
(2011) 07 SC CK 0005

In the Supreme Court Of India

Case No : Civil Appeal No's. 6334-6335 of 2003 and 1757 of 2004

Commissioner of Customs, Calcutta

APPELLANT

Vs

G.C. Jain and Another

RESPONDENT

Date of Decision : 04-07-2011

Acts Referred:

Customs Act, 1962 — Section 47

Citation : AIR 2011 SC 2262 : (2011) 186 ECR 137 : (2011) 7 JT 175 : (2011) 6 SCALE 743

Hon'ble Judges : Mukundakam Sharma, J;Anil R. Dave, J

Bench : Division Bench

Advocate : Arjit Prasad, M. Khairati, B.K. Prasad and Anil Katiyar, for the Appellant; S.K. Bagaria, V. Shekher, Pijush K. Roy, G. Ramakrishna Prasad, Sudhir Kumar Mehta, Puneet Jain, Trishna Mohan and Pratibha Jain, for the Respondent

Final Decision : Dismissed

Judgement

Mukundakam Sharma, J.—These appeals are directed against the judgment and order dated 17.02.2002 passed by the Customs, Excise and Gold (Control) Appellate Tribunal, Eastern Bench, Kolkata in appeal Nos. CRV-75 and 74 of 1999, whereby the Tribunal had allowed the appeal of the Respondents and set aside the order passed by the Commissioner of Customs on the ground that the Butyl Acryl ate Monomer i.e. the chemical imported by the Respondents can safely be held to be an adhesive and was covered by the advance licences produces by the Respondents.

2. As per the facts on record the Respondents, M/s. Sanghvi Overseas imported 14 consignments of Butyl Acryl ate Monomer (hereinafter referred to as 'BAM') between April and December, 1997 and cleared the same against advanced licenses by availing the benefit of customs Notification Nos. 203/92 and 79/95, without payment of duty. Another consignment of BAM was cleared by the Respondents under bill of entry dated 06.03.1998 and thereafter one more

consignment was imported. The last two consignments were warehoused and not cleared by the authorities.

3. In all these consignments of BAM, the Respondents declared the product as Butyl Acrylate Monomer and claimed the classification under heading 2916.12. The assessments were sought by the Respondents as adhesives under the DEEC license.

4. Enquiries were initiated by the Revenue against the Respondents on the belief that the product imported by the Respondents was defined organic chemical and was not an adhesive. The Revenue/Appellant took a stand that the advanced licences covering imports of adhesives submitted by the Respondents for clearance of the consignments under DEEC scheme, availing the benefit of customs notification were not applicable in the matter of clearance of the goods in question inasmuch as the said licences were for import of adhesives and the product imported was not adhesive. Accordingly, searches were conducted in the offices of the Respondents and their statements were recorded. The customs clearing agent was also interrogated and efforts were made to find out as to whether the product in question was used as a bonding agent or not. Shri R.K. Jain, in his statement, recorded during such investigations, deposed that the product was used as a bonding agent and on polymerization the same become an adhesive.

5. The Revenue also drew the samples and sent it for testing. The Revenue also sought the opinion of the various experts as also the persons of the trade dealing in identical items. On the basis of the material collected during the investigation the Revenue formed an opinion that the BAM was not adhesive but was one of the raw materials for adhesive formations. As such Revenue was of the opinion that the exemption had been wrongly claimed by the Respondents. In addition, the Revenue also disputed the value of the goods in question.

6. Accordingly, on the above basis the Respondents were served with a show cause notice proposing confirmation of demand of duty, as also confiscation of the imported product and imposition of personal penalties upon the various persons.

