
(1993) 05 CAL CK 0019
In the Calcutta High Court
Case No : Matter No. 3729 of 1992

Daga Nylomet Private Ltd.

APPELLANT

Vs

Assistant Collector of Customs

RESPONDENT

Date of Decision : 03-05-1993

Acts Referred:

Citation : (1993) 67 ELT 270

Hon'ble Judges : Ruma Pal, J

Bench : Single Bench

Advocate : S.K. Bagaria and Partha Banerjee, for the Appellant; N.C. Roychoudhury and Prantosh Mukherjee, for the Respondent

Judgement

Ruma Pal, J.—The dispute in this case is whether the machinery imported by the petitioners is a textile machine. The petitioners say that the machine imported is a textile winding machine and is covered by Heading No. 84.45 sub-heading 8445.40 to the First Schedule of the Customs Tariff Act, 1975 (referred to as the Act). The respondents say that the machine is classifiable under sub-heading 8479.89 of the First Schedule to the Act.

The relevant Tariff Headings are as follows :

"84.45 Machines for preparing textile fibres; spinning, doubling or twisting machines and other machinery for producing textile yarns; textile reeling or winding (including weft winding) machines and machines for preparing textile yarns for use on the machines of Heading No. 84.46 or 84.47.

Machines for preparing textile fibres :

8445.40 Textile winding (including weft-winding) or reeling 80% machines."

"85.79 Machines and mechanical appliances having individual functions, not specified or included elsewhere in this Chapter.

8479.89 Others."

2. The machine in question is a Criss-Cross Winding Automatic Machine imported by the petitioners from Germany. The machine was initially classified in the Bills of Entry under Sub-heading 8479.89. At the instance of the petitioners the Customs Authorities reassessed the Bills of Entry after classifying the machine under sub-heading 8445.40.

3. On 4th June, 1992 the Customs Authorities cancelled the reassessment order and again classified the machine under sub-heading No. 8479.89.

4. On 26th June, 1992 the Customs Authorities wrote to the Additional Industrial Advisor, Directorate General of Technical Development (DGTD), stating that a dispute had arisen whether the machine was a textile machine used in the textile industry. The DGTD's opinion was solicited in the matter. The DGTD wrote back stating that -

"2. The proforma invoice specifically states that "the precision cross winding machine model DS 28 (for cheese winding machine) with 8 winding heads arranged in 2 decks" imported by the said firm is specifically intended to wind polypropylene tapes 2.5 to 3.5 mm wide and 0.05 to 0.08 mm thick, though such machines are generally used in textile industries for winding of yarns.

3. No specific evidence is available on record to establish at the precision winding machine DS 28 will be used in a textile industry. The invoice suggests that this will be used in an industry processing plastic materials like polypropylene tapes falling under the harmonised I.C.T. classifications -

392020.00 Other strip of plastics, non-cellular and not reinforced or combined with other materials.

- of polymers of propylene.

The Customs authority may please take a view with regard to the Tariff applicable in this case."

5. This writ application was filed on 24th July, 1992. The petitioners have raised two contentions. The first is that the Customs Authorities had erred in taking into consideration the actual user to which the machine would be put for determining the nature of the machine itself. It is contended that the purpose for which the machine was imported is immaterial. Secondly it is contended that in any event admittedly the machine was being imported for winding polypropylene tapes of widths between 2.5mm and 3.5mm. Such tapes were classifiable under Heading 54.05 of the First Schedule to the Act which substantially corresponds with Tariff Heading No. 54.06 of the Central Excise Tariff Act, 1985. It is argued that these Tariff headings come under Chapter 54 of the respective Acts which deal with man-made filaments. Chapter 54 of both the Acts fall within Section XI which deals with textiles, and textile articles. It is submitted that therefore the machine could not but be described as a textile winding machine within the Tariff Heading No. 84.45.

6. The respondents have submitted that the petitioners had not disclosed what business was being carried out by them or the purpose for importing of the machine nor the order placed on the foreign supplier. It is also stated that the order confirmation in the proforma invoice did not describe the machine as a textile machine. It is submitted that the end-use is relevant because the Tariff Heading No. 84.45 refers to machines for preparing textile fibres. It is stated that the machine in question undoubtedly was primarily for winding polypropylene tapes. This was clear from the brochure issued by the manufacturer of the machine.

