

(2009) 04 MAD CK 0083
In the Madras High Court
Case No : C.M.A. No. 483 of 2009

Commissioner of Customs

APPELLANT

Vs

Brinda Enterprises and Customs Excise and Service Tax
Appellate Tribunal

RESPONDENT

Date of Decision : 28-04-2009

Acts Referred:

Customs Act, 1962 — Section 108, 11, 111
Hazardous Wastes (Management and Handling) Rules, 1989 — Rule 13, 19(12), 9(2)
Imports and Exports (Control) Act, 1947 — Section 3

Citation : (2009) 04 MAD CK 0083

Hon'ble Judges : T.S. Sivagnanam, J;Prabha Sridevan, J

Bench : Division Bench

Advocate : P. Bhuvaneswari, Central Govt. Standing, for the Appellant; S. Murugappan, for R1, for the Respondent

Final Decision : Allowed

Judgement

Prabha Sridevan, J.—The substantial question of law raised by the Department in this civil miscellaneous appeal is:

Whether the Tribunal is right in holding that confiscation of "Druid" u/s 11(d) of the Customs Act, 1962 is "is not" sustainable on the ground that as

per para 4.2.7 of the Foreign Trade Policy goods imported for jobbing in terms of a Notification, do not require a licence, certificate or permission?

2. The facts are as follows:

The respondents imported a consignment which was described as ""Lead covered Copper cable Scrap ""Relay"""" purportedly for the purpose of

segregating the and re-exporting it in terms of the job work notification No. 32/97. They have registered themselves and given a bond to Central

Excise Authorities for this purpose. The goods were supplied free of charge by

the supplier. It was stated that the segregated copper as well as other waste material would be re-exported back to suppliers who were in U.S.A. The goods were of Australian origin. The importer claimed exemption from duty this claim was turned down. Aggrieved by that, he preferred an appeal which was dismissed. Thereafter the appellant went on appeal before the CESTAT and the matter was pending before the CESTAT. In the mean time, the subject consignment was examined in the presence of Scientists of the National Metallurgical Laboratory(NML). It was found that in addition to lead scrap, PVC/plastic insulated copper cables/wires were also imported. The NML gave a report dated 22-03-2005 which showed that only 60% of the materials was Lead covered Copper cable Scrap Relay and that the remaining 40% consisting of PVC/plastic insulated copper cables/wires could be considered as "Druid" as per ISRI specifications. The various metals present in the two samples weighing 12.48 kgs and 6.33 kgs representing Lead covered Copper Cable Scrap Relay and PVC/Plastic insulated copper cables/wires Scrap Druid respectively would show that the rubber and plastic content in "Druid" far exceeds the plastic and rubber content in "relay". The copper scrap Druid is "restricted goods". As per licensing Note (2) attached to Chapter 74, import of Druid is permissible without a license to units registered with Ministry of Environment and Forest, Government of India. The importers were not registered. Therefore, the order in original held that there was mis-declaration in respect of goods and since there was no specific license or a certificate of registration, the goods were liable for confiscation u/s 111(d) and 111(m) of the Customs Act. By the time the Appellate Authority took up the matter the CESTAT had allowed the claim under Notification No. 32/97. The Appellate Authority observed that this puts the entire issue in a new light, as under notification 32/97 even "restricted goods" imported for jobbing are prima facie permitted without a license. The relevant paragraph 4.2.7 of the Foreign Trade Policy reads as follows:

4.2.7. Jobbing, re-pairing etc. for re-export Import of goods, including those mentioned as restricted in ITC (HS), but excluding prohibited items, supplied free of cost, may be permitted for the purpose of jobbing without a license/certificate/permission as per the terms of notification on issued by the Department of Revenue from time to time.

3. The Appellate Authority then held that the issue was not a simple one, since even at the show cause notice stage it was pointed out that the

appellant is not registered with the Ministry of Environment and Forests, Government of India. Therefore, the Commissioner(Appeal) took into

account the perception and awareness of environmental pollutants being imported into the country.

