p. We may mention at this stage itself that though the equipment was valued at Rs.24,33,21,540/-, the petitioner had not paid any such amount to the supplier in China. In fact, no amount was paid by the petitioner to the supplier at all. The imported equipment, however, could not be provided to BSNL as much before the equipment could reach India, BSNL terminated the contract of the petitioner vide notice dated 10.12.2004 with effect from 9.1.2005. The case of the petitioner is that because of this arbitrary termination of the contract, the equipment could not be utilized and remained in unpacked condition in its godown.

3. Against the termination of the contract, the petitioner filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 in this Court being OMP No. 482/2004. Though vide order dated 17.2.2005, this Court constituted the Arbitral Tribunal, the arbitration proceedings could not commence due to non-payment of

fee by the petitioner and, therefore, the Arbitral Tribunal was constrained to terminate the proceedings vide its orders dated 5.9.2006.

4. The petitioner states that as the goods were of no use to it after the termination of the franchisee agreement, it applied for re-export of the said goods under Section 74 of the Customs Act, 1962 (hereinafter referred to as the 'Act') to M/s. Atlas Opportunities Ltd, Karlol CSONTO, c/o. In Store Media, A.S. Mileticova, 4482109, Bratislava, Slovakia where the goods were purportedly required. Letter dated 30.8.2008 in this behalf was addressed by the petitioner to the customs authorities seeking permission to re-export the goods. The petitioner was, however, asked to obtain GR waiver clearance from the Reserve Bank of India (RBI). It took more than nine months to get such a permission from the RBI. In the meantime, on 18.7.2006, the goods were transmitted to customs warehouse at ICD, Patparganj after fulfilling the parameters laid down under Section 74 of the Act. The petitioner also alleges that though its agent informed the petitioner that the goods had been examined by the customs authorities and were stuffed in the shipping line containers and were ready to be shipped in February 2009, all of a sudden on 18.2.2007, without any notice or intimation to the petitioner, the Department of Revenue Intelligence (DRI), the respondent No.2 herein, seized and sealed the containers containing the goods. They also seized all the original documents such as bill of entries, duty payment receipts, shipping bills, RBI GR waiver from the Customs Clearing Agents of

the petitioner, namely, M/s. R.B. Ramnathlambah & Sons Pvt. Ltd. Though all this was done without panchnama or preparing the list of itinerary, it was followed by summons dated 19.4.2007 issued under Section 108 of the Act to the petitioners Director Mr. Ravinder Singh Chauhan asking him to appear before the DRI on 23.4.2007 pertaining to the said import. The petitioner states that in the meanwhile since almost 19 months had elapsed from the date of filing of the shipping bills, the use and requirement for the goods also ended in Slovakia. The supplier in China, however, agreed to take back the goods and, thus, on 28.4.2007 the petitioner and the supplier informed DRI about this with a request to release the original documents to the petitioner for filing the said amendment in the shipping bills so that goods could be shipped to China. However, the DRI refused to release the original documents even when the petitioner kept on sending various letters and reminders to the authorities in this behalf. Thus, according to the petitioner, goods have been illegally seized and retained by the respondents without compliance of mandatory procedure contained in Sections 105 and 110 of the Act and, therefore, the petitioner filed the present petition on 6.11.2007 with the following prayers :-

> "a) issue a writ of Mandamus or any other appropriate writ, order of direction be issued against the respondents to hand over the original documents together with the goods illegally seized by the respondents for being re-exported to the consignor forthwith;
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> b) issue writ of Certiorari or any other appropriate writ, order or direction be issued and after calling the records, see the propriety, legality and validity of the order and quash the same, allow the petitioner to re-export the goods immediately

and refund the Customs duty in accordance with Section 74 of the Customs Act.

c) issue a writ of Mandamus ordering the respondents to waive all the Govt. Charges for the period when the petitioner was unable to re-export the goods.

d) And may further be pleased to pass such further order or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case. "

5. On 7.11.2007, notice was issued in this petition, pursuant to which counter affidavit was filed by the respondents. On 12.12.2007, the respondent was directed to file supplementary affidavit clarifying certain aspects as mentioned in that order. The said supplementary affidavit was also filed by the respondents on 24.1.2008. The petitioner has filed rejoinder to the counter affidavit of the respondent as well as reply to the supplementary affidavits. With the pleadings having completed, matter was finally heard.