7. During the adjudication proceedings the Respondents took a specific stand that the BAM in question is a liquid which becomes adhesive on polymerization upon coming into contact with light and heat. It was argued on behalf of the Respondents that to prevent spontaneous polymerization BAM is normally stabilized by some inhibitor and that since BAM polymerises readily without much requirement of processing and as after polymerization the same shows adhesive properties it should be treated as adhesive only. They also placed reliance on the manufacturer's printed literature and contended that it is clear that BAM is used as an adhesive. The Respondents clarified that BAM does not possess any adhesive properties in the Monomer form, but the same is an adhesive in the polymer form, which process is undertaken naturally when the Monomer form

comes in contact with heat and light. The Respondents pleaded that it is not feasible and practicable to import the item in polymer form as after polymerization, the product immediately becomes an adhesive which does not has much shelf-life. The Respondents also pleaded their case on the point of time-bar by submitting that they had declared the goods in the bill of entry correctly and the clearances were given by the customs authorities after drawing samples and satisfying themselves that the product was an adhesive and squarely covered by the advance licences. Their advance licences were accordingly debited by the customs authorities. As such they submitted that the longer period of limitation could not be invoked against them inasmuch as there was no mis-declaration on the part of the Respondents.

8. The said show cause notice culminated into the impugned order passed by the Commissioner, whereby, it was held that BAM was not adhesive and the benefit of the advance licences and the notification in question was not available to the importer. Accordingly, the demand of duty was confirmed by invoking the extended and longer period of limitation in respect of 14 bills of entries on the ground that the Respondents had mis-declared the product in question.

9. It was also held by the Commissioner that the goods are liable to confiscation, but inasmuch as the same were not available, no redemption fine had been imposed by him. Penalty of equivalent amount was imposed upon M/s. Sanghvi Overseas. The goods covered by the bills of entry dated 08.05.1997 and 19.03.1998 which were under seizure by the Revenue were confiscated with an option to the Respondents to redeem the same on payment of redemption fine of Rs. 6,00,000/- (Rupees six lakhs). Further penalty of Rs. 3,00,000/- (Rupees three lakhs) was imposed upon M/s. Sanghvi Overseas in relation to the importation of the goods under the above two bills of entries. Penalty of Rs. 65,00,000/- (Rupees sixty-five lakhs) was imposed on the second Respondent Shri R.K. Jain on the findings that he was the main person behind the imports which led to evasion of huge amount of customs duty and was an adviser to the importers. It was also observed that the evidence on record showed his active and financial involvement in the matter.

10. Aggrieved by the abovementioned order, the Respondents filed an appeal before the Central Excise Gold (Appellate) Tribunal, Kolkata submitting that the BAM in question can be classified as an adhesive and the Respondents had rightly claimed clearance of the goods on the basis of the advanced licences which allowed adhesive to be cleared duty free. It was pointed out that the Revenue also drew samples before clearance of the goods and it is only thereafter that the clearances were permitted by them. The Tribunal by its order dated 17.02.2003 allowed the appeals of the Respondents stating that BAM can be rightly classified as an adhesive and therefore, the Respondents had rightfully claimed the clearance of goods on the basis of advanced licences. Hence, the present Special Leave Petitions have been preferred by the Appellant.

11. The learned Counsel appearing for the Appellant submitted before us that the

Tribunal made a fundamental error in ignoring the fact that the BAM was required to undergo a further industrial process to become an adhesive, and thus the imported item under no circumstances could be classified as an adhesive. The contention is that the imported chemical is a Monomer organic chemical, which is one of the raw materials used in the manufacture of adhesives, the opinion which has been substantiated by various experts from the field of Industry. The Appellant has alleged that the imported material i.e. BAM (inhibited), is a colorless liquid, lighter than water, monomer organic chemical having wide use in paint, textile and leather industry as raw material and can in no way be compared with other polyurethane adhesives of well known brands. It was further contended that in the product literature submitted before the Tribunal, the portion specifying that BAM was used as raw material for Adhesive Industry was erased by the Respondent Importers. He also refuted the Respondents' claim that BAM in the Monomer form on coming in mere contact with heat and light undergoes self polymerization and au contraire it was submitted that it requires a specific industrial process.

12. The next contention was that the Tribunal also failed to take into account that the difference in value between acrylates and products obtained after polymerization is one and a half times to three times which means polymerization involves complicated technical and industrial processes. It has been contended that various experts in the fields from industry as well as renowned institutions have categorically opined that BAM is not an adhesive. It was also argued that taking into account the product literature of M/s LG Chemicals Ltd, a manufacturer of the imported product, which was part of the appeal petition, revealed that BAM was a raw material for adhesive. It was claimed that BAM in inhibited state is quite different from product obtained after emulsion polymerization through industrial process. Thus the form in which the goods were imported could not be termed as an adhesive.