It is seen that the country of origin of the goods is Australia but the export product is supposedly for export to the U.S.A. The appellant has

contended that the goods as well as the waste products would be exported back abroad. It is not known where the waste material i.e., Plastic,

PVC Coir, residue etc. would be exported (as averred by them), whether to U.S.A. or Australia. There is serious doubt whether those countries

would even permit import of waste material from India. Thus the bona fides of the appellants claim are also suspect. A lack of registration as

required under the Import Licensing notes to Chapter 74 would thus render the importer a violation of the import conditions.

Thereafter, the Commissioner(Appeals) held that the value declared is a tentative value and therefore, the scrap cannot be confiscated u/s 111(m)

for under-valuation. He thus held that since the goods were "restricted goods" even if they were imported for job-work since the unit had not

registered itself as required under Import Licensing notes held that it was liable for confiscation u/s 111(d) of the Customs Act'62. He upheld the

confiscation u/s 111(m) and (d) on account of mis-declaration of description and the violation of the import condition. The penalty however, was

reduced. The Tribunal took a very superficial view of the subject and referring to para 4.2.7 of the Foreign Trade Policy, held that therefore, the

subject goods i.e., copper scrap Druid could be imported even if it is not registered with the Ministry of Environment and Forest and therefore, the

confiscation u/s 111(m) was not sustainable and remanded the matter.

4. In view of the aforesaid finding, the Tribunal directed the de novo adjudication should be completed within a period of three months. This order

was passed on 15-09-2006. The Department filed this appeal on 13th June 2008. But, however, it was listed for admission only after the delay in

representation and the delay in filing was condoned. In the mean time, the respondent filed W.P. No. 37874 of 2007 to direct the

Commissioner(Appeals) to take up the matter as per the directions of the Tribunal and dispose of the same. On 20-03-2008, this Court disposed

of the above writ petition, giving direction to the Commissioner of Customs (Appeals) to dispose of the matter within eight weeks.

5. So while this appeal was being processed the Commissioner (Appeals) in compliance with the remand order and the order in the above writ

petition heard the matter again. No material was produced before him to show that the department had contested the CESTAT's order dated 15-

09-2006 viz; the present impugned order and since no order of stay was produced. Then following certain orders of the Tribunals in 2006 (110)

ECC 342 and N.K. Enterprises v. CCE, Chennai 2007 (209) ELT 93 (Tri-Chennai) imposed a redemption fine of 60,000/- and a penalty of Rs.

20,000/- on 30.04.2008. Against that, the department again went before the CESTAT by filing C/320/2008 and prayed for stay in

C/SO/259/2008 on the ground that this appeal was pending before the High Court of Madras the final order in C/882/2006 . But, stay was not

granted.

6. When the matter was taken up, the respondent's counsel raised a preliminary objection and submitted that nothing survives in this matter, since

the order of remand had been given effect to. In addition to oral arguments, the written submissions have also been filed by the respondent.

7. According to the learned Senior Central Government Standing Counsel, the subject goods could be imported only if the importer is registered

with the Ministry of Environment and Forest. Further she also submitted that there was a clear case of misdeclaration. What was declared to be

Lead Scrap was found to include PVC/plastic insulated copper cable wires. The learned Counsel referred to the report of the NML in this regard.

It was also submitted that because there was a delay in representation and the delay in filing the appeal, the interim orders could not be obtained to

stay the order of remand. The learned Counsel submitted that if the question of law raised is accepted then all the proceedings that have taken

place in the interregnum would be non-est in law.

8. The learned Counsel appearing for the respondent after submitting that the appeal had in fact become infructuous, since the remand order had

been given effect to also contested the appeal on merits, The learned Counsel

referred to Notification No. 32/97 where it is stated that the goods imported into India for execution of an export order and referred to in the Exim Policy, including mentioned as restricted in ITC (HS) but excluding prohibited items, supplied free of cost, may be permitted for the purpose of jobbing without a licence/certificate/permission as per the terms of notification issued by Department of Revenue from time to time. Similarly, import of goods for carrying out repairs, re-conditioning, re-engineering, testing etc. shall be allowed as per the terms and conditions of the Customs notification even though the goods may be restricted for imports under the Exim Policy/ITC (HS) Classifications of Imports and Exports Book. It was submitted that this is a job-work strictly and therefore, unless the goods are prohibited, the import of goods must be permitted without a license or certificate, and that the Tribunal was quite right in concluding that the Department could not invoke Section 111(d) and confiscation of Goods u/s 111(d) was not sustainable.

