

(1992) 08 BOM CK 0069

In the Bombay High Court

Case No : Writ Petition No. 1551 of 1992

Bussa Overseas and Properties P. Ltd.

APPELLANT

Vs

C.L. Mahar, Asstt. C.C.

RESPONDENT

Date of Decision : 04-08-1992

Acts Referred:

Customs Act, 1962 — Section 111, 112, 143(1), 2

Citation : (2004) 163 ELT 304

Hon'ble Judges : V.V. Kamat, J;M.L. Pendse, J

Bench : Division Bench

Advocate : I.M. Chagla, J.D. Dwarkadas and D.J. Khambatta, instructed by Desai Berjis and Chinoy, for the Appellant; M.I. Sethna and H.V. Mehta, for the Respondent

Final Decision : Allowed

Judgement

M.L. Pendse, J.

Rule, returnable forthwith.

Shri Sethna waives service on behalf of the respondents.

By consent, Petition taken on board and called out for hearing.

1. By this Petition, filed under Article 226 of the Constitution, the petitioners are challenging legality of show-cause notice dated March 18,1992 issued by the Assistant Collector of Customs, Appraising Group-I, Bombay and the copy of which is annexed as Exh. "L" to the Petition. By the impugned notice, the petitioners are called upon to show-cause why the goods imported by the petitioners should not be confiscated u/s 111(d) of the Customs Act, 1962 and penalty u/s 112 should not be imposed upon the petitioners. To appreciate the facts which gave rise to the issuance of the show-cause notice and the challenge of the petitioners to the impugned notice, it is necessary to set out few facts.

2. The petitioner No. 1 is a Private Limited Company and are holders of valid REP

licences. The petitioners imported 25 consignments of compound alcoholic preparations, viz. over proof strength preparations of a kind used for the manufacture of beverages. The petitioners sought clearance of the 25 consignments on the ground that the said consignments were covered by the generic description "Ethyl Alcohol" appearing in the REP licences which were issued under the relevant import policies AM 84-85 and AM 85-88. In respect of these consignments, the Customs Department declined to clear the goods on the ground that the import was illegal. The Customs Authorities felt that the REP licences permitted import of "Ethyl Alcohol" and the said licences did not cover the goods which were over proof strength alcoholic preparations, in other words concentrated whisky, brandy and gin. The Customs Authorities also felt that the goods imported were not relatable to the raw material used in the manufacture of the product to be exported and the goods imported were consumer goods covered by entry at serial No. 121 of Appendix 2 Part B of the import policy AM 85-88. The petitioners thereupon filed 16 writ petitions in this Court seeking a declaration that the 25 consignments imported were legal and validly imported and Customs Authorities should forthwith permit the clearance. By interim orders passed in the writ petitions, the petitioners were permitted to clear the consignments upon the petitioners furnishing to the department an ITC bond for 25% of the c.i.f. value and the bank guarantee for the disputed amount of duty. By judgment dated November 9, 1990, the Division Bench of this Court held that the objection raised by the Customs Authorities was without any merit and the petitioners are entitled to clearance of the goods. The decision of the Division Bench was challenged by the department by filing SLP before Supreme Court but it was summarily rejected.

3. During the pendency of the petitions in this Court, the petitioners imported 45 consignments of the identical goods, 6 consignments were imported in February 1990, 34 consignments in March 1990 and the remaining 5 consignments in November 1991. In respect of these consignments, the Customs Department agreed to grant clearance provided the petitioners give an undertaking that they are willing to bound by the final decision in the pending writ petitions and furnishing an ITC bond equivalent to 100% of the c.i.f. value with bank guarantee to the extent of 25% of the c.i.f. value. The petitioners executed the requisite bonds as required under Sub-section (1) of Section 143 of the Customs Act on February 21, 1990 in respect of 6 consignments, in March 1990 in respect of 34 consignments and on November 9, 1991 in respect of the remaining 5 consignments and also furnished bank guarantees. It is not in dispute that the petitioners also furnished the undertaking as required by the Customs Department in respect of the clearance of the first 2 consignments for home consumption. It is also not in dispute that the terms and conditions of the bonds executed by the petitioners were complied with.