13. The learned Counsel for the Respondents refuted all the contentions raised by the Appellant and submitted that 'BAM' is used as adhesive in leather industry and that during transportation and storage it is kept in a manner which would restrict it from self polymerization. It was thus submitted that when the chemical BAM is packed, an inhibitor is used to keep the goods in storage condition and that as and when the container is opened and the chemical comes into contact with air, light and heat at room temperature, the BAM starts self polymerization by itself and suo moto and gets the properties of adhesive. He also pointed out the fact that there is no dispute with regard to the fact that the BAM when polymerised becomes adhesive.

14. Dispute in short is whether BAM can be said to be an adhesive for the purpose of allowing the duty free clearances against advance license issued under the DEEC scheme. Goods in packed condition are of no use. It can only be used when it is opened and put to use. We are, therefore, to consider as to whether for all practical purposes BAM is an adhesive. It is admitted in the Show

Cause that end-use of BAM is adhesive in leather industry. However, a distinction is sought to be made in the present case that until monomer becomes polymer, it is not adhesive. It is alleged that in Monomer form, BAM is not adhesive. By putting such an interpretation, an attempt has been made by the Appellant to divest BAM from the coverage of adhesive. The issue is whether the requirement of opening the container, allowing BAM to contact with air, light and heat and even putting a catalyst could detract from its being an adhesive.

15. Admittedly, the expression "adhesive" is not defined in the Act. It is now well settled that the words and expressions, unless defined in the statute have to be construed in the sense in which persons dealing with them understand i.e. as per trade and understanding and usage.

16. The word "adhesive" was mentioned in the ex-Bond B/E inasmuch as the Appellant sought release of goods under advance licences allowing adhesive as duty free import. In any event goods were chemically tested in the Customs House and goods were cleared after satisfaction of the proper officer that BAM is an adhesive. The department was very much conscious that goods were claimed as an adhesive and they were so satisfied after examination of the goods and deliberation made in this regard. Therefore, the 14 consignments referred to in para 4 of the Show Cause Notice were cleared on the basis of advance licence under Customs Notification No. 203/92-Cus. or 79/95-Cus. Customs authorities cleared the goods with consciousness and knowing fully well that BAM is an adhesive. There is no question of suppression of any fact before customs authorities because no fact was concealed. Each of the consignments were tested and chemically examined.

17. Therefore, the counsel appearing for the Respondents submitted before us that the allegation made by the customs authorities in the Show Cause Notice cannot be allowed to stand on two counts. Firstly, the goods imported were very much covered by the licence and secondly, assuming, though denying that the goods were not covered under the licence even then customs authorities cannot change their stand inasmuch as after debiting of the licence, the position becomes irreversible. Licence cannot be restored to its original position. The valid order of clearances made u/s 47 of the Customs Act cannot be disturbed because of the irreversible situation. Acceptance of advance licences for clearance of BAM as adhesive stands absolute and it cannot be repudiated as licences have been debited by customs authorities. Assessment orders already made cannot be disturbed in the facts and circumstances of the case. These are important factors and areas which are required to be kept in mind while deciding the issue falling for our consideration.

18. So the undisputed picture which emerges is that the imported chemical is in its Monomer form and becomes an adhesive on self-polymerization. The Respondents' case is that the self-polymerization, which is nothing but increase in molecular weight takes place on the chemical coming out of the container. The question is that whether the solution in its Monomer form can be considered as

an adhesive or not. According to the Respondents it is not practical and feasible to import the product in its polymerised form and the same is always stored in its Monomer form. In fact inhibitors are added to avoid self-polymerization of the product during storage. It is the case of both the sides that the Monomer form becomes polymer form of the chemical suited to be used as adhesives, when it comes in contact with nature. It is only that in some cases where bulk polymerization is required, extra heat i.e. more than the heat provided by the nature is required to increase the process of polymerization, as has been opined in the opinions of experts brought on record by the Revenue. As such the Tribunal was of the view that the Butyl Acryl ate Monomer, which undergoes self-polymerization on coming in contact with the atmosphere, can be safely held to be an adhesive and covered by the various advance licences in question.