6. In the counter affidavit filed by the respondents, it is explained that on investigation of the matter by the DRI, based on specific information received, it was found that drawback benefit under Section 74 of the Act was wrongly claimed by the petitioner. Report dated 11.6.2007 of DRI in this behalf was sent to the Commissioner of Customs, ICD, Tuglakabad. Based on the said report, the following issues arose :-

"(a) The 'Let Export Order' under Section 51 of the Act was given in January 2007 i.e. after the expiry of statutory period of two years in respect of two shipping bills bearing No. 146/8.11.2006 and 149/8.11.2006 as under :-

SB No. Date	Let Export Date	BE No./Date	Duty paid as per BE	98% of the duty paid claimed as DBK

146/8.11.06	9.1.07	848296/31.12.04	21,27,380	20,84,832
149/8.11.06	16.1.07	843008/23.12.04	28.07.757	27,51,602
		Total	49,35,137	48,36,434

The exporter failed to produce any permission of Board for extension of two years limit specified under Section 74 of the Act.

(b) GR waiver certificate obtained earlier was also not valid on the date of 'let export order' and had expired long back.

(c) Present Market Value of the goods is less than drawback being claimed in the light of technological obsolescence.

(d) As per their letter dated 28.4.2007, the petitioner is now to re-export the goods back to the supplier in China instead of earlier declared consignee, i.e. M/s. Atlas Opportunities Ltd. as that order is cancelled now. In such a case, it appears that they would be required to file fresh shipping bills, which would render all the shipping bills hit by the limit of two years prescribed under Section 74 of the Act.

(e) On invoice of 80,000 USD paid as 'professional services' to the overseas consignor (located in Israel) by the supplier in respect of goods supplied to the petitioner in India has come to the notice recently. These charges were not declared and included in the assessable value at the time of import. This needs to be inquired further as to whether these charges are includible in the assessable value of goods from the angle of undervaluation of import goods and consequent evasion of duty."

As per DRI's report, the petitioner has not fulfilled the conditions of Section 74 and Section 76 of the Act.

7. The matter was, therefore, under investigation. Pending investigation it was decided to provisionally release the goods of the petitioner for the purpose of re-export, subject to execution of a Bond. The petitioner was informed about this provisional release for re-export vide letter dated 5.12.2007. The respondents have also stated that the goods were seized and, therefore, requirement of drawing of panchnama did not arise. The DIR had not sealed the containers either. The documents submitted by the Assistant

Commissioner (Customs), ICD, Patparganj, Delhi were retained as they were required for further scrutiny/investigation.

8. In the supplementary affidavit, the respondents reiterated that the instant case pertained to examination and detention of the said goods and it was not a case of seizure and, therefore, no show-cause notice had been issued. It is also clarified that execution of the Bond was not being sought under Section 110 of the Act. The petitioner had essentially filed shipping bills to claim benefit under Section 74 of the Act. The claim of the petitioner was still under scrutiny. In these circumstances, the re-export of the goods could only be allowed provisionally in terms of Section 18 of the Act. It is also stated that though Circular No. 33/2005, filed as Annexure R-2 to the counter affidavit, refers to seized goods, the guidelines laid down in the said circular would be equally applicable to the other circumstances also wherein the exported goods have been put under scrutiny. The reason for insisting execution of the Bond, according to the respondent, is that when the goods are imported without payment of duty, for subsequent re-export, such a Bond was required as per the standing order No. 2/2001 dated 7.3.2001. The circumstances for re-export under Section 74 of the Act are analogous to the aforesaid circumstances. The respondents have also referred to the Board's instructions issued vide Letter F. No. 450/82/95/CUS-IV dated 7.7.1997 and Circular No. 42/01-CUS dated 31.7.2001 wherein it is specifically provided that where it is not practicable to seize the goods, the goods may be detained for investigation and pending

such investigation the goods could be provisionally released for re-export on furnishing a Bond.

