(1993) 05 CAL CK 0021

In the Calcutta High Court

Case No : Writ Appeal in Matter No. 666 of 1983

Collr. of customs APPELLANT

Vs

National Insulated Cable Co. Ltd. RESPONDENT

Date of Decision : 07-05-1993

Acts Referred:

Central Excise Rules, 1944 — Rule 4
Customs Act, 1962 — Section 17

Citation : (1994) 46 ECC 101 : (1994) 74 ELT 568

Hon'ble Judges : Shyamal Kumar Sen, J;Ajit K. Sengupta, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Ajit K. Sengupta, J.

This appeal arises out of a Judgment and Order dated 16th January, 1987, passed by Mr. Justice Sudhir Ranjan Roy, the learned Trial Judge, who allowed the writ petition filed by the respondent-assessee [reported as National Insulated Cable Company v. Collector of Customs in 1987 (12) ECC 407]. The only question involved in the said writ petition relates to the question whether Hypalon-40, a chemical compound which is used in the manufacturing of electric cables is synthetic rubber or synthetic resin for its proper classification under the appropriate heading of Customs Tariff Act, 1975 for the purpose of assessment to customs duty. The relevant facts as noted by the Trial Court are as under :

1. The writ petitioner, the respondent herein having its factory at Shyamnagar, 24-Parganas, West Bengal, is carrying on the business of manufacturing various types of electrical cables and wires. In course of its said business, the respondent is required to import various items including synthetic rubber sold under the trade name of Hypalon-40 which is used for insulating wires and cables. The said Hypalon-40 is manufactured by only one concern in the world, namely, DU POINT DE NEMOURS INTERNATIONAL, S.A. in the United States of America. The said manufacturer is selling the said Hypalon-40 throughout the world as "synthetic

rubber," According to the respondent, the said Hypalon-40 is also known in the market and amongst commercial people the world over including India, as a variety of synthetic rubber.

2. The respondent imported certain quantities of Hypalon-40 but the customs authorities insisted that the material so imported was synthetic resin and not synthetic rubber. The Customs authorities demanded customs duty at higher rates under chapter 39 of the Customs Act, 1962 [First Schedule to the Customs Tariff Act, 1975] instead of assessing the same as synthetic rubber under Chapter 40 of the said Act. The respondents got the disputed consignments released from the customs authorities under two different interim orders passed by this Court. In the instant writ petition, the respondents asked for a declaration that the bags of Hypalon-40 imported by them were assessable as synthetic rubber under Item 40.01/04 of the Customs Tariff Act, 1975 and also for a writ in the nature of mandamus directing the appellants herein to assess the said bags of Hypalon-40 as synthetic rubber under the said item.

3. According to the customs authorities, the said Hypalon-40 was tested in the Custom House Chemical Tests Laboratory and it was found that it was in the form of white irregular lumps; that it was essentially composed of a saturated synthetic organic polymer .and that it did not conform to the definition of synthetic rubber as given in Note 4 of the Notes under Chapter 40 of the 1st Schedule to the Customs Tariff Act, 1975. Reference was also made to Tariff Advice No. 17 of 1974 where Hypalon has been suggested to be treated as plastic material in certain exemption notifications issued by the Customs authorities; Hypalon and been described as goods falling under Chapter 39. It was also described as resin in the compendium of classification of opinions issued by the Directorate of Statistics & Intelligence (Central Excise & Customs), New Delhi as synthetic resin, covered by Chapter 39 of the Customs Tariff Act, 1975. Thus, according to the appellants herein, Hypalon-40 was assessable as synthetic resin under Chapter 39 of the Customs Tariff Act, 1975 and not under Chapter 40 thereof as synthetic rubber, as claimed by the respondent herein.

4. The learned Trial Judge also noted that the writ petitioners also obtained a test report for Hypalon-40 from the Indian Institute of Technology, Kharagpur. The results of such test report as summarised in the report dated 1st June, 1982 given by the Indian Institute of Technology are as under :

(1) Hypalon is a polymer (a new synthetic rubber) like EPDM and butyl (ITR) in respect of functionality and like NBR and CR in oil resistance.

