

(2014) 10 MAD CK 0295

In the Madras High Court

Case No : Writ Petition No. 16288 of 2014 and MP. No. 1 of 2014

City Office Equipments

APPELLANT

Vs

The Commissioner of Customs (Seaport- Import)

RESPONDENT

Date of Decision : 08-10-2014

Acts Referred:

Customs Act, 1962 — Section 11, 110A, 111, 111(d), 112

Environment (Protection) Act, 1986 — Section 25, 6, 8

Foreign Trade (Development and Regulation) Act, 1992 — Section 11, 11(1), 11(8), 11(9), 3

Citation : (2015) 316 ELT 199 : (2015) WritLR 466

Hon'ble Judges : V. Ramasubramanian, J

Bench : Single Bench

Judgement

V. Ramasubramanian, J.—Under an invoice dated 03.3.2014, the petitioner imported a consignment of 129 packages of old and used Digital Multifunction Print and Copying Machines of various models for a declared value of USD 82,01,63.75 (CIF). They also filed a Bill of Entry dated 26.5.2014.

2. The Customs Approved Chartered Engineers examined the goods on arrival, in the presence of the Customs Officers and submitted an examination report on 4.6.2014. However, the appraised value was USD 24,932.77 (CIF).

3. The respondents did not permit the clearance, even after the report of the Chartered Engineers. Therefore, the petitioner made a representation on 16.6.2014 to the second respondent, informing him that he is prepared to accept the enhancement of value. But, the petitioner did not receive any response. Therefore, the petitioner has come up with the above writ petition seeking the issue of a Writ of Mandamus to direct the respondents to assess and permit the clearance of 129 packages of the so called second hand Digital Multifunction Print and Copying Machines, forming the subject matter of the Bill of Entry dated 26.5.2014, upon payment of applicable duties of customs.

4. I have heard Mr.N.Viswanathan, learned counsel for the petitioner and

Mr.V.Sundareswaran, learned Senior Panel Counsel appearing for the respondents.

5. The Department of Commerce, Ministry of Commerce and Industry, Government of India, issued a Foreign Trade Policy with effect from 05.6.2012. Under Chapter II of the said Policy, it was stated that exports and imports shall be free, except when regulated and that such regulation would be as per the Foreign Trade Policy. Paragraph 2.7 of the said Policy stipulated that any goods/ service, the export or import of which is "restricted", may be exported or imported only in accordance with an authorisation/permission/licence or in accordance with the procedure prescribed in a Notification/public notice issued in this regard.

6. Insofar as the second hand goods are concerned, Paragraph 2.17 of the Foreign Trade Policy, prior to its amendment, stipulated that Digital Multifunction Print and Copying Machines are restricted items and that they will be allowed to be imported only as per the provisions of the Foreign Trade Policy.

7. With effect from 28.02.2013, the Central Government issued an amendment to Paragraph 2.17, vide Notification No. 35 (RE-2012)/2009-2014 . Insofar as the second hand Digital Multifunction Print and Copying Machines are concerned, the amended Notification made them restricted goods importable only as against authorisation.

8. It appears that the petitioner made an application on 27.8.2013 seeking permission for the import of used Digital Multifunction Print and Copying Machines. The request of the petitioner was placed before the Export Facilitation Committee, in a meeting held on 19.12.2013 and the Committee decided to reject the case as per the recommendation of the Department of Industrial Policy and Promotion under the Office Memorandum dated 03.10.2013. The decision of the Export Facilitation Committee was communicated to the petitioner by a letter dated 03.01.2014. The only reason stated in the said communication for the rejection of the request of the petitioner was that the second hand equipment would become obsolete/junk very fast and that the disposal of such junk equipment would pollute the environment.

9. But, despite such a rejection order communicated on 03.01.2014, the petitioner appears to have raised an invoice on 03.3.2014 and filed a Bill of Entry on 26.5.2014. According to the petitioner, they had placed orders much before the rejection of their request and that those items were kept for the raising of invoice and for transshipment at the Foreign Port before the rejection order. Hence, it is claimed that the petitioner should be allowed to clear the goods.

