
(2002) 05 BOM CK 0001

In the Bombay High Court

Case No : Writ Petition No. 2229 of 1988

D.R. Enterprises Ltd.

APPELLANT

Vs

AC Customs and Others

RESPONDENT

Date of Decision : 03-05-2002

Acts Referred:

Customs Act, 1962 — Section 15, 49
Evidence Act, 1872 — Section 102

Citation : (2002) 103 ECR 495 : (2002) 147 ELT 3

Hon'ble Judges : V.C. Daga, J;H.L. Gokhle, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

V.C. Daga, J.

INTRODUCTION

1. This petition is filed against the refusal of the Customs Authorities to allow clearance of the printing machine imported by the petitioners under the Open General License ("OGL" for short) under Appendix-I, Part-B, Serial No. 11(17) of the Import-Export Policy 1985-88, which covered Web-fed printing machines having an output of more than 35,000 copies per hour.

FACTS IN BRIEF The facts necessary to appreciate the rival contentions may be stated briefly:

2.1. The petitioners claim that the printing machine imported by them is specifically covered by the relevant entry in OGL and placed reliance on the Import and Export Policy - April 1985 - March 1988 framed by the Government of India for import and export promotion (hereinafter called as "the Policy").
2.2. The relevant Clause 45 of the Import Policy reads as under:

45. Import of Printing Machinery.

(1) Printing Machinery listed in Appendix I Part-B of Imports-export Policy 1985-88 will be allowed for import to eligible Actual Users under Open General Licence subject to the conditions laid down.

(2) Applications for import of other printing machinery should be made to the Chief Controller of Imports & Exports, New Delhi, where the value of the machinery to be imported does not exceed Rs. 1 crore (c.i.f.) and to the Secretariat for Industrial Approvals, Ministry of Industry New Delhi where the value exceeds Rs. 1 crore.

(3) Printing machinery imported by Projects & Equipment Corporation of India Ltd. under rupee payment arrangements will be distributed to eligible Actual Users by the Projects & Equipment Corporation on the basis of Release Advice issued by the licensing authority. In such cases also import applications should be made to the Chief Controller of Imports & Exports, New Delhi, or the Secretariat for Industrial Approvals, as the case may be.

Appendix-I, Part-B contains list of items covered under Clause 45 of the Import Policy. The relevant entry reads as under:

(17) Web-fed High Speed letter press rotary and Offset rotary printing machines having output of more than 35,000 composite impressions or copies per hour.

3. The Customs Act 1962 is an Act to consolidate and amend the law relating to the customs. Chapter-V thereof deals with levy of and exemption from customs duty. Section 12 is a charging section. Under this section all the goods imported in India or exported from India are liable to customs duty unless the Customs Act itself or any other law for the time being in force provides otherwise.

4. In order to appreciate the contentions raised in this petition, it is necessary to notice certain steps required to be taken under the Customs Act for levy of duty on goods imported into India. As stated above, Section 12 declares that the duty of customs shall be levied on all the goods imported into India. The goods imported are required to be valued u/s 14 and duty payable is required to be determined according to the rates specified u/s 15 of the Customs Act or any other law for the time being in force.

5. The other sections falling in Chapter V dealing with levy and exemption from customs duty need no detailed reference for the decision of this petition. Suffice it to say that the chargeability of the goods to the customs duty arises when the goods are imported into India. In this case, it is not in dispute that the printing machine is the goods imported into India by the petitioners.

6. The petitioners submit that in normal circumstances such goods shall attract customs duty but for the alleged benefit of the exemption notification, bearing No. 114-Cus. dated 19.6.1980 as amended by Notifications No. 236-Cus., dated 29.11.1980; No. 38-Cus., dated 28.2.1982 and No. 176/86-Cus., dated 1.3.1986.

Exemption for specified machines for printing industry.--In exercise of powers

conferred by Sub-section (1) of Section 25 of the Customs Act, 1962 (52 of 1962), the Central Government being satisfied that it is necessary in the public interest so to do, hereby exempts the goods specified in the Table below and falling within Chapter 84 or Chapter 90 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), and are designed for use in the printing industry, when imported into India, from so much of that duty of customs leviable therein which is specified in the said First Schedule as in excess of 35 per cent ad valorem.

TABLE

Sr. No.	Description
1.	Web-feb High Speed letter Press Rotary and Web-feb Offset Rotary print- ing machine having output of 30,000 or more copies per hour.
2.	Photo composing machines and key boards thereof.
3.	Reflection type densitometers.
4.	Proofing presses and photo mechanical proofing system.
5.	Hot metal Mono or Lino type composing and casting machine, or com- posing and casting machine, with or without key boards.