(2) Hypalon can be vulcanized by Sulphur system and thus can be irreversibly transformed into an elastic and non-thermoplastic substance.

5. The learned Trial Judge noted that from the report of testing made by the Customs authorities, it appeared that Hypalon-40 was tested to find out as to whether it was synthetic rubber as claimed by the writ petitioners and since it was found that it was not so, it was concluded that Hypalon-40 was synthetic

resin. The learned Trial Judge noted that the test report of the Customs authorities did not show that Hypalon-40 was specifically tested to find out as to whether it responded to the composition of synthetic resin as specified in Chapter 39 of the Customs Tariff Act, 1975.

The learned Trial Judge further observed that according to the report of testing by the Customs authorities, Hypalon-40 was a fully saturated substance whereas Note 4 to Chapter 40 of the Customs Tariff Act, 1975 showed that synthetic rubber was "unsaturated synthetic substance". The report of Indian Institute of Technology, however, was silent on this issue. The Trial Court further noted that Note 4 to Chapter 40 indicated that synthetic rubber could be irreversibly transformed into non-thermoplastic substance by vulcanization with sulphur. According to the test report of Indian Institute of Technology, which is based on sulphur vulcanization of Hypalon-40, it is clear that Hypalon can be vulcanized by sulphur and thus can be irreversibly transformed into an elastic and non-thermoplastic substance. The L.I.T. report further shows that on vulcanization, the matter could be extended to about four times original length and that when extended .to twice the original length and then released, the matter returned to its original length. This fact, according to the I.I.T., specifically corresponded with the qualities of synthetic rubber as specified in Note 4 to Chapter 40. The learned Trial Judge also noted that though Hypalon-40 did not correspond to the definition of synthetic rubber as given in Note 4 to Chapter 40 to the extent that it was not an unsaturated substance, it materially and substantially corresponded with the other qualities as specified in Note 4. Further, the rubber technology centre of I.I.T. clearly opined that Hypalon was a polymer, a new synthetic rubber. The learned Trial Judge also noted that the test report of Customs authorities was not reliable since it concluded that Hypalon-40 was a synthetic resin although it was -not specifically tested to find out whether it was synthetic resin covered by Chapter 39 of the Customs Tariff Act, 1975. According to the learned Trial Judge, a substance which is not synthetic rubber cannot automatically be called synthetic resin unless it is found to be so on proper testing made to ascertain whether it was synthetic resin. On the other hand, the learned Trial Judge found that from the test report of Indian Institute of Technology, Kharagpur, it was clear that Hypalon-40 on testing, responded to some of the basic qualities of synthetic rubber as given in Note 4, Chapter 40 of the Customs Tariff Act, 1975, though it was not an unsaturated substance as it ought to be under the said Note.

The learned Trial Judge ultimately concluded that none of the said two test reports could be said to be conclusive regarding the actual character and composition of Hypalon-40 as to whether it was synthetic rubber or synthetic resin.

6. The learned Trial Judge referred to the rules for the interpretation of the 1st Schedule to the Customs Tariff Act, 1975. Rule 4 provided that goods not falling within any heading of the Schedule should be classified under the heading

appropriate to the goods to which they were most akin. Having regard to the test report of Indian Institute of Technology, which showed that Hypalon-40 on testing responded to some of basic qualities of synthetic rubber as given in Note 4, Chapter 40 of the Customs Tariff Act, 1975, the learned Trial Judge observed that Hypalon-40 was most akin to "synthetic rubber" and, therefore, it was fair and proper to place it under the heading of synthetic rubber under Chapter 40 of the Tariff Act. The learned Trial Judge also found that the manufacturers of the product were also describing it as "synthetic rubber".

7. Section 17 of the Customs Act, 1962 requires that assessment of duty should be made after testing of the goods. The learned Trial Judge, however, found that the question involved in the instant writ petition was whether Hypalon-40 was synthetic rubber or synthetic resin. The test report of Customs authorities did not test the substance to ascertain whether it was synthetic resin and the test report of I.I.T. showed that Hypalon-40 was most akin to synthetic rubber, although it did not fulfil all the requirements of Note 4 to Chapter 40 of the Customs Tariff Act, 1975.