10. Before proceeding to consider the rival contentions, I should take note of one subsequent development namely that the Joint Commissioner of Customs - the second respondent herein has now issued a show cause notice dated 27.6.2014 under Section 124 of the Customs Act, 1962, calling upon the petitioner to show cause as to why the value declared should not be rejected and as to why the imported items should not be held as prohibited, liable for confiscation. The

proposals made in the show cause notice can be best understood only if the operative portion of the show cause notice in paragraph 9 is extracted. Hence, it is extracted as follows :

In view of the above, the importer M/s. City Office Equipment, Chennai is hereby called upon to show cause to the Joint Commissioner of Customs, Group 5, Customs House, Chennai-600001 as to why :

(a) the declared value of the goods namely 102 units of used Digital Multifunction Print and Copying Machine imported under the Bill of Entry No. 5602113 dated 26.5.2014 should not be rejected under Rule 12 of the Customs (Determination of Value of Imported Goods) Rules, 2007 and re-determined as USD 24932.77 (CIF) equivalent to Rs.14,98,459/- (CIF) under Rule 9 of the said Rules.

(b) the goods namely 102 units of used Digital Multifunction Print and Copying Machines imported under the Bill of Entry No. 5602113 dated 26.5.2014 should not be held as prohibited under Sub-Section (u) of Section 11 of the Customs Act read with Sub-Section (3) of Section 3 and 11 of Foreign Trade (Development and Regulation) Act, 1992 and Rules and Orders issued thereunder read with Para 2.17 of Foreign Trade Policy 2009-14 as amended vide DGFT Notification No. 35/(RE-2012)/2009-14 dated 28.2.2013.

(c) the goods namely 102 units of used Digital Multifunction Print and Copying Machine imported under the Bill of Entry No. 5602113 dated 26.5.2014 should not be held as prohibited under Sub-Section (u) of Section 11 of the Customs Act read with Rule 16 of the Hazardous Waste (Management, Handling and Transboundary) Rules, 2008.

(d) the goods namely 102 units of used Digital Multifunction Print and Copying Machine imported under the Bill of Entry No. 5602113 dated 26.5.2014 valued at Rs.14,98,459/- (CIF) should not be confiscated under Section 111(d) and (m) of the Customs Act, 1962 read with Sub-Section (3) of Section 3 and 11 of Foreign Trade (Development and Regulation) Act, 1992 and Rules and Orders issued thereunder read with Paragraph 2.17 of Foreign Trade Policy 2009-14 as amended vide DGFT Notification No. 35/(RE-2012)/2009-14 dated 28.2.2013 read with Rule 16 of the Hazardous Waste (Management, Handling and Transboundary) Rules, 2008.

(e) Penalty should not be levied under Section 112(a) of the Customs Act, 1962." Since the writ petition was filed on 23.6.2014 and the show cause notice is dated 27.6.2014, the petitioner has not dealt with the same in this writ petition.

11. The Respondents have filed a counter affidavit contending inter alia (1) that in terms of Board Circular No. 27/2011, dated 04.07.2011, the import of goods covered under Entry B 1110 of Part B of Schedule III of the Hazardous Material (Management, Handling and Transboundary) Rules, 2007, such as second hand computers/electronic assemblies require the permission of the Ministry of

Environment and Forests; (2) that as per para 4 of the clarification issued on 30.11.2011 to the Tamil Nadu Pollution Control Board, the Director, Ministry of Environment and Forests, Government of India indicated that used photocopiers/multifunction devices covered under electric and electronic assemblies meant for direct use require prior permission of the Ministry of Environment and Forests; (3) that the import of goods "restricted" under the Foreign Trade Policy, makes those goods liable for confiscation under Section 111(d) of the Customs Act, 1962; (4) that as per the law declared by the Supreme Court in *Sheikh Mohd. Omer Vs. Collector of Customs, Calcutta and Others*, , restriction is also one form of prohibition; (5) that despite the denial of permission to the petitioner way back in December 2013, the petitioner had the audacity to import the goods; and (6) that in the light of a show cause notice already issued to the petitioner, proposing to confiscate the goods, the goods cannot be released.