9. We will not dismiss the appeal on that short ground that since the remand order had been given effect to this appeal has become infructuous.

W.P. No. 37804 of 2007 (referred to supra) was disposed of on 20-03-2008. But we see from the affidavit filed in support of the application to

condone the delay in filing the present appeal that the order of the Tribunal dated 15-09-2006 was received by the appellants office only on 23-

12-2006 and the appeal was filed on 06-06-2007 with a delay of 46 days and interim stay was granted only on 15-04-2009, when the matter

came up for admission. Of course, by that time, the respondent had obtained the orders from this Court for disposal of the appeal. It is clear from

the facts that the Department was not satisfied with the order of remand and had challenged it. However, there was a delay in processing the

appeal and obtaining an interim order. The order of remand is impugned in this appeal. We have to decide the correctness of the said order. If we

hold that the remand order is correct then the proceedings pursuant to the order of remand are sustainable. But if we hold that the remand order is

wrong and set it aside, then the proceedings pursuant to the order of remand will have no legal existence, since they are only consequential to the

order of remand. We refer to the following two cases:

(i) In Kapoor Chand and others Vs. Ganesh Dutt and others, the judgment and

decree of the Rajasthan High Court was set aside by the Supreme Court in SLP No. 12981 of 1987. While the SLP was pending the party aggrieved by the aforesaid judgment and decree filed a review petition before the Rajasthan High Court. This was dismissed on the ground that the review petition was not maintainable. Against that SLP No. 6544 of 1991 was filed. The Supreme Court dismissed the second petition as infructuous since the SLP against the original judgment of the Rajasthan High Court was set aside i.e., in SLP No. 12981 of 1987. While doing so they have observed that the question regarding "merger" of judgment under review had arisen only after this Court had considered the SLP on merits and passed the order. Therefore, it is clear that upon the reversal of the original order the intermediate proceedings that took place pending the above decision were rendered infructuous.

(ii) In Kota Kanakayya and Another Vs. Kamepalli Lakshmayya and Others, , a learned Judge of this Court, A.V. Viswanatha Sastry, J., was hearing an appeal against the order of remand. The counsel for the respondent raised a preliminary objection that the order of remand had been carried out and the suit decided and therefore, the remedy of the defendants was only to file an appeal against the suit decree and that the appeal against the order of remand must be dismissed on that ground. The learned Single Judge is not inclined to accept that and observed that there is no provision in the Code that an appeal against a preliminary decree or an order of remand properly presented becomes defunct by the passing of a final decree pending the appeal" and that, "Abrogation of a right of appeal given by statute cannot be imported by Courts for reasons founded on practical convenience" and he said, "The maintainability of an appeal against an order of remand should not in my opinion, be made to depend on the grant or refusal of stay of further trial in the exercise of a Court's discretion" and that, "The further trial after remand depends on the validity of the order of remand and if that order is set aside on appeal the final decree and indeed, all the proceedings taken under the remand order, would fall with it." The learned Judge asked, "As already stated, the further proceedings under the order of remand might go on in the trial Court either because a party has not had sufficient time to file an appeal and obtain an order for a stay or because a stay of

trial has been refused. Is it to be said in such a case that the party who attends the further trial of the suit without allowing the case to go for default

against him takes his stand on it and precludes himself from appealing against the order of remand if the final decree happens to be passed?"". This

view was confirmed by the Division Bench in *S. Venkatarama Ayyar Vs. Unnamalai Ammal and Another*, wherein the Division Bench referred to

the judgment of A.V. Viswanatha Sastry, J., as an exhaustive and illuminating one. The Division Bench held that ""notwithstanding the fact that after

an order of remand the suit was disposed of, the party aggrieved by the order of remand would have a right of appeal"" and held that we entirely

agree with his reasoning & his conclusion. And they held that the view taken by Mack J. in *S. Venkatarama Aiyar Vs. Unnamalai Ammal and*

Another, , that the appeal against the order of remand was incompetent if the suit is disposed of after remand is wrong. .