The petitioners are claiming that their import is covered by OGL read with Appendix-I, Part-B, Serial No. 11(17) of the Import Policy which covers Web-feb Printing Machines having an output of more than 35,000 copies per hour.

7. It appears that after import of the printing machine, certain documents such as Invoice of the machine along with leaflet giving details of the machine in question were submitted by the petitioners to the Customs Department, which has resulted in a Query Memo finding discrepancy in the invoice and the literature of the machine which was in the form of leaflet. In the invoice the declared speed of the machine was 36,000 copies per hour, whereas literature of the machine in the form of leaflet indicated that the speed of the machine was 25,000 copies per hour. In the circumstances, the petitioners were called upon to explain how the import of machine was allowed in OGL and benefit of exemption notification No. 114/Cus. was claimed. The said query memo was replied by the petitioners. The contents thereof forming part of petition (as Exh. "B") read as under:

QUERY MEMO (for Bill of Entry)

Appraising Group New Custom House, Bombay-400 038

Sr. D. No. 66782

Date 26.11.1987

B/E No. 225, Ex. S.S. Marsk Clementing Description of the goods: Printing Press
Name & Address of the Importer: M/s. D.R. Enterprises, E 5/8 Area Colony,

_____ Date Sr. No. Query Date Sr. No. Reply/ Request _____

_____ (1) In this invoice speed of the machine M/C is Sir, declared to be 36000 copies per hour. But as With reference to your query kindly leaflet furnished speed is only 25,000. Pls. ex- note the following: plain how the M/C is allowed in OGL and to benefit of Notfn. No. 114/80-Cus is claimed. (1) Catalogue of Model V-15H along with shippers Certificate is enclosed. Accordingly the machines speed is 36,000 copies per hour. (2) Please furnish correct OGL declaration for (2) Correct OGL Declaration men- capital goods and give your full regn. No. tioning full Registration num- therein. ber enclosed. (3) Please furnish conditions attached to your (3) Conditions attached to DGTD DGTD regn. as per Clause (4) of the certificate. Certificate enclosed (Page-10) (4) Please furnish details and invoice value of (4) Write-up on the items imported spares and accessories imported and speed up is enclosed from which it the same in B/E as per Notification No. 132/87- would be clear that all the items Cus. are integral part of machine. (5) Please furnish proforma invoice, In (5) Contract signed between buyer tent/order, full contract, and bank attested in- and seller is enclosed. Whereas voice and detailed catalogue. the original documents are not Yet received from the bank. (6) Please furnish a write up explaining the relevance of items to the machine. (7) In the meanwhile you may get the goods examined (6) Description in Bill of entry am- 1st CH. ex order is given and B/E is amplified as desired. closed. We therefore request you to kindly (8) Amplified description in B/E to indicate allow clearance on Second-Check speed. basis. Signature of the Appraiser Signature of Importer/CHA

Sd/- _____

_____ ORDERS PASSED IN THE GROUP

- (i) Bond executed/accepted on
- (ii) Warehousing u/s 49 CA 62 allowed on
- (iii) Samples despatched to lab on
- (iv) Any other orders
- (v) B/E completed on

8. The Customs Department not being satisfied with the aforesaid reply, pending investigation, requested the petitioners vide their letter dated 21st January 1988 (Exh. "H") to warehouse the goods u/s 49 of the Customs Act after depositing admitted customs duty so as to avoid incurring demurrage. Accordingly, the said machine was warehoused.

9. M/s. S.L. Kulkarni & Co., claiming to be the agent of the manufacturer in India, on the same day i.e. on 21st January 1988, addressed a letter to the

Special Investigating Officer of the Customs Department, Bombay (Exh. "J") indicating that as per information received from their principal that the printing machine Model Harris Graphics vis-a-vis Web Offset Press exported to India was modified to run at the speed of 36,000 copies per hour. The relevant extract of the said letter reads as under:

1. We are sending a telex to our Principals to send us operator manual of the machine and shall furnish you the same when received.
2. Our Principals have informed us that V-15H models exported to India are modified to run at 36,000 speed. The modification pertains to design changes in JF-25 folder of the machine to run at that speed. And to take additional load due to higher speed, the horse power of the machines are suitably modified. A copy of manufacturer's certificate is enclosed.

(emphasis supplied)

10. The aforesaid agent M/s. S.L. Kulkarni & Co. again by their letter dated 25th January 1988 (Exh. "K") informed the Special Investigating Officer of the Customs reiterating the above contents and furnished further data so as to emphasis their view point. The said letter reads as under:

With reference to your query as to the modification of the above machine to run at a speed of 36,000 copies per hour, we have to state as follows:

Our principals had re-designed JF-25 folder so as to run at a maximum speed of 36,000 copies per hour:

Normally horse power used in U.S.A. to run a 2 to 3 unit machine is 50 HP. Therefore, to take extra load required to run at a higher speed our principals have fixed this machine with a drive of 75 HP so that the machine can be run at a maximum speed of 36,000 copies per hour.