12. In order to test the correctness of the contentions raised on both sides, it is necessary to have a look at the provisions of the Customs Act, 1962, The Foreign Trade (Development and Regulation) Act, 1992, The Foreign Trade (Regulation) Rules, 1993 and the Hazardous Material (Management, Handling and Transboundary) Rules, 2007.

THE CUSTOMS ACT, 1962:

13. The expression "Prohibited Goods" is defined in Section 2(33) of the Customs Act, 1962 to mean "any goods, the import or export of which is subject to any prohibition under the Customs Act or any other law for the time being in force, but it does not include any such goods in respect of which, the conditions subject to which the goods are permitted to be imported or exported have been complied with."

14. Unfortunately, the Act does not define the expression "Restricted Goods". But the definition of the expression "Prohibited Goods" itself contains an indication as to how the expression "Restricted Goods" has to be understood.

15. A careful look at Section 2(33) would show that even prohibited goods could be permitted to be imported or exported subject to some terms and conditions. The moment those conditions are complied with, those goods would cease to be prohibited goods. This is why the exclusion clause contained in the second part of Section 2(33) uses the expression "any such goods". Therefore, it appears that the Customs Act recognizes only two types of goods namely: (1) those that are prohibited; and (2) those that are not prohibited. The Act also recognizes the fact that even prohibited goods could be imported or exported subject to certain conditions. If those conditions are fulfilled, prohibited goods would automatically become non-prohibited goods.

16. Section 11 of the Act empowers the Central Government, by Notification in the official gazette, to prohibit either absolutely or subject to such conditions to be fulfilled before or after clearance of the import or export of goods of any specified description. The expression "illegal import" is defined in Section 11A(a)

of the Customs Act, 1962 to mean the import of any goods in contravention of the provisions of the Customs Act or any other law for the time being in force.

17. What is to be done if goods are improperly imported into or exported outside India, is spelt out in Chapter XIV. Section 111, which makes certain goods liable for confiscation, states that any prohibited goods brought into any bay or any goods which are imported contrary to any prohibition imposed or under the Customs Act, 1962 or any other law for the time being in force, are liable for confiscation. Under Section 112, the person guilty of improper importation of goods is also made liable for a penalty. But before confiscation, an adjudication is to take place in terms of the procedure prescribed under Section 122A. Section 125(1) of the Customs Act 1962, obliges the adjudicating authority to give to the owner of the goods, an option to pay fine in lieu of confiscation. Section 125 reads as follows:-

"125. Option to pay fine in lieu of confiscation:

(1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit:

PROVIDED that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1), the owner of such goods or the person referred to in sub-section (1) shall, in addition, be liable to any duty and charges payable in respect of such goods."

18. Section 110A enables the provisional release of goods, pending adjudication. From the language of Section 110A read with Section 125, it is clear that both these provisions do not distinguish between goods which are prohibited from being imported into or exported out of India and goods in respect of which there is no such prohibition.

19. In case, the imported goods are confiscated to Government, the property in those goods vests in the Central Government in terms of Section 126(1) of the Customs Act, 1962. Consequently, the officer adjudging confiscation, should take and hold possession of the confiscated goods under Section 126(2) of the Act. There appears to be no provision in the Customs Act, 1962 for directing the re-export of the goods that are confiscated under Section 122 of the Act. The only manner in which confiscated goods could be dealt with, is perhaps by the sale of those goods by the Central Government, after taking possession under Section 126 of the Act. Interestingly, even the procedure for sale of goods prescribed in

Section 150(1) seems to apply only to goods which are not confiscated. Therefore, the answer to the question as to what happens to the confiscated goods whose possession is taken by the adjudging officer is not found in Customs Act, 1962.