9. Mr. Amit Sibal, learned counsel appearing for the petitioner, made strenuous plea that the detention of goods and taking away the documents amounted to seizure, inasmuch as, in the absence of those documents it was not possible for the petitioner to re-export the goods. According to him, when in sum and substance the goods were seized, the procedure for seizure of such goods was required to be followed, but admittedly no seizure orders were passed and, therefore, the seizure was illegal. He also submitted that on 14.2.2007, the goods were seized and even till the expiry of six months, i.e. 14.8.2007, no show-cause notice was issued, which is required to be done under Section 110(2) of the Act and, therefore, continued retention of such goods clearly became illegal. He submitted that the term *'seizure'* has to be given its proper meaning and whenever there is an interference with the possessory rights or where the dominion of goods is transferred, which is not legal, it would not amount to seizure. If the seizure is illegal, the petitioner had civil right to seek return of such goods. Support of the judgment of this Court in the case of ***Rajesh Arora*** v. ***Collector of Customs,*** 1998 (101) ELT 246 was sought to be taken to buttress this plea. It was further argued that even when the investigation was completed on 11.6.2007, goods were still retained and, therefore, the respondent was to bear the charges. With regard to duty drawback,

it was argued that the same was legally drawn and it could not be a reason to retain the goods.

10. Detailed submissions on the aforesaid aspects were made by the learned counsel for the petitioner.

11. Mr. Chandhiok, learned Addl. Solicitor General appearing for the respondents, refuted the arguments of the petitioner. He pointed out that when the equipment in question was imported between 23.12.2004 to 24.6.2005, duty was paid thereupon. Thereafter, shipping bills were filed in September 2004 for re-export of the goods claiming duty drawback. In November 2006, two shipping bills were filed with regard to 14 bill of entries. Since the petitioner requested for re-export of goods under Section 74 of the Act, the team of DRI officers visited ICD, Patparganj, Delhi for verification as the information received indicated substitution of original goods by junk and goods being not worth the amount of drawback made, it required fresh examination. In these circumstances, the Customs authorities were requested not to allow re-export till clearance by the DRI. Pending such an investigation, re-export could not have been allowed and this did not amount to seizure of goods. The DRI had not sealed the containers either until further inquiry with respect to the information received was in progress. The learned ASG also pointed out that there was something dubious about the entire deal, inasmuch as, the supplier in China agreed to supply the equipment worth more than Rs.24 crores without charting a single penny.

Further, when the BSNL terminated the contract and the goods were not required, instead of sending the goods back the supplier at China, the petitioner chose to re-export the same to some other party in Slovakia. When the DRI started investigation about the said party and wanted the petitioner to establish the credentials thereof, as the respondents had the apprehension that the said company was not in existence, the petitioner, for fear of exposure, took a somersault and changed the request for re-export to the supplier in China rather than sending it to Slovakia. The learned ASJ referred to the statement of Mr. Chauhan, Director of the petitioner, recorded under Section 108 of the Act, which finds mention in the show-cause notice issued under Section 124 as well. As per the statement, though it is mentioned that M/s. Atlas Opportunities Ltd. at Slovakia is a sister concern, there was no communication in writing received by the petitioner with regard to scrapping of the project of M/s. Atlas Opportunities Ltd.

12. It was further submitted that the petitioner was not serious about the release of documents, which were taken by the respondents for further investigation, inasmuch as, the request for release of documents was made for the first time only on 27.3.2007. Information regarding change of consignee was also received only on 28.4.2007. Thereafter, till filing of the petition on 6.11.2007, no request for release of goods was made. This request was made for the first time only on 5.12.2007 and request for release of documents was made on 7.12.2007. He submitted that there was not even an

allegation that documents were with the respondent. The learned ASG has referred to various provisions of the Act, particularly Sections 60(2), 51, 110, 124 and 149 of the Act, on the basis of which he explained the scheme of seizure and confiscation as per the aforesaid provisions. He also argued that there was no order of seizure. Only documents were required for investigation and it was permissible for the respondents to carry out the said investigation in view of the information received, as explained above. He pointed out that under Section 18 of the Act, assessment of the duty could be made even in case of duty drawback.

