(1993) 07 BOM CK 0019

In the Bombay High Court

Case No : Writ Petition No. 1376 of 1986

Baboobhai Patel and Company APPELLANT

Vs

Collector of Customs RESPONDENT

Date of Decision : 19-07-1993

Acts Referred:
Central Excises and Salt Act, 1944 — Section 28

Citation : (1993) 49 ECR 424 : (1993) 68 ELT 734

Hon'ble Judges : M.L. Pendse, J;A.P. Shah, J

Bench : Division Bench

Advocate : Shri E.P. Bharucha and Mr. Jaideep Patel, instructed by M/s. C.R. Patel and Co, for the Appellant; Shri J.P. Deodhar, Shri R.C. Master and Shri K.C. Sidhwa, for the Respondent

Judgement

Pendse J.

1. The petitioners imported two consignments of goods described as Diethylene Diamine Hexahydrate and sought clearance under two bills of entries against two REP licences dated August 7, 1981 and September 5, 1981. The petitioners claimed that the consignments imported were under OGL and the goods were not described either as banned items or canalised items under Import and Export Policy April 1982 - March 1983. The customs authorities declined to permit clearance on the ground that the goods imported were Diethylene Diamine Hexahydrate of Pharmacopoeia grade with which were canalised items as per import policy. The show cause notice was issued to the petitioners as to why the two consignments should not be confiscated and penalty imposed. In answer to the show cause notice, the petitioners claimed that the imported goods were neither banned items nor canalised items and the goods were not a drug but drug intermediate used for manufacture of Diethylene Anhydrous or Hexahydrate.

2. The Additional Collector of Customs, Bombay by order dated August 17, 1983 held that the goods imported were canalised items and therefore was not permissible to be imported as OGL. The Additional Collector confiscation of the

goods and fine in lieu of confiscation was fixed at Rs. 2,00,000/-. The Additional Collector relied heavily upon certificate issued by Deputy Chief Chemist on July 15, 1983. The petitioners preferred two appeals before Customs, Excise and Gold (Control) Appellate Tribunal, Bombay but the appeals ended in dismissal by order dated August 21, 1984 subject to variation in respect of redemption fine. The Tribunal reduced redemption fine to Rs. 1,50,000/-in respect to two consignments. The order passed by the Tribunal holding that the items imported were canalised items is under challenge in this petition filed under Article 226 of the Constitution.

3. Shri Bharucha, learned counsel appearing on behalf of the petitioners, submitted that the Tribunal proceeded to hold against the petitioners by travelling beyond the show cause notice served by the Additional Collector. The learned counsel submitted that as the Additional Collector relied upon the report received from Deputy Chief Chemist, the petitioners requested the Collector to forward the samples for testing to Assistant Drug Controller. The Assistant Drug Controller issued a certificate on December 10, 1983 holding that "the item imported does not fall under the category of drugs but will qualify as chemical fit for use in the manufacture of Piperazine salts and therefore there is no objection to release the goods in so far as Drugs and Cosmetics Act and the Rules thereunder are concerned. " Shri Bharucha submitted that during the pendency of the appeals before the Tribunal, a further report was sought for from the Chief Chemist and after receipt of the report, the Tribunal proceeded to record the finding against the petitioners by making out a new case. There is considerable merit in the submission urged by the learned counsel. As regards the report of the Deputy Chief Chemist, the Tribunal observed that in the absence of analytical data, no reliance can be placed on the test report of the Deputy Chief Chemist. The Tribunal therefore held that the order passed by the Deputy Collector on the basis of report by Deputy Chief Chemist cannot be sustained. The Tribunal further held that the certificate issued by Assistant Drugs Controller cannot be of any assistance to the petitioners because the imported goods are not pharmacopoeial goods. The Tribunal then proceeded to examine the opinion of the Chief Chemist that the samples are not Diethylene Diamine Technical. The Tribunal, on consideration of large number of books produced, noticed that anhydride is described as "descriptive of an inorganic compound that does not contain water either absorbed on is surface or combined as water of crystallisation. " The Tribunal then observed in the impugned order that all the reports of all the analyst disclosed that the samples contained piperazine and water. The percentage of water found by the Chief Chemist was 26% and 19.3%. " The other reports also found water percentage in samples of imported consignments to different degrees. In spite of the reports that the samples contained water and therefore could not be described as anhydrous, the Tribunal proceeded to record finding against the petitioners by observing that the water contained in the samples could be the moisture content. Shri Bharucha complains and in our judgment, with considerable merit that this is a case which

was made out by the Tribunal for the first time and the petitioners had no notice of the same. In our judgment, the Tribunal has clearly made out a new case and therefore the order of the Tribunal cannot be sustained. The show cause notice served on the petitioners does not refer to any such claim.

4. We wish to make it clear that we are not recording any finding as to the nature of the goods imported, but we are setting aside the order on a short ground that the Tribunal made out a new case without any notice to the petitioners. The consignments are already cleared by the petitioners by interim order and only thing now required is to set aside the order of the Tribunal providing for confiscation of goods and imposing fine of Rs. 1,50,000/-as redemption fine.

5. Accordingly, petition is allowed and the impugned order dated August 21, 1984 passed by the Tribunal and order dated August 17, 1983 passed by the Additional Collector of Customs, Bombay are set aside. The redemption fine paid by the petitioners shall be refunded forthwith. In the circumstances of the case, there will be no order as to costs.