THE FOREIGN TRADE (DEVELOPMENT AND REGULATION) ACT, 1992:

20. After the economy of the country underwent a transition in the year 1991, the Parliament enacted the Foreign Trade (Development and Regulation) Act, 1992. The object of the Act was to provide for the development and regulation of Foreign Trade by facilitating imports into and augmenting exports from India. Under Section 3 of the said Act, the Central Government was empowered to pass two types of orders namely: (1) orders making provision for the development and regulation of Foreign Trade by facilitating imports and increasing exports; and (2) orders making provision for prohibiting, restricting or otherwise regulating the import or export of the goods. Any order passed under Section 3(2) of the said Act prohibiting, restricting or otherwise regulating the import or export of goods, would make those goods, by virtue of Section 3(3) Foreign Trade (Development and Regulation) Act, 1992 to be the goods the import or export of which is prohibited under Section 11 of the Customs Act, 1962. In other words, once an order is passed under Section 3(2) of the Foreign Trade (Development and Regulation) Act, 1992 prohibiting or restricting or regulating the import of certain goods, those goods would automatically be deemed to be prohibited goods under Section 11 of the Customs Act, 1962. Consequently, all the provisions of the Customs Act, 1962 would automatically come into play. Therefore, the provisions relating to adjudication, confiscation etc., would also become applicable in such cases.

21. Section 11(1) of the Foreign Trade (Development and Regulation) Act, 1992, prohibits the import or export of goods except in accordance with the provisions of the Act, the Rules and orders made thereunder and the Foreign Trade Policy for the time being in force. The consequences of contravention of the provisions of the Foreign Trade (Development and Regulation) Act, 1992, the Rules and orders issued under the Act and the Foreign Trade Policy are spelt out in sub-sections (2) to (9) of Section 11. Section 11(8) makes the goods imported in contravention of any provision of the Foreign Trade (Development and Regulation) Act, liable for confiscation. Sub-sections (8) and (9) of Section 11 of the Foreign Trade (Development and Regulation) Act, 1992 are to be noted and hence they are reproduced as follows:

"(8) Where any contravention of any provision of this Act or any rules or orders made thereunder or the foreign trade policy has been, is being, or is attempted to be made, the goods (including the goods connected with services or technology) together with any package, covering or receptacle and any conveyances shall, subject to such conditions and requirements as may be prescribed, be liable to confiscation by the Adjudicating Authority.

(9) The goods (including the goods connected with services or technology) or the conveyance confiscated under sub-section (8) may be released by the Adjudicating Authority, in such manner and subject to such conditions as may be prescribed, on payment by the person concerned of the redemption charges equivalent to the market value of the goods or conveyance, as the case may be."

22. Therefore, it is clear that even the goods which are liable for confiscation can be released upon payment of redemption charges under Section 11(9) of the Act. This provision appears to be in tune with Section 125(1) of the Customs Act, 1962.

FOREIGN TRADE (REGULATION) RULES, 1993:

23. Rule 17 of the Foreign Trade (Regulation) Rules, 1993, deals with confiscation and redemption. It reads as follows:

RULE 17. Confiscation and redemption:- (1) Any imported goods or materials in respect of which -

(a) any condition of the licence, or letter of authority under which they were imported relating to their utilisation or distribution; or

(b) any condition relating to their utilisation or distribution, subject to which they were received from or through, an agency recognised by the Central Government; or

(c) any condition imposed under the Policy with regard to the sale or disposal of such goods or materials, has been, is being, or is attempted to be, contravened, shall together with any package, coverage or receptacle in which such goods are found, be liable to be confiscated by the Adjudicating Authority, and where such goods or materials are so mixed with any other goods or materials that they cannot be readily separated, such other goods or materials shall be liable to be confiscated:

Provided that where it is established to the satisfaction of the Adjudicating Authority that any goods or materials which are liable to confiscation under this rule, had been imported for personal use, and not for any trade or industry, such goods or materials shall not be ordered to be confiscated.

(2) The Adjudicating Authority may permit the redemption of the confiscated goods or materials upon payment of redemption charges equivalent to the market value of such goods or materials."

24. Therefore, despite the fact that the goods, whose import is restricted in terms of the Foreign Trade Policy, should be construed to be prohibited goods, there is no bar for the release of the goods: (1) either under Section 125(1) of the Customs Act, 1962 upon payment of fine in lieu of confiscation; or (2) in terms of Section 11(9) of the Foreign Trade (Development and Regulation) Act, 1992 upon payment of redemption charges.