13. After considering the respective arguments, we are of the opinion that in the facts of this case it is not even necessary to deal with all the aforesaid contentions of the parties while exercising our extraordinary jurisdiction under Article 226 of the Constitution of India.

14. We find it to be somewhat puzzling that the supplier at China agreed to deliver the equipments worth more than Rs.24 crores to the petitioner for free. This is the equipment which the petitioner wanted to supply to BSNL for broadband facilities. BSNL terminated the contract. According to the petitioner, it was a wrongful termination. However, the petitioner though started litigation with BSNL alleging wrongful termination, it left the same midway and did not take the proceedings to their logical conclusion. Naturally, when the equipment of more than Rs.24 crores was to be supplied to

BSNL, stakes were high. However, the petitioner, after getting the arbitrators appointed, allowed walkover in its legal battle with the BSNL and, thus, gave up its purported claims against BSNL. No satisfactory explanation is forthcoming as to why the petitioner wanted to re-export the said goods to its so-called sister concern in Slovakia. When the inquiry into this duty drawback was initiated by the DRI on some information received about the petitioner and in the process DRI wanted to find out the genuineness of the Slovakian company and to see as to whether there is such a company or not, the petitioner all of a sudden came out with the plea that the equipments were not required by the Slovakian party and now it wanted to re-export the same to the supplier in China. The entire transaction is shrouded with mystery, to say the least.

15. That apart, we also find that no serious efforts were made by the petitioner to seek release of documents for re-export either. The request for such purpose was made much belatedly, which gives an impression that the petitioner was only buying time. This impression further gets strengthened from the fact that no serious efforts were made by the petitioner to re-export the goods even when the respondents allowed the same, subject to furnishing of Bond. Though, during the arguments, an attempt was made to contend that it was not open to the respondent to put a condition of furnishing a Bond, the circumstances lead us to believe that the petitioner was not serious about this condition as well. When re-export was allowed on provisional basis, the present writ petition

had already been filed and was pending in this Court. The petitioner never moved any application challenging the said condition of furnishing Bond and seeking orders allowing re-export without such stipulation. What is more important is that no attempt is even made to amend the petition and incorporate the prayer challenging the condition of furnishing a Bond imposed for re-export. In the absence of any such miscellaneous application or amendment in the prayers, this Court cannot go into the issue as to whether such a condition was rightly put or not.

16. When we proceed with the matter on this basis, the irresistible conclusion is that the state of affairs in which the petitioner has landed is its own creation. Insofar as the respondents are concerned, pending investigation, they had allowed the re-export on provisional basis. However, the petitioner did not utilize this opportunity. In the meantime, show-cause notice dated 2.8.2009 under Section 124 of the Act has been issued calling upon the petitioner to show-cause as to why :-

> "(a) Let Export Order granted under Section 51 of the Act should not be cancelled for –
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> (i) misdeclaration of name and address of the consignee; and
>
> (ii) not having valid GR Waiver Certificate on the date of Let Export Order.
>
> (b) The duty drawback claimed of Rs.5,61,40,985/- should not be denied to them as they failed to comply with condition as stipulated under Section 74 of the Act.
>
> (c) the impugned goods valued Rs.24,13,60,578.30p should not be confiscated under Section 113(h)(i) of the Act for the reasons stated above; and

(d) the penalty should not be imposed upon them under the sub-section (iii) of Section 114 of the Act for mis-declaration of consignee and without having valid GR Waiver Certificate with intention to avail benefit of duty drawback under Section 74 of the Act."

17. Further, action in the matter is possible only after the conclusion of the proceedings in the said show-cause. Therefore, at this stage, only relief that can be granted is to allow the petitioner to re-export the goods, subject to furnishing of the Bond (as that condition is not challenged) and leaving the petitioner to seek the appropriate remedy after the orders pursuant to the said show-cause notice are passed by the respondents.

18. The petition is disposed of in the aforesaid terms.

No costs.

(A.K. SIKRI)
JUDGE

(VALMIKI J. MEHTA)
JUDGE

October 30, 2009
nsk