19. It is also noted that in the technical literature given by the manufacturer, use of the product has been shown as adhesives. Even though the Revenue has disputed that the said literature produced by the Respondents is not correct and is manipulated inasmuch as the same is different than the manufacturer of identical product in India, however, no concrete evidence to that effect has been led by the Revenue. The Tribunal has given a finding that the literature produced by the Respondents is of the Korean manufacturer and is given in English language as well as Korean language and there is no reason to doubt the veracity of the said literature. Inasmuch, as the manufacturers themselves have shown the use of Butyl Acryl ate as adhesive as well as textile binders, we see no reasons to take a different view.

20. Under the DEEC scheme, the word 'adhesives' has not been defined. Under exemption notification, the word 'materials' has been defined as under: -

(a) raw materials, components, intermediates, consumables, computer software and parts required for manufacture of export products

Therefore 'materials' permissible, are not only raw materials but are also intermediates for such raw materials, which are required for manufacture of export products specified in the licences, which in this cases are 'Leather Industry' products. The term used as 'material' required for manufacture of export products would encompass such entities also which are not only directly used or usable as such in the manufacturing processes but also which could be used with same processing.

21. From the Encyclopedia of Chemical Technology 4th Edition published by John Wiley and Sons, it is found for Acryl ate Esters as in the present case it prescribes:

Emulsion Polymerization: Emulsion polymerization is the most important industrial method for the preparation of acrylic polymers. The principal markets for aqueous dispersion polymers made by emulsion polymerization of acrylic esters are the print, paper, adhesives, textile, floor polish, and leather industries, where they are used principally as coatings or binders. Copolymers of either

ethyl acrylate or butyl acrylate with methyl methacrylate are most common. (Vol. 1, page 328)

From this authoritative Book, it is apparent and can be concluded, that BAM, which is an Acrylate Ester, can be polymerised by using water to prepare the 'aqueous emulsion dispersion' which is used in the 'Leather Industry' as a 'Coating or Binder' to be an Adhesive. The aqueous preparation of this emulsion would not require any elaborate use of technology. There is no reason why BAM which on aqueous dispersion, even if classified under 2916.12, can be used as a binder in 'Leather Industry' as per this authoritative Encyclopedia on Technology, should be denied the benefit of considering the same as adhesives.

22. The Appellant has placed reliance on the judgment passed by the CEGAT, Mumbai in the matter of 2005 (98) ECC 61 . We have gone through the said judgment, however, the same is not applicable to the present case both on facts and law.

23. When it is found that the licences produced entitle the Respondent to clear the ex-bond goods free of duty, there are no reasons for them to have mis-declared the values since the goods are duty free. There appears no incentive to do so. There is no allegation that the licences produced will not cover the quantity of values, even after the alleged loading of values as declared. Therefore, this Court upholds the decision of the Tribunal.

24. It is also observed that the demand is hit by the bar of limitation inasmuch as the Appellant had cleared the goods in question after declaring the same in the bills of entries and giving correct classification of the same. Availing of benefit of a notification, which the Revenue subsequently formed an opinion was not available, cannot lead to the charge of misdeclaration or mis-statement, etc. and even if an importer has wrongly claimed his benefit of the exemption, it is for the department to find out the correct legal position and to allow or disallow the same. In the instant case the Appellant had declared the goods as Butyl Acrylate Monomer with correct classification of the same and the word 'adhesive' was added in the ex-bond bill as per the Appellant's understanding that BAM is an adhesive. In these circumstances it was for the Revenue to check whether BAM was covered by the expression adhesive or not and if even after drawing of samples they have allowed the clearances to be effective as an adhesives Appellant cannot be held responsible for the same and subsequently, if the Revenue has changed their opinion as regards the adhesive character of BAM, extended period cannot be invoked against them. As such we are of the view that the demand of duty in respect of 14 consignments is also barred by limitation.

25. Therefore, the present appeals are dismissed but without any orders as to costs.