(emphasis supplied)

M/s. S.L. Kulkarni & Co. vide its letter dated 3rd February 1988 (Exh. "L") again reiterated the above contentions and tried to bring home their view point.

11. The petitioners vide their letter dated 22nd March 1988 (Ex. M) again approached the Assistant Collector of Customs, Bombay and tried to impress upon the Custom that the machine imported by them was a modified version of the machine - Harris Model vis-a-vis Web Offset covered under Bill of Entry No. 3234/84. The petitioners finding no response from the Customs invoked extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India, with the following substantial prayer:

(a) For a declaration that the petitioner is in law entitled to import and clear the said printing machine covered by the said Bill of Entry for Home Consumption (Exhibit A hereto) as an Actual User under the Open General Licence.

EVENTS DURING PENDENCY OF THE PETITION

12. This Court by an order dated 10th August 1988, had directed the Customs Authorities to submit a list of the relevant material required by them to the petitioners on or before 17th August 1988 and directed the petitioners to comply with these requirements on or before 26th August 1988 and also directed the Customs Authorities to pass appropriate order within one week thereafter. The matter was adjourned to 31st August 1988. No list of materials as required by the Customs Authorities was ever served on the petitioners and no adjudication order was passed. The learned single Judge Mr. Justice Daud (as he then was), had passed order on 2nd September 1988 directing the parties to inspect and test the consignment under the supervision of the Court appointed Officer. The testing and inspection was to be done within five days from 2nd September 1988 and the adjudicating authority was directed to pass an order within seven days from the inspection and testing. Extract of the said order is reproduced hereinbelow:

...In the circumstances the only way out is to direct the inspection and testing of the consignment by the parties or their representatives under the supervision of a Court appointed officer. Mr. A.R. Bapat of the Original Side is designated that officer. He will arrange to getting the inspection and testing done within five days from today. The adjudicating authority will pass an order within 7 days of the inspection and testing. Mr. Bapat's transport will be arranged for by the parties contributing in equal portions towards the fare....

As the respondents could not complete inspection and testing of machine as directed by this Court, the Customs Authorities sought for extension of time which was granted up to 28th September 1988 vide order dated 20th September 1988. The Assistant Collector of Customs (SUB) vide his affidavit dated 25th October 1988 submitted that the examination of the entire consignment was completed on 28th September 1988. The inspection report was placed on record along with the said affidavit. On 3rd October 1988, this Court passed an order allowing clearance of the said machine in terms of inter prayer Clause c(i) of the petition. Since then the petition was pending for final disposal. The same was taken up and heard finally with the assistance of the learned Counsel appearing for the parties.

THE ARGUMENTS

13. The learned Counsel appearing for the petitioners relying on the documents placed on record contended that the printing machine imported by them was capable of printing more than 35,000 copies per hour. The import of the said machine was permissible under OGL keeping in view the Import and Export Promotion Policy, prevailing at the relevant time. The learned Counsel sought to place reliance on the documents, namely, leaflet showing print area as 36,000 coupled with certificate issued by the manufacturer. The learned Counsel took us through all the documents and contents thereof and tried to impress upon us that there are no proceedings pending against the petitioners. Alternatively, he submitted even if there were proceeding pending, if any, the same should not be

allowed to be proceeded with. He placed reliance on the judgments of this Courts in the case of Universal Generics Pvt. Ltd. Vs. Union of India, , in Oriole (Exports) Pvt. Ltd. v. Union of India 1993 (68) ELT 723 (Bom) and in Nehawa Steel Traders Vs. Union of India, to contend that the respondents should not be permitted to complete any such proceeding. He further tried to emphasize the very fact that there was no order of this Court restraining the respondents from issuing show cause notice and to proceed with the process of adjudication. He submitted that 14 years have been passed since the machine was cleared and the dispute only related to the speed of the machine. He relying upon the affidavit dated 25th October 1988 filed by the Customs contended that in spite of completion of inspection of the consignment on 28th September 1988 no steps were taken by the Customs and there is nothing in the affidavit to suggest that the inspection of the said consignment revealed anything other than what the petitioner had already pointed out, namely, that the printing machine in question was capable of printing more than 35,000 copies per hour. He further submitted that even in the aforesaid affidavit dated 25th October 1988, filed after inspection of the machine in question, no mention is to be found that the machine was not capable of printing 35,000 copies per hour. In his submission, this affidavit is totally silent on this aspect of the matter. No further affidavit has been filed though 14 years have been passed. He, therefore, submitted that it is clear that the department had accepted the documents and contentions of the petitioners and was satisfied that the said machine was capable of printing more than 35,000 copies per hour. In the circumstances, he prayed that rule be made absolute as the interim prayer which had been granted viz. prayer Clause (c-i) was to the same effect as the principal prayer (a).