(iii) In *Union of India (UOI) and Others Vs. Ram Kumar Thakur*, , the order of reinstatement had been implemented pending appeal to the higher

forum so as to avoid contempt proceedings. When the appeal came up for hearing it was contended that in view of the reinstatement the appeal

had become infructuous. The Supreme Court disagreed and held that,

Merely because the impugned order before the High Court was implemented to avoid possible contempt proceedings that did not take away the

right of the appellants to prefer an appeal and question correctness of the impugned order. ... 5. It has been noted by this Court that if even in

cases where interim relief is not granted in favour of the applicant and the order is implemented that does not furnish a ground for not entertaining

the appeal to be heard on merits. (See *Nagar Mahapalika (Now Municipal Corpn.) Vs. State of U.P. and Others*, . Similar view was also taken in

Nagesh Datta Shetti and Others Vs. The State of Karnataka and Others, .

In view of the above rulings, we will not dismiss the appeal as infructuous or not maintainable , but we shall decide the appeal on merits.

10. The Commissioner (Appeals) had taken note of the environmental impact of the import of "Druid" have, which was totally lost sight of by the

Tribunal which took into account only the paragraphs in the Foreign Trade Policy which allows the import of goods of job work without a license.

We find that the Appellate Authority had even doubted whether the druid

purportedly to be exported would be permitted in the countries which is alleged to be the destination, since those countries may not permit waste materials from India. We also know that in his own statement the respondent had said that the segregation of scrap in USA is very expensive and that is why they chose India for segregation of this scrap. The need for getting registered with the Ministry of Environment and Forest to import these materials is very clear. The Hazardous Waste Management Rules also deals with import of hazardous waste and export of hazardous waste and there are lot of procedures and safeguards to be complied with when hazardous waste is imported and the application should be received first by the State Pollution Board which shall examine it and thereafter, by the Ministry of Environment and Forest, which shall satisfy itself and then grant permission for imports merely because Clause 4.2.7 of the Exim Policy states that all restricted goods excluding prohibited items, supplied free of cost, may be permitted for the purpose of jobbing without a license/certificate/permission as per the terms of notification on issued by the Department of Revenue from time to time.

11. In 2009 WLR 199 (ITC Ltd. v. Norasia Container Lines Ltd. and Ors.), the Division Bench of this Court had an occasion to deal with an issue of confiscation of unsorted scrap of waste paper which attracted the classification of "municipal waste" and "hazardous waste". The Bench observed,

39. The entire reading of the materials would clearly show the sheer negligence exhibited by the appellant and their way of finding ways to throw the blame on somebody or other. When, as has already been pointer out supra, the appellant found that the so-called cargo was not the one for which they have placed orders and when the Customs Officials have specifically directed them to re-export the cargo to the country of origin that is U.S.A., they should have shunted it back to the sender, instead of trying to send it to another country, where, according to him, the true purchaser is available, that too without the knowledge of the original sender M/s. Evergreen Specialities, USA.

40. It is really painful rather pathetic to note that the foreign developed countries are searching for dumping yards to dumped their municipal waste and are dumping their municipal waste somehow or other in the waters or soil of

developing countries and thus are trying to enjoy a pollution free surroundings in their countries. In the case on hand, the appellant, instead of trying to secure the pollution free environment in our country, by scrupulously following the instructions given to them by the customs officials and the Pollution Control Board are raising legally unsustainable grounds, only to escape the legal liability of paying the amounts to the first respondent, which would not be allowed to happen.