4. On March 18, 1992, the impugned show-cause notice was served by the Assistant Collector of Customs and the notice inter alia recites that 45 consignments were cleared provisionally on ITC bonds for full c.i.f. value and

25% of bank guarantee. The notice further recites that the goods were provisionally assessed as the department was looking into the scope of newly inserted entry No. 30 in Appendix 2 Part B of the Import Policy 1988-91. The show-cause notice then recites that the goods imported under 45 consignments are nothing but concentrates of alcoholic beverages used for manufacture of Indian whisky and the goods were covered by Appendix 28, entry No. 30 and 31 of Import Policy period AM 88-91 and 1990-93 and therefore require a specific licence for valid and legal importation. The show-cause notice further recites that the various REP licences submitted by the importers do not appear to be valid for importation of compound alcoholic beverages preparations and therefore the goods appear to have been imported in contravention of provision of Sub-section (1) of Section 3 of the Import (Control) Act 1947 and Import Control Order, 1955 and therefore the goods are liable for confiscation u/s 111(d) and the petitioners are liable to penal action u/s 112 of the Customs Act. The petitioners have approached this Court to challenge the issuance of show-cause notice.

5. Shri Chagla, learned counsel appearing on behalf of the petitioners, submitted that the Assistant Collector of Customs lack jurisdiction to issue show-cause notice. It was contended that the petitioners have approached this Court under Article 226 of the Constitution as the Assistant Collector of Customs had issued impugned notice without any authority whatsoever. Shri Chagla submitted that the goods imported under 45 consignments were cleared long back in accordance with the bonds executed by the petitioners under Sub-section (1) of Section 143 of the Customs Act and once the imported goods are cleared for home consumption, then it is not permissible for the Customs Authorities to claim that the goods are liable for confiscation u/s 111(d) of the Act. Shri Chagla also submitted that the proceedings for levy of penalty u/s 112 of the Act are not permissible as the petitioners had complied with the requirements of the bond and Sub-section (2) of Section 143 of the Act prohibits the Customs Authorities to levy any penalty provided under the Act on the petitioners or commence any proceedings for contravention of provisions relating to any other law. Shri Sethna, learned counsel appearing on behalf of the department on the other hand, submitted that the jurisdiction to commence proceedings for levy of penalty u/s 112 of the Act is not dependant upon the availability of the imported goods and even if the goods are cleared for home consumption, that would not divest the Customs Authorities of power to commence proceedings for levy of penalty. Shri Sethna submitted that the prohibition to commence proceedings for levy of penalty as prescribed under Sub-section (2) of Section 143 is not attracted in the present case as the petitioners had not strictly complied with the requirement of the bond. In view of the rival submission, a short question which falls for determination is whether the Assistant Collector of Customs had jurisdiction to commence proceedings for confiscation of goods u/s 111(d) and for levy of penalty u/s 112 of the Customs Act.

6. Section 2(25) of the Act defines the expression "imported goods" and means any goods brought into India from a place outside India but does not include

goods which have been cleared for home consumption, as it then loses the character of imported goods. The clearance of goods for home consumption is in accordance with the provisions of Section 47 of the Act. The section inter alia provides that the officer may make an order permitting clearance of the goods for home consumption on satisfaction that the goods are not prohibited goods and the importer has paid the import duty. Section 143 confers power upon the Assistant Collector of Customs to allow import or export on execution of bonds in certain cases. The section inter alia provides that if the officer is satisfied that having regard to the circumstances of the case, the clearance cannot wait till all the requirements are satisfied, then permission can be granted to the importer to clear the goods for home consumption by executing a bond in such amount with such surety or security and subject to such conditions as the Assistant Collector of Customs approves for compliance with the requirements of the bond. Subsection (1) of Section 143 of the Act is an enabling provision conferring power upon the Assistant Collector of Customs to grant clearance for home consumption even though the things which are required to be done prior to clearance are not satisfied, provided the importer executes a bond promising to comply with the things within a stipulated period.