14. Per contra, the learned Counsel appearing for the respondents has drawn our attention to the affidavit of one Shri P.M. Parab, Deputy Commissioner of Customs filed on 26th February 2002 and contended that the petitioners are not right in contending that no affidavit has been filed after 25th October 1988. He submitted that the Customs Officers in the presence of representative of CHA M/s. G.H. Mehta & Co. inspected 21 subject packages in detail on four different dates and inventories of the goods found therein were prepared and placed on record. He brought to our notice that the owner of goods was required to be present at the time of detailed inspection but the petitioners avoided to remain present during inspection on one pretext or other and showed total non co-operation in this regard. He further submitted that only the physical inspection of the consignment could be taken by the Customs. No test run of the machine could be taken as to ascertain the speed of the machine because the concerned Officers were not in a position to assemble and run the machine for want of co-operation from the petitioners. The test run of the machine could have been possible only if the petitioners had cooperated, which would have clearly demonstrated per hour printing capacity of the machine.

15. The learned Counsel for the respondents contended that the petitioners deliberately and malafidely did not co-operate for test run of the machine in

question. He submitted that the technical leaflet furnished by the petitioners along with the bill of entry seeking clearance of the goods specifically mentions that the speed of the imported machine is 25,000 in prints per hour. In other words, it means that the imported machine was capable of printing only 25,000 copies per hour. He further submitted that when the office premises of the petitioners at Bhopal was searched an identical technical leaflet in respect of the same model was found and seized. Even in the said leaflet the speed of the machine was shown as 25,000 copies per hour. However, another leaflet identically in all other aspects to the aforesaid but showing the speed of 36,000 copies per hour was also found and seized. On close examination of the leaflet showing the speed of 25,000 copies per hour, it was found to be printed for M/s. Harris Graphics, Wed Press 121 Broadway, Dover, New Hampshire and the one showing speed of 36,000 also included the name of representative in India, M/s. S.L. Kulkarni & Co. However, other details were the same. It was not satisfactorily explained by the petitioner as to how a particular machine with the nature of its technical specifications etc. having capacity of 25,000 copies per hour can possibly print 36,000 copies per hour. It is further submitted that some lame explanation was sought to be given by the petitioners. He drew our attention to few items admittedly imported by the petitioners like Automatic Splicer, Baldwin Circulating Water Level System Web Break Detector, Silicone Applicator and P.B.-3 plate Benders. All these items imported by the petitioners are not mentioned in the technical leaflet originally submitted by the petitioners for claiming the beneficial assessment under notification No. 125 of 1986. In such a situation it was obligatory on the part of the petitioners to show to the department that the imported parts were essential to qualify for exemption under the said notification. He further submitted that the petitioners had submitted letter of M/s. S.L. Kulkarni & Co. dated 21st January 1988 regarding modifications as referred to hereinabove. He, however, submits that the said modifications nowhere appear in the technical leaflet supplied/seized from the petitioners. The petitioners had not submitted any evidence that the subject machine was modified to match the extra load or speed limit. He, therefore, submitted that a reasonable inference should be drawn from above facts that the literature was specifically got printed for Indian markets so as to fit in the scheme of qualifying for clearance of these machines under OGL as well as at a lower rate of duty, without effecting any modification in the alleged new model of the machine in question. He also pointed out that the whole attempt was to deprive the revenue of its right to claim duty legally recoverable from the petitioners. In this context he pointed out that the duty exemption would result in loss of 55% of CIF value to the exchequer. He also took us through various documents available on record and tried to show that complete documents with respect to the machine and transaction in question were not produced before the Court and further tried to persuade us to draw an adverse inference against the petitioners. He reiterated that the test run of the subject machine was deliberately avoided by the petitioners as they were sure that the machine was unable to stand to the required test laid down under OGL and import-export

policy of the country prevalent at the relevant time. He also submitted that the machine is being used in a printing unit at Bhopal for printing news paper " Nai Duniya". He further tried to explain that this Court allowed the clearance of the subject machine under interim order and the petition was kept pending, as such the Customs could not issue show cause notice to the petitioners as the matter was sub judice before this Court.

16. In rejoinder, the learned Counsel for the petitioners filed an affidavit dated 19th March 2002 duly sworn by one Shri Himanshu Jhawar of Bhopal claiming to be the Chief Manager, Finance of the petitioner company. He tried to emphasize that at no point of time