12. We think that the warning could not have been better phrased. In : (2005)10SCC510 (Research Foundation for Science Technology National

Resource Policy v. Union of India), the Supreme Court held thus:

1. Hazardous wastes are highly toxic in nature. Industrialisation has had the effect of generation of huge quantities of hazardous wastes. These and

other side effects of development gave birth to principles of sustainable development so as to sustain industrial growth. The hazardous waste

requires adequate and proper control and handling. Efforts are required to be made to minimise it. In developing nations, there are additional

problems including that of dumping of hazardous waste on their lands by some of the nations where cost of destruction of such waste is felt very

heavy. These and other allied problems gave birth to the Basel Convention. The key objectives of the Basel Convention are: ""to minimise the

generation of hazardous wastes in terms of quantity and hazardousness;

to dispose of them as close to the source of generation as possible;

to reduce the transboundary movement of hazardous wastes.

13. Fourteen terms of reference were framed on which the high power committee was required to give its reports. Amongst them are included the

following:

13. To examine the quantum and nature of hazardous waste stock lying at the docks/ports/ICDs and recommend a mechanism for its safe disposal

or re-export to the original exporters.

14. Decontamination of ships before they are exported to India for breaking.

14. In Paragraph No. 16 of the above judgment, the Supreme Court had also referred to Article 7 of the draft approved by the working group of

the International Law Commission in 1996 on ""Prevention of Trans-boundary Damage from Hazardous Activities"" to include the need for the State

to take necessary "legislative, administrative and other actions" to implement the duty of prevention of environmental harm and had also referred to

some directions and orders that have been passed by the Supreme Court on 23-09-2003, 24-09-2003 and 25-09-2003. Sub-rule (12) of Rule

19 of the Hazardous Waste Rules was also extracted which reads as follows:

19. (12) In case of units registered with the Ministry of Environment and Forests or the Central Pollution Control Board for items placed under

free category" in Notifications Nos. 22(RE-99)1997-2002 dated 30-07-1999; 26 (RE-99) 1997-2002 dated 10-9-1999; 38 (RE-2000) 1997-

2002 dated 16-10-2000 and 6 (RE-2001) dated 31-3-2001 issued by the Directorate General of Foreign Trade and other similar notifications

issued based on the advice of Ministry of Environment and Forests, prior import permission from that Ministry shall not be required.

Rule 9 deals with procedure for registration and renewal of registration of recyclers and re-refiners.

...Sub-rule (1) requires every person desirous of recycling or re-refining non-ferrous metal wastes as specified in Schedule 4 or used oil or waste

oil to register himself with the Central Pollution Control Board. There are two provisos to Sub-rule (1). The said provisos provide the cases where

registration is not required. Apparently, it seems difficult to comprehend the reason for inserting Sub-rule (2) in Rule 9 which provides for

registration and renewal and Sub-rule (12) providing for dispensing with prior import permission. Prima facie we hope that the intention is not to

permit banned items or hazardous waste items under the guise of Sub-rule (12) of Rule 19. It can have the effect of setting at naught Rule 13. This

aspect too requires to be examined by the Ministry of Environment and Forests and affidavit filed within 8 weeks....

In the order dated 23-09-2003 we find this observation or apprehension.

15. In the direction dated 24-09-2003, the Supreme Court insisted that since,

The HW Rules allow import of certain items subject to fulfilment of conditions. The requisite notification shall be issued making the compliance with

the said conditions mandatory before the imported consignment is cleared.

16. The Scrap Specifications defines "druid" as "Insulated Copper Wire Scrap" which "Shall consist of copper wire scrap with various types of

insulation. To be sold on a sample or recovery basis, subject to agreement

between buyer and seller.

17. In the Hazardous Wastes (Management and Handling) Rules, 1989 Schedule III which deals with lists of wastes applicable for only import and

export includes Basel No. A1090 - "ashes from the incineration of insulated copper wire" and list B of the same Schedule includes Basel No.

B1010 - "copper scrap". There is an asterisk mark which indicates that import of copper scrap covered under ISRI code "Druid" and Jelly filled

copper cables is permitted without a licence to units registered with the Ministry of Environment and Forests.