IV. HAZARDOUS WASTES RULES :

25. In exercise of the powers conferred under Sections 6, 8, and 25 of the Environment (Protection) Act, 1986, the Central Government issued Hazardous Material (Management, Handling and Transboundary Movement) Rules, 2007. As per Rule 2 of these Rules, they would apply to the handling of hazardous wastes as specified in the Schedules, but not to (i) waste water and exhaust gases; (ii) wastes arising out of the operation from ships; (iii) radioactive wastes; (iv) biomedical wastes; and (v) municipal wastes. There are seven Schedules to these Rules. Schedule I contains a list of processes generating hazardous wastes. Schedule II contains a list of waste constituents with concentration limits. Schedule III is divided into two parts, namely Part A and Part B. Part A contains a list of hazardous wastes applicable for import with Prior Informed Consent, with reference to Annexure VIII of the Basel Convention. Part B of Schedule III contains a list of hazardous wastes applicable for import and export not requiring Prior Informed Consent, with reference to Annexure IX of the Basel Convention. Entry B 1110 in Part B of Schedule III to the Rules relates to "Electrical and Electronic Assemblies". The description of items under Entry B 1110 is as follows :

B 1110

- Electrical and electronic assemblies
- Electronic Assemblies consisting only of metals or alloys****
- Waste Electrical and Electronic Assemblies scrap (including printed circuit boards) not containing components such as accumulators and other batteries included in list A, mercury - switches, glass from cathode-ray tubes and other activated glass and PCB - capacitors, or not contaminated with constituents such as cadmium, mercury, lead, polychlorinated biphenyl or from which these have been removed, to an extent that they do not possess any of the constituents mentioned in Schedule 2 to the extent of concentration limits specified therein.****

Electrical and Electronic Assemblies (including printed circuit boards, electronic components and wires) destined for direct re-use and not for re-cycling or final disposal.

26. It is pertinent to note that there are stars (single, double, triple or four) assigned to some of the items in the Table below Schedule III. The significance of these stars is indicated at the bottom. If an item is assigned four stars, it means that the import of the said item is permitted in the country by the actual users with the permission of the Ministry of Environment and Forests and a licence from the Director General of Foreign Trade. It is also indicated in the Table below Schedule III to these Rules that those wastes, which do not carry any star, can be imported only with the permission of the Ministry of Environment and Forests.

27. Schedule IV to these Rules contains a list of hazardous wastes requiring

registration for re-cycling and re-processing. Schedule V contains specifications for used oil suitable for re-processing/re-cycling. Schedule VI contains hazardous wastes prohibited for import and export. Schedule VII contains a list of authorities and corresponding duties.

28. The expression "hazardous waste" is defined in Rule 3(I) of the Rules as follows :

?Hazardous waste means any waste, which by reason of any of its physical, chemical, reactive, toxic, flammable, explosive or corrosive characteristics causes danger or is like to cause danger to health or environment, whether alone or when in contact with other wastes or substances, and shall include -

- (i) waste specified under column (3) of Schedule-I;
- (ii) waste having constituents specified in Schedule - II, if the concentration is equal to or more than the limit indicated in the said schedule; and
- (iii) waste specified in Part A or Part B of Schedule III in respect of import or export of such wastes in accordance with Rules 12, 13 and 14 or the wastes other than those specified in Part A or Part B if they possess any of the hazardous characteristics specified in Part C of that Schedule."

29. Therefore, if the item imported into India is one that falls under Part A or Part B of Schedule III, it would be deemed to be an hazardous waste within the definition of the expression under Rule 3(I), only in accordance with Rules 12 to 14. Rule 12 makes the Ministry of Environment and Forests as the Nodal Ministry to deal with transboundary movement of hazardous wastes and to grant permission for transit of the hazardous waste through any part of India. Rule 13 prohibits the import of hazardous wastes into India for disposal, though it permits the import of such wastes for re-cycling or recovery or re-use. Rule 14(1) stipulates that the import and export of hazardous wastes specified in Schedule III shall be regulated in accordance with the conditions laid down in the Schedule. Rule 14(2)(ii) stipulates that the import of hazardous wastes specified in Part B of Schedule III shall not require Prior Informed Consent of the country from where it is imported. Rule 16 provides the procedure for import of hazardous wastes. Rule 17(1) makes the import of hazardous wastes into India illegal, if it was made without the permission of the Central Government in accordance with these Rules. Under Sub-Rule (2), the importer is obliged to re-export the waste in question at his cost within 90 days from the date of its arrival, in the case of an illegal import of hazardous wastes. The Authorities competent to do the same are specified in Schedule VII. Therefore, the obligation to re-export an imported item arises only out of Rule 17(2) of the Hazardous Material (Management, Handling and Transboundary Movement) Rules and not out of the Customs Act or the Foreign Trade (Development and Regulation) Act. Consequently, if the petitioner had to be directed to re-export what was imported by him, it could be done only by the Authorities specified in Schedule VII. Till date, no action under these Rules has been initiated by any of the Authorities

