
(1995) 02 CAL CK 0002
In the Calcutta High Court
Case No : Matter No. 961 of 1994

Bengal Tools Ltd.

APPELLANT

Vs

Additional D.G.R.I.

RESPONDENT

Date of Decision : 03-02-1995

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 110, 111, 112, 113, 124

Citation : (1995) 77 ELT 858

Hon'ble Judges : Ruma Pal, J

Bench : Single Bench

Advocate : Hasmukh Kundalia, for the Appellant;

Final Decision : Dismissed

Judgement

Ruma Pal, J.—The petitioner company imported 103 machines which it described as Power Tillers between 10 August 1993 and 7th January 1994. In the Bills of Entry the relevant Tariff Item was mentioned as 8432.80. The goods were assessed on that basis and released u/s 47 of the Customs Act, 1962 (hereafter referred to as the Act). The goods were warehoused in the petitioner's warehouse. On 8th March 1994 they were sought to be detained by virtue of an order Section 110 of the Act on the ground that they had been imported by misdeclaration and were liable to confiscation under the Act.

2. The order of detention was challenged by the petitioners under Article 226 of the Constitution on 5th April, 1994. By a judgment and order dated 5th April 1994 A.N. Ray, J. made the Rule absolute and quashed the impugned order of detention. An appeal was preferred from this order by the Customs Authorities. Before this the petitioners claim to have sold some of the machines. The order dated 5-4-1994 was set aside and the matter remanded back to be heard on affidavits.

3. Affidavits were filed. A preliminary objection was raised by the petitioners that

the impugned order of detention had been issued by the Preventive Officer of the Department of Revenue Intelligence, who had no jurisdiction to do so. The Department produced relevant notification from which it was apparent that the Preventive Officer of the DRI had in fact been empowered to exercise powers inter alia u/s 110 of the Act. The point was decided as a preliminary issue against the petitioners by an order dated 19th September, 1994.

4. Further issues were raised by the petitioners. The first is whether an order u/s 110 may be passed in respect of the goods which have already been cleared. According to the petitioners the precondition to the exercise of power u/s 110 is that goods must be liable to be confiscated. It is submitted that once the goods have been cleared they were no longer confiscable u/s 111 of the Act.

5. It is contended that when goods have been cleared under an order u/s 47 they cannot be detained without setting aside the order u/s 17(4) or Section 129D of the Act. It is argued that an order u/s 47 is passed after assessment is made by the proper officer. This amounts to an adjudication which can only be corrected by an order passed in Revision u/s 129D or Section 17(4) and could not be set at naught by initiating proceedings for confiscation. Such a proceeding it is submitted would be without jurisdiction. Reliance has been placed on several decisions in this context which are considered at a later stage in this judgment.

6. The next issue raised is that the machines were correctly classified under Tariff Heading 8432. It is submitted that the Customs Authorities were seeking to classify the same under Tariff Heading 8701 which did not apply. According to the petitioners the Tariff Heading 8701 related to the Tractors of specific types and did not include Power Tillers. It is contended that even as a legal proposition it was not open to the Customs Authorities to give different findings in respect of the same machines. It is stated that not only the petitioners but other concerns had imported the, same machines and that the Customs Authorities had treated the same as classifiable under Tariff Heading 8432. Particular reliance was placed on an order passed by Shri Varadarajan, Additional Collector of Customs by which the machines were classified under Tariff Item 8432.80. The petitioners have cited the decisions reported in Sandip Agarwal Vs. Collector of Customs, to contend that an earlier finding is binding on the Department unless new facts come to light. According to the petitioners no such facts existed.

7. The respondents on the other hand have relied upon the following cases to contend that even after assessment and clearance of goods u/s 47 proceedings could be taken against the petitioners :

(i) Chandrakant Seth Vs. Collector of Customs,

(ii) Collector of Customs and Central Excise, West Bengal and Others Vs. Hindustan Motors Ltd. and Another,

(iii) Titanide Coating (P) Ltd. Vs. Assistant Collector of Customs,

8. It is further submitted that the show cause notice had been issued u/s 28 read

with Section 124 of the Act on the petitioners and that proceedings have been fixed for hearing on 24-1-1995. It is submitted that the Adjudicating Authority should be permitted to determine the classification of the imported goods as to whether they fall under Tariff Heading 8701 or 8432.