The bonds secured by the Customs Department from the petitioners in respect of 45 consignments are on identical grounds. The bonds recite that the Collector of Customs permitted the clearance of the goods set out in the Schedule on the petitioners binding themselves to the Collector for payment backed by the bank guarantee. The relevant portion of the bond reads as follows : -

"Now the conditions of the above written Bond are such that if the said (1) Bussa Overseas and Properties Pvt. Ltd. (Importers) having office at 215, Commerce House, 140, Nagindas Master Road, Bombay-400 023, their heirs and representatives shall deliver or cause to be delivered to the said Collector within one month from the date hereof the import licence referred to in the Schedule."

The Schedule to each of the bond sets out the bills of entries, the quantity and description of the imported goods and the c.i.f. value and assessable value and the import licences number and the date of issuance of such licences. The three bonds as mentioned hereinabove in respect of three different consignments were executed on February 21, 1990, March 1990 and November 9, 1991. The bonds required the petitioners to produce the import licences or REP licences within a period of one month and it is not in dispute that all the terms and conditions of the bonds including the production of import licences were complied with by the petitioners within the stipulated period.

7. Sub-sections (2) and (3) of Section 143 of the Customs Act read as follows : -

"(2) If the thing is done within the time specified in the bond, the Assistant Collector of Customs shall cancel the bond as discharged in full and shall, on demand, deliver it, so cancelled, to the person who has executed or who is entitled to receive it, and in such a case that person shall not be liable to any

penalty provided, in this Act or, as the case may be, in such other law for the contravention of the provisions thereof relating to the doing of that thing.

(3) If the thing is not done within the time specified in the bond, the Assistant Collector of Customs shall, without prejudice to any other action that may be taken under this Act or any other law for the time being in force, be entitled to proceed upon the bond in accordance with law."

The plain reading of Sub-section (2) makes it clear that if the thing, which is required to be done, is done within the time specified, then the Assistant Collector of Customs shall cancel the bond and return the same to the importer and thereafter the importer shall not be liable to penalty provided therein. Subsection (3) on the other hand deals with cases where the importer fails to comply with the things set out in the bond within the time specified and in those cases," the Assistant Collector of Customs is not only entitled to enforce the bond but to take any other action permissible in accordance with the Act. Shri Chagla raised two-fold, contentions to urge that the show-cause notice issued in exercise of powers u/s 111 and Section 112 of the Act is not valid. The first submission of the learned counsel is that the goods imported under 45 consignments were cleared for home consumption on the petitioners executing ITC bonds as required under Sub-section (1) of Section 143 of the Act. The learned counsel urged that once the goods are cleared for home consumption, then the goods covered by the consignments cease to be imported goods in accordance with the definition of expression "imported goods" u/s 2 of the Act and consequently such goods are not liable for confiscation. There is considerable merit in the submission of the learned counsel. The goods lose its character of imported goods on being granted clearance for home consumption and thereafter the power to confiscate can be exercised only in cases where the order of clearance is revised and cancelled Shri Chagla then submitted that the proceedings for imposition of penalty u/s 112 are not permissible if the goods cannot be confiscated u/s 111 of the Act. The submission is not correct. Section 112 deals with the levy of penalty for improper importation of goods and Section 112(a) provides that any person who in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation u/s 111, or abets the doing or omission of such an act, is liable to a penalty. The power to impose penalty can be exercised not only when the goods are available for confiscation but when such goods are liable to confiscation. The expression "liable to confiscation" clearly indicates that the power to impose penalty can be exercised even if the goods are not available for confiscation. It is possible that the goods may be cleared for home consumption without the Customs Authorities being aware that the clearance is sought by suppressing the relevant facts or by producing documents which are not genuine. The mere fact that the importers secured such clearance and disposed of the goods and thereafter goods are not available for confiscation cannot divest the Customs Authorities of the powers to levy penalty u/s 112 of the Act. Shri Chagla relied upon the decision of Calcutta High Court reported in 2000 (123) E.L.T. 330 (Cal.) : 1976