7. In my view, the word "for" simpliciter, used in Tariff Heading 84.45 has been used in a descriptive sense and does not mean actual use. In other words, a textile winding machine would remain as such irrespective of the actual use to which it may be put. When the Central Government has thought it fit to take into consideration the actual end-use it has specifically said so in notifications issued by it. For example, by Notification No. 314/85-Cus., dated 11-8-1985 (as amended), exemption has been granted to moulds and dies falling within Chapter 84 of the First Schedule to the Act subject to the condition that it is proved to the satisfaction of the Assistant Collector of Customs that the said moulds or dies have been imported for the manufacture of artificial plastic articles. Notification No. 159/86-Cus., dated 1-3-1986 as amended, grants exemption to specified machineries, equipments for registered exporters of Gems and Jewelleries provided that the importer furnishes an undertaking to the effect that the imported goods would be used for the purposes specified. Similarly, Notification No. 349/86-Cus., dated 16-6-1986 (as corrected and amended) relates to the grant of exemption to specified parts falling within Chapter 84 or 85 for the manufacture of electronic goods subject inter alia to the importer executing a bond to pay on demand such sum as may be determined by the Assistant Collector in respect of the goods as are not proved to have been used for the purpose of such manufacture. Reference may also be made to Notification No. 1/91-Cus., dated 1-1-1991 which grants exemption to specified machinery and accessories imported by manufacturers of jute products subject to the importer being an actual user engaged in the manufacture of jute products and subject to the importer producing evidence that the goods had been installed for the purpose of manufacture of jute products.

8. In this case there is no such restriction and as held by the Supreme Court in the case of *Dunlop India Ltd. and Madras Rubber Factory Ltd. Vs. Union of India (UOI) and Others*,

"When there is no reference to the use or adaptation of the article, the basis of end use for classification under a tariff entry is absolutely irrelevant."

9. In the case of *Sainet Private Ltd. and Another Vs. Union of India (UOI) and Another*, a Division Bench of the Bombay High Court was called upon to consider whether fishing nets were knitted fabrics covered by Tariff Item No. 22 of the First Schedule of the Central Excises and Salt Act, 1944 or whether they fell

under Tariff Item No. 68. The Collector emphasised before the Court that fish nets were not used as fabrics. In that context, the court said :

"Perhaps he wanted to suggest that the user of the product is relevant to classify the goods of which description is given in the Schedule. We are afraid this criteria is absolutely unwarranted and irrelevant to find out whether a particular product falls in the description of goods given in the Schedule of the Central Excises and Salt Act, 1944."

10. The Andhra Pradesh High Court took the same view in the case of *Golden Press Vs. Deputy Collector of Central Excise, Hyderabad* and Another, of the report, it was held that the end-use of the article was totally irrelevant in the context of the entry where there was no reference to the use or adaptation of the article and the fact that the article can be put to an altogether different use is not a ground for taking it out of its natural placement.

(See also 1989 (22) ECC 245 1985 ECR 162 and 1989 (42) ELT 109

11. The DGTD had also noted that a machine such as the one imported by the petitioners is generally used in textile industries for winding of yarns. That being the case, the fact that the machine may be used for processes other than for winding yarns would nevertheless, not detract from its being a textile winding machine. The end-use being immaterial no significance can attach to the fact that the petitioners had not stated what business was being carried on by them, nor the purpose of the import nor was the petitioner called upon to disclose the order placed by it on the foreign supplier for the machine.

12. The respondents having relied upon the opinion of the DGTD cannot be discarded.

13. The contention of the respondents is that the brochure issued by the manufacturer stated that the machine was in fact :-

"manufactured for the continuous winding of flat, fibrillated or spliced foil tape, flat or round monofilaments of polypropylene, polyethylene, polyamide or polyester, direct from the Extruder."

14. The question still remains whether the polypropylene tapes are textiles or not. The proforma invoice annexed to the writ petition and which has not been disputed by the respondents shows that the machine was for cheese winding with 8 winding heads arranged in two decks to wind P.P. tapes 2.5 - 3.5mm wide and 0.05 - 0.08mm thick.