9. According to the respondents what was called the order of Shri Varadarajan was not in fact an order of adjudication. The Court's attention was drawn to the fact that the order was on a plain piece of paper and not in the normal form. The Court was also told that in other matters where the importers had sought to rely upon this order of Shri Varadarajan, the Court had remanded the matter back to him to determine the issue after hearing the parties.

10. In such cases Shri Varadarajan had passed a reasoned order to the effect that the machines were classifiable under Tariff Heading 8701.

11. The respondents have also relied upon the fact that the petitioners had themselves imported identical machines earlier under Tariff Heading 8701 and paid duty thereon. It was stated that subsequent to the imports in question the same machines had again been imported by the petitioners and customs duty had been paid on the basis that they were classifiable under Tariff Heading 8701. It is argued that there were sufficient materials before the Department to issue notice u/s 28 read with Section 124 of the Act.

12. The first issue raised by the petitioner proceeds on the basis that an order u/s 47 is an order of adjudication and is final in that it concludes the questions of the rate of duty and whether the goods are prohibited or not.

The relevant portion of Section 47 reads :

"(1) Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption."

13. The Section does not involve any adjudication nor is the proper officer who permits clearance an adjudicating authority. Assessment takes place u/s 17 of the Act. The assessment may be after examination of the goods or before examination subject to re-assessment after examination [Section 17(4)]. This re-assessment takes place prior to clearance. The satisfaction of the proper officer u/s 47 is administrative, that is, that the goods are not prohibited and that the assessed duty has been paid. Permission to clear goods by the proper officer u/s 47 cannot result in rendering other powers under the Act nugatory including the powers u/s 28 to realise short levy and u/s 111 to confiscate the goods. The order u/s 47 being neither final in that sense nor an adjudication, there is no question of revising the same u/s 129D before proceedings for short levy and confiscation are taken. The power of review given to the Collector u/s 129D is independent of that conferred on the proper officer to reopen assessments u/s

28 and of confiscation u/s 111.

14. u/s 28 of the Act recovery may be made if duty is short levied despite assessment u/s 17 and payment of duty as assessed. This is clear from the language of Section 28 itself.

* * * * 15. The section pre-supposes that an order has already been passed levying duty and allowing the refund as the case may be and that pursuant to such order duty has been paid or refund has been made [See: Chandrakant Seth Vs. Collector of Customs, .

16. Section 111 deals with confiscation of improperly imported goods of the different classes of goods which are liable to confiscation. Section 111(m) (with which we are concerned in this case) provides that goods brought from a place outside India which do not correspond in respect of value or in any other particular with the entry made under the Act are liable to confiscation.

17. Section 110 of the Act provides for the seizure of goods if the proper officer has reason to believe that any goods are liable to confiscation under the Act. An order of seizure is to be followed by a show cause notice issued u/s 124 of the Act within a specified period. An order of seizure is thus preparatory to proceedings for confiscation. The proceedings for confiscation commence with the service of notice of seizure u/s 110 and conclude with the order passed on the proceedings initiated by a show cause notice issued u/s 124.

18. In this case a show cause notice has been issued against the petitioner on 29th September, 1994 u/s 28 read with Section 124 of the Act. In the show cause notice, a copy of which was handed over to Court by the respondents, a claim has been made that the machines imported by the petitioner were classifiable under Tariff Heading 8701 and that the petitioners having cleared the goods under Tariff Heading 8432 had paid the exempted rate of Customs Duty by suppression of material particulars and misdeclaration of the description of the goods. It has therefore been alleged that an amount of Rs. 50,24,568/- had been short levied from the petitioners in respect of the goods in question. The show cause notice has also been addressed to M/s. G.N.B. Credit Private Ltd. claiming a short levy of Rs. 28,11,031.99 and M/s. Nightingale Engineering Industries Private Ltd. for an amount of Rs. 1,59,214.17.

19. The operative portion of the show cause notice read as under :-

"M/s. Bengal Took Ltd., M/s. GNB Credit Pvt. Ltd. and M/s. Nightingale Engineering Industries Pvt. Ltd., Todi Mansion, P-15, India Exchange Place Extension, Calcutta - 700 073 and their Directors/Secretary are therefore called upon to explain in writing before the Collector of Customs, Customs House, 15/1, Strand Road, Calcutta within 10 days from the date of receipt of this notice as to why -

1. Total extra duty to the tune of Rs. 79,94,814.90 (Rs. 50,24,864 A/c. Bengal Tools Ltd., Rs. 28,11,031.99 A/c. GNB Credit Pvt. Ltd.; and Rs. 1,59,214.17 A/c.