8. The appellants have challenged the said decision of the learned Trial Judge. We find that in Collector of Central Excise, Kanpur v. Krishna Carbon Paper Co., : 1988(37)ELT480(SC) , their Lordships of the Supreme Court held and observed that where no definition is provided in the statute itself for ascertaining the correct meaning of a physical nature, the reference to a dictionary is not always safe as it gives all the different shades of meaning. Where the word has a scientific or technical meaning and also an ordinary meaning according to common parlance, it is in the latter sense that in a taxing statute, the word must be held to have been used, unless contrary intention is clearly expressed by the Legislature. If special types of goods is subject-matter of a fiscal entry, then that entry must be understood in the context of that particular trade, bearing in mind that particular word. The trade meaning is one which is prevalent in that particular trade where such goods are known or traded. The Court also held that the trade notices and Tariff Advices are not relevant as such in construing items for Tariff Schedule.

9. In this case, we find that Hypalon-40 is manufactured by only one concern in the world, namely DU PONT DE NEMOURS INTERNATIONAL S.A. in the United States of America. The U.S. Manufacturers admittedly sell Hypalon-40 throughout the world as "synthetic rubber". It is also an admitted position that Hypalon-40 is known in the market and amongst commercial people the world over as a variety of synthetic rubber.

Furthermore, according to the test report of Indian Institute of Technology, Kharagpur, it was found that hypalon can be vulcanized by sulphur and thus can be irreversibly transformed into an elastic and non-thermoplastic substance. This is one of the characteristics of synthetic rubber as stated under Note 4 to Chapter 40 of the First Schedule to the Customs Tariff Act, 1975. Furthermore, the I.I.T. Test Report also shows that on sulphur vulcanization of Hypalon-40, the matter could be extended to about four times its original length and that when extended twice the original length and then released, the matter returned to its original length. This was admittedly another characteristic of synthetic rubber as stated under Note 4 to Chapter 40 of the Customs Tariff Act, 1975. The Test Report of I.I.T., therefore, clearly shows that Hypalon-40 specifically corresponded with the qualities of synthetic rubber as specified under Note 4 to Chapter 40 of the Customs Tariff Act, 1975.

The Rubber Technology Centre of I.I.T. also stated that "Hypalon is a polymer (a new synthetic rubber)...."

10. If we adjudge the relative merits and demerits of the two reports, we find that the departmental testing was negatively and selectively oriented. The test was directed only for the ouster of Hypalon 40 from the classification of synthetic rubber. There is another loophole in the report. It made a leap for the conclusion that it was synthetic resin, though exclusion from synthetic rubber does not necessarily bring the item under synthetic resin. An item not being synthetic rubber has again to be proved by test whether it is synthetic resin. It is not in dispute that the customs authorities conducted no test in that direction. To our mind, the report of the Indian Institute of Technology merits more attention and credibility. It conducted the test in a more comprehensive manner. It found Hypalon to be a polymer. It further found that the item possesses the essential properties of synthetic rubber, i.e., capability of vulcanization by sulphur to transform Hypalon irreversibly into an elastic and non-thermoplastic substance and further its capacity of being extended to about four times of its original length and further its power to revert to its original length when extended to twice the original length if released after extension. The only gap in the results of the said test is that unlike synthetic rubber, the imported item, i.e., Hypalon 40 was a fully saturated substance, if we go by the report of testing by the customs authorities, But that by itself does not preclude the classification of the item as synthetic rubber when it has all the functionalities and properties of synthetic rubber.

11. In this view of the matter, it is clear that both in the commercial world as well as on scientific test being carried out by I.I.T., Kharagpur, Hypalon-40 was known and/or found to contain qualities of synthetic rubber.

12. We, therefore, find no merit in the appeal filed by the appellants herein. The appeal is accordingly dismissed.

13. There will be no order as to costs.

ORDER

Shyamal Kumar Sen, J.

14. I agree.