listed in Schedule VII to the Hazardous Waste Rules.

30. The Ministry of Environment and Forests, which is named as the Nodal Ministry under Rule 12 of the Hazardous Wastes Rules, have not initiated any action against the petitioner. As pointed out earlier, the import of hazardous wastes is prohibited by Rule 13(1) only if the import of such wastes is for disposal in India. But, if the import is for re-cycling or recovery or for re-use, it is permitted under Rule 13(2), subject however perhaps to the permission of the Ministry of Environment and Forests.

31. The procedure for import of hazardous wastes is stipulated in Rule 16. As per Rule 16(1), a person who intends to import hazardous wastes specified in Schedule III, should apply in Form 7 or Form 8 to the Central Government, together with Prior Informed Consent, wherever applicable and should send a copy of such application to the concerned State Pollution Control Board. The application so submitted has to be examined by the Ministry of Environment and Forests under Sub-rule (2) of Rule 16, with reference to the observations made by the State Pollution Control Board. Once permission is granted, the same has to be communicated by the Ministry of Environment and Forests to the Central Pollution Control Board, the State Pollution Control Board as well as the concerned Port and Customs Authorities.

32. What a Customs Authority is obliged to do, is also indicated in Rule 16(6). As per this rule, the Customs Authority should collect three randomly drawn samples of the consignment, before clearing it as per the Customs Act, 1962, for analysis and retain the report for two years. The importer is also obliged to maintain a record of the hazardous wastes imported by him.

33. The consequences of importing hazardous wastes into India are spelt out in Rule 17. If an import of hazardous wastes is made into India without the permission of the Central Government, it is deemed to be an illegal import under Rule 17(1). In such cases, the importer is obliged to re-export the waste in question within 90 days, at his cost. The implementation of this is to be ensured by the State Pollution Control Board. Even Schedule VII to these Rules, which contains the list of authorities under the Act and their corresponding duties, does not name the Commissioner of Customs as one of the authorities who is entitled to take action under Rule 17 for illegal traffic in hazardous wastes. Therefore, the action now taken cannot be construed as one for re-export under Rule 17(2) of the Hazardous Wastes Rules.

34. In such circumstances, I do not think that any of the respondents herein is competent, to order the re-export, even though they are competent to order confiscation. As a matter of fact, no samples have been drawn as per Rule 16 of the Hazardous Wastes Rules, to decide whether the item imported into India by the petitioner, falls within Entry B 1110 under Part B of Schedule III to the Hazardous Wastes Rules. Hence, the refusal of the respondents to permit the provisional release of the goods does not appear to be in accordance with law.

35. As I have stated earlier, the Customs Act, 1962, provides for provisional release. Even the Foreign Trade (Regulation) Rules, 1993 allows redemption of confiscated goods under Rule 17(2). No proceedings have been initiated by an authority competent in terms of the Hazardous Wastes Rules for directing the petitioner to re-export the goods. Therefore, the petitioner, in my considered view, is entitled to the release of the goods provisionally.

36. In view of the above, the writ petition is allowed, directing the respondents to assess and permit the provisional release of 129 units of second hand Digital Multifunction Print and Copying Machines, which form the subject matter of Bill of Entry No. 5602113 dated 26.5.2014, upon payment of applicable duties of customs, subject however to the eventual adjudication. The respondents shall release the goods, after assessing and collecting the customs duty and other charges, provisionally, within a period of four weeks from the date of receipt of a copy of this order. However, the proceedings in pursuance of the show cause notice can go on. No costs. Consequently, connected M.P. is closed.