M/s. Nightingale) not be realised u/s 28 of the Customs Act, 1962;

2. The goods totalling CIF value Rs. 1,43,92,106.26 (Rs. 90,45,128.34 A/c. M/s. Bengal Tools Ltd.; Rs. 50,60,863.61 A/c. M/s. GNB Credit Pvt. Ltd. and Rs. 2,86,614.17 A/c. M/s. Nightingale) Engineering Industries Pvt. Ltd.) should not be liable to be confiscated u/s 111(m) of the Customs Act, 1962;

3. The penal action should not be taken against him/them u/s 112 of the Customs Act, 1962.

20. In other words, it is the case of the Customs Authorities that the goods should not have been cleared under Tariff Heading 8432 u/s 47 and that apart from the goods being confiscable u/s 111(m) there was a short levy of duty which could be claimed by the Department u/s 28.

21. If goods have been cleared on the basis of a misdeclaration they may, according to the Scheme of the Act, not only be subject to confiscation u/s 111 but duty which has been short levied may be recovered despite an order u/s 47, i.e. Section 47 does not preclude proceedings u/s 28 or Section 111.

22. The matter is not *res Integra* [See : Collector of Customs and Central Excise, West Bengal and Others Vs. Hindustan Motors Ltd. and Another, ; The Assistant Collector of Customs, Special Section, Calcutta and Others Vs. United India Minerals Ltd., In both the cases of Hindusthan Motors Ltd. (supra) and United India Minerals (supra) the power of review had been relied upon by the petitioners in those cases to contend that the order u/s 47 (or Section 51) had become final. Indeed in the case of United India Minerals the period during which the power of review could be exercised had already expired. Nevertheless the Court held that the power to confiscate the goods remained.

23. A full Bench of this Court in the case of Euresian Equipments and Chemicals Ltd. and Others Vs. The Collector of Customs and Others, upheld the law as stated in the cases of Hindusthan Motor (supra) and United India Minerals (supra).

24. It was contended before the Full Bench that Section 113 which relates to confiscation of goods attempted to be exported (similar to Section 111 of the Act in relation to imported goods) could not have any application to a case where the goods had actually been exported after an order u/s 51 (similar to Section 47 of the Act in relation to imported goods). The submission was rejected by the Full Bench which held :-

"The liability which accrues or arises as soon as the attempt to export the goods is made is in no way dependent and has not been made dependent on the possibility or feasibility of actual confiscation of the goods.

We fail to appreciate how the accrued liability of the goods to confiscation with the attempt made for exporting the same contrary to prohibition is extinguished or wiped out with the said illegal attempt succeeding, resulting in the actual

exportation of the goods.

An order by the proper officer permitting clearance and loading of the goods u/s 51 of the Customs Act, does not affect the position."

25. Other High Courts have also taken this view. [See Madanlal Steel Industries Ltd. Vs. Union of India, and Titanide Coating (P) Ltd. Vs. Assistant Collector of Customs,

26. In dealing with the question of Division Bench of the Karnataka High Court said :-

"The primary question is whether the goods cleared u/s 47 could be subsequently confiscated without the said order being reversed or set aside. The simple answer lies in Section 47, according to which;

"any goods exempted, subject to any condition from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer".

is liable to be confiscated. This shows that goods may be cleared on the basis of the exemption which in turn was granted subject to any condition. If the condition is violated or not complied with subsequently by the importer, the said goods are certainly liable to be confiscated. This can happen only after the goods are cleared u/s 47. Secondly an order of clearance u/s 47 involves two aspects; (i) the duty assessed on the goods shall have to be paid;

(ii) the goods are not prohibited goods. If the assessment order is modified u/s 28 resulting in the payment for further duty, the clearance granted earlier would be technically in contravention of Section 47 itself. It may come to light that the imported goods were really prohibited goods as defined u/s 2(33) of the Act. Failure of the conditions to be satisfied by the importer in respect of the goods would result in treating the goods as prohibited goods. Section 47 specifically does not say that the order made thereunder is final subject to any appeal, etc. The usual legislative practice of granting finality to such an order is not found in Section 47. In the circumstances, we are not inclined to agree with the submission of the learned Counsel for the petitioner."