15. In the publication of Indian Standard Institution, a cheese winder has been defined as a winder upon which the bobbins for creeling and the "gaiting" of formers, the lifting and doffing of packages is effected automatically. The term "gaiting" refers to the time of supply yarn on partial wound packages. The foreward to this definition states that the draft was finalised by the Cotton Winding Machinery Components Sectional Committee and approved by the

Textile Division Council. The cheese winder has been classified as a textile machinery. In the Harmonised Commodity and Description and Coding System polypropylene has been described as a synthetic fibre used in the textile process. Additionally Tariff Item 54.04 covers strips and the like not exceeding 5mm. The Tariff Item is in Chapter 54 which deals with man-made filaments u/s XI which relates to Textiles and Textile articles. There can be no doubt therefore, that the strips which are to be wound by the machine in question is a textile or textile article.

16. For the reasons stated it must be held that the machine in question clearly comes within the Tariff definition of 8445.40. Tariff sub-heading 8479.89 is the residuary head under the Chapter and can come into operation only if the machine is not classifiable under any other specific heading.

17. In the case of Superintendent of Central Excise, Surat and Others Vs. Vac Met Corpn. (P) Ltd., etc. etc., the Supreme Court said that where an article falls within a specific entry it must necessarily be excluded from the general entry. Again in the case of M/s. Bharat Forge and Press Industries (P) Ltd. Vs. Collector of Central Excise, Baroda, Gujarat, the Supreme Court specifically stated that under a residuary entry only such goods are covered which cannot be brought under the various specific entries in the Tariff:

"In other words, unless the department can establish that the goods in question can by no conceivable process of reasoning be brought under any of the tariff items, resort cannot be had to the residuary item." [Emphasis added]

18. This statement of the law was accepted and followed by the Supreme Court in the case of Indian Metals and Ferro Alloys Ltd., Cuttack Vs. The Collector of Central Excise, Bhubaneswar, the Supreme Court said:

"If an article is classifiable under a specific item, it would be against the very principle of classification to deny the proper parentage and consign it to the residuary item."

19. Applying this test, it cannot be said that the machine in question could not be conceivably classified under Tariff Heading 8445.40. Indeed the conclusion that the machine is so classifiable does not require any such extreme test and the machine comfortably fits within the four corners of the Tariff Heading 8445.40.

20. In the facts of this case it must be held that the construction adopted by the respondent authorities in making the classification under Tariff Heading 8479.89 was perverse. The construction adopted by the respondent authorities on Tariff Entry 8445.40 is not one which it could reasonably bear. The decision in Collector of Customs, Madras v. K. Setty (supra) relied upon by the respondents cannot, therefore, stand in the way of this Court holding in favour of the writ petitioner. (See : Government of India Vs. English Electric Company of India Ltd., Madras, ; Union of India and Others Vs. T.S.R. and Co., and Indian Cardboard Industries Ltd. Vs. Collector of Central Excise, .

21. For all the aforesaid reasons the writ application must be allowed. The respondents are directed to allow clearance of the machine to the petitioner on the basis that it is classifiable under sub-heading 8445.40 of the First Schedule to the Act. Any order or proceeding against the petitioners on the basis that the machine is classifiable under sub-heading 8749.89 is quashed. In the facts of this case there will be no order as to costs.

22. Before leaving the case the Court wishes to record its appreciation for the manner in which the petitioner's counsel has prepared the paper book including all relevant decisions, notifications etc. which has made the task of the Court in delivering judgment that much easier.

Matter No. 3729 of 1992 In the High Court at Calcutta Constitutional Writ Jurisdiction Original Side

Before The Hon"ble Mrs. Justice Ruma Pal

11-5-1993

Daga Nylomet Private Limited

v.

The Assistant Collector of Customs and Others

Mr. S.K. Bagaria mentions judgment dated 3rd May, 1993.

Mr. Prantosh Mukherjee appears and submits.

The Court : In view of the decision allowing the writ application, the bank guarantee given by the writ petitioner will be cancelled and returned by the Customs authorities to the petitioner.

Let a xerox copy of the judgment dated 3rd May, 1993, duly signed by the Assistant Registrar of this Court, be given to the parties upon their undertaking to apply for the certified copy of the judgment and on payment of usual charges.

All parties are to act on a signed copy of the minutes of this order on the usual undertaking.