Tax. L.R. 1567, *Thomas Duff and Co. (India) Ltd. v. Collector of Customs and Ors.* The Calcutta High Court took the view in a case of export where a show-cause, notice was issued as to why penal action should not be taken, that once the goods were exported and/or not available for confiscation, then the Customs Authority had no jurisdiction to initiate the proceedings by issuance of show-cause notice for levy of penalty. It is not possible to share the view taken by the Calcutta High Court. The power to levy penalty is not dependant upon availability of the goods imported or exported. The power to levy penalty arises because the importer or exporter has done or omitted an act in relation to goods and which renders such goods liable for confiscation. The power, in our judgment, to levy penalty is available once the Customs Authorities come to the conclusion that the goods imported or exported were liable to confiscation because of act or omission on the part of the importer or exporter as the case may be. The power is not dependant upon the availability of the goods. It is therefore not possible to accede to the submission of Shri Chagla that as the goods covered by 45 consignments were not available for confiscation u/s 111 of the Act, the Customs Department could not have commenced proceedings u/s 112 of the Act for levy of penalty.

8. Shri Chagla then submitted that the powers u/s 112 of the Act are not available in view of the provisions of Sub-section (2) of Section 143 of the Act and this submission deserves acceptance. The perusal of Sub-section (2) makes it clear that if the person who had executed the bond, complied with the requirement of the bond within the stipulated period, then the Collector of Customs is bound to discharge the bond and deliver it back the person executing the same. The consequence of cancellation of the bond is that the person shall not be liable to any penalty provided under the Act and that covers the penalty contemplated u/s 112 of the Act. Shri Chagla submitted that the petitioners had complied with the requirements of the bond within the stipulated period and consequently the bonds are required to be cancelled and no action is permissible for levy of penalty u/s 112 of the Act. The learned counsel urged that the ITC bond was executed by the petitioners as required by the Collector of Customs under the statutory provisions contained in Sub-section (1) of Section 143 of the Act and the consequence of compliance with the terms must follow and the show-cause notice proposing to levy penalty could not have been issued by the Customs Department. Shri Sethna could not dispute that the Customs Department did not take any action in enforcement of any of the three-bonds after expiry of the stipulated period. Shri Sethna also did not dispute that the terms and conditions set out in the bonds were complied with by the petitioners. Shri Sethna submitted that the requirement of the bonds need to be complied with strictly and it was not merely sufficient for the petitioners to produce the import licences within the stipulated period, but it was also essential to satisfy the Customs Department that the goods imported were permissible under the import licences. Shri Sethna submitted that the Customs Officers were not satisfied that the import licences were legal and valid in respect of the import of

the consignments but did not take any steps to enforce the bonds because the earlier petitions filed by the petitioners in this Court were pending. The submission is devoid of any merit. There is no contemporaneous record to indicate that the Customs Department was not satisfied about the compliance with the requirement of the bonds. It is futile to suggest that the Customs Authority did not take steps to enforce the bonds merely because some litigation between the parties was pending in this Court. Shri Chagla pointed out that not only the Department did not take steps to enforce the bonds but the bank guarantees furnished by the petitioners were discharged after the stipulated period and the Department had no objection to that course. Shri Sethna then submitted that the Department has a particular form in which ITC bonds u/s 143(1) of the Act are secured. A copy of such form is annexed as Exh. 2 to the rejoinder filed by the petitioners. Shri Sethna wondered why the bonds secured by the Department from the petitioners in the present case are worded differently. The surprise of Shri Sethna cannot be answered by the Court. It is not for this Court to investigate why the Department took bonds from the petitioners which are differently worded than the normal bonds secured by the Department from the importers. In our judgment, once the conditions imposed by the Assistant Collector of Customs on the petitioners while securing the bonds under Sub-section (1) of Section 143 are complied with within the stipulated period, then the conclusion is inescapable that the Assistant Collector of Customs had no jurisdiction to commence proceedings for confiscation of goods and levy of penalty under Sections 111 and 112 of the Customs Act by issuance of show-cause notice.

9. Accordingly, petition succeeds and rule is made absolute in terms of prayer (b). In the circumstances of the case, there will be no order as to costs.