27. The reasoning is not limited to cases of prohibited goods as contended by the petitioner.

28. The petitioner has contended that the Delhi High Court in Jain Shudh Vanaspati Ltd., etc. Vs. Union of India and Others, and the Bombay High Court in Union of India and others Vs. Popular Dyechem, have taken a contrary view. If that were so I have no hesitation in following the law laid down by the Full Bench of this Court both in principle and because of the binding nature of the precedent. But the Delhi High Court has not in fact decided the issue in the manner contended by the petitioner. The Delhi High Court said :-

"Consideration Section 47 of the Customs Act in the light of the legislative history, we are clear that the Section attaches finality to the satisfaction of the Officer that the goods are not prohibited. The finality cannot be disturbed unless the department successfully shows that there was fraud or deliberate suppression."

29. Thus the "finality" of an order u/s 47 is conditional upon there being no fraud or deliberate suppression. Where there are allegations of deliberate suppression, as in this case, even according to the Delhi High Court's Judgment, an Order u/s 47 would not stand in the way. The Bombay High Court in *Popular Dychem* has merely followed the decision in *Jain Shudh Vanaspati* (supra).

30. When the case of *Jain Shudh Vanaspati* (supra) came up before the Supreme Court Union of India and others Vs. *Jain Shudh Vanaspati*, the Supreme Court upheld the decision of the Delhi High Court in so far as it held that there had in fact been no short levy or misdeclaration, but on its interpretation of Sections 28 and 47 of the Act, at paragraph 4 of its judgment, the Supreme Court said:

"So far as the interpretation of Sections 28 and 47 of the Customs Act is concerned we do not consider it necessary to express any opinion on the findings recorded by the High Court and we leave the question open."

31. The submission of the petitioners that the interpretation of Section 47 of the Delhi High Court was affirmed by the Supreme Court in appeal is therefore incorrect.

32. For the reasons stated I reject the first contention of the petitioner and hold that the power u/s 110 being preliminary to the power of confiscation could be exercised without the order u/s 47 being revised or set aside in appeal.

33. Interestingly the petitioners have filed an application for refund in respect of the earlier consignments contending that they had mistakenly classified the same under Tariff Heading 8701. The application for refund proceeds on the basis that the assessment on clearance u/s 47 is not final. If the petitioners' argument u/s 129D were to be accepted no such refund application may be moved without the petitioners applying to the Collector u/s 129D(2) challenging the legality of such decision.

34. On the merits two legal propositions relating to the correctness of the classification have been relied on by the petitioners to contend that power tillers are not tractors and are not classifiable under Tariff Heading 8701. The first is that other concerns had imported the same machines when the Customs Authorities had treated them as classifiable under Tariff Heading 8432. Reliance has also been placed on an order of Shri Varadarajan dated 2-7-1993 in this context. It does not appear under what section the order of Shri Varadarajan was passed. The order is handwritten and in any event passed in connection with the consignment of another concern. It however appears that in respect of at least two other importers namely, General Trading Company and Khazana Credit

Private Ltd. the matter was remanded back by this Court for a decision on the matter by Shri Varadarajan after hearing the parties. In both the cases Shri Varadarajan has taken a view different from that taken by him in the order dated 2nd August 1993.

35. The petitioner has relied upon the decision in Sandip Agarwal Vs. Collector of Customs, to contend that the Customs Authorities having cleared identical goods at identical prices in the past were bound by their own precedent. The decision in fact operates against the petitioners. The petitioners had themselves, between October/November 1992, imported machines classifying the same under Tariff Heading 8701 and paid duty on such classification. If the principle in Sandip Agarwal (supra) is to be applied, the Customs Authorities would be bound to follow the same classification and continue to classify the machines under the same Tariff Heading. But I express no final opinion in the matter as I am not inclined to decide the dispute as a matter of fact whether the machines should be classified under Tariff Heading 8701 or 8432. The show cause notice having been issued by the Department and there being no reason why this Court should interfere with the proceedings u/s 124 at this stage, it will be open to the petitioners to raise all the points argued before me in answer to the show cause notice to justify the claim that the machines should be and had been properly classified under Tariff Heading 8432.

36. For the reasons aforesaid the writ application is dismissed with costs interim orders if any are vacated.

37. Let xerox copy of this judgment, duly signed by the Assistant Registrar of this Court, be given to the parties upon their undertaking to apply for the certified copy of this judgment and on payment of usual charges.