18. In the order in original, Job No. 4349/2005 dated 21-03-2006 which shows that a voluntary statement had been given by the respondent u/s

108 of the Customs Act, 1962, where he is said to have met one John Saliba at Lebanon who is a regular supplier to a plastic factory and who

informed him that segregation of mixed metal scrap at U.S.A. is very expensive and he would send mixed metal scrap for segregation. If we

juxtapose this against the observations of the Supreme Court in : (2005)10SCC510 (cited supra) and the Division Bench of this Court in 2009

WLR 199 (cited supra), it is clear that the apprehension of the Commissioner (Appeals) was not baseless. Therefore, it is precisely this kind of

activities, the Division Bench was afraid of in 2009 WLR 199(cited supra) extracted above. It is to safeguard our country from hazardous waste.

The import policy requires that imports to be registered with the Ministry of Environment and Forest only to safeguard the country from import of

hazardous waste. Section 111(d) of the Customs Act, 1962 reads as follows:

(d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported,

contrary to any prohibition imposed by or under this Act or any other law for the time being in force;

19. The effect of interpretation of the words "prohibited goods" was considered in Om Prakash Bhatia Vs. Commissioner of Customs, Delhi, and

in paragraph No. 10 of the said judgment the Supreme Court held as follows:

10. From the aforesaid definition, it can be stated that (a) if there is any prohibition of import or export of goods under the Act or any other law for

the time being in force, it would be considered to be prohibited goods; and (b) this would not include any such goods in respect of which the

conditions, subject to which the goods are imported or exported, have been complied with. This would mean that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. This would also be clear from Section 11 which empowers the Central Government to prohibit either "absolutely" or "subject to such conditions" to be fulfilled before or after clearance, as may be specified in the notification, the import or export of the goods of any specified description. The notification can be issued for the purposes specified in Sub-section (2). Hence, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods. This is also made clear by this Court in *Sheikh Mohd. Omer Vs. Collector of Customs, Calcutta and Others*, wherein it was contended that the expression "prohibition" used in Section 111(d) must be considered as a total prohibition and that the expression does not bring within its fold the restrictions imposed by Clause (3) of the Import Control Order, 1955. The Court negated the said contention and held thus:

...What Clause (d) of Section 111 says is that any goods which are imported or attempted to be imported contrary to "Any prohibition imposed by any law for the time being in force in this country" is liable to be confiscated. "Any prohibition" referred to in that section applies to every type of prohibition. That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression "any prohibition" in Section 111(d) of the Customs Act, 1962 includes restrictions. Merely because Section 3 of the Imports and Exports (Control) Act, 1947, uses three different expressions "prohibiting", "restricting" or "otherwise controlling", we cannot cut down the amplitude of the word "any prohibition" in Section 111(d) of the Act. "Any prohibition" means every prohibition. In other words all types of prohibitions. Restriction is one type of prohibition. From item (I) of Schedule I, Part IV to Import Control Order, 1955, it is clear that import of living animals of all sorts is prohibited. But certain exceptions are provided for. But nonetheless the prohibition continues.

Therefore, if we apply this judgment to the notification, the notification contemplates import of "druid" subject to certain conditions.

20. If we employ the meaning of the word ""prohibition"" as was done in Om Prakash Bhatia case we have to hold that the imported "druid" was

"prohibited goods" since the respondent is not an eligible passenger as he did not satisfy the conditions. The impugned order deserves to be set

aside. In view of the above decision, the order dated 30-04-2008 consequent to the order of remand also is set aside. Since we are of the opinion

that the conclusion of the Tribunal was wrong and the order of remand was also erroneous.

21. The substantial question of law is answered in favour of the Revenue and the confiscation u/s 111(d) must be sustained since the goods are

"prohibited goods". The appeal is allowed. The order of remand is set aside. Consequently the order dated 30.04.2008 must be set aside.

However, there will be no order as to costs. Consequently, the connected M.P. No. 1 of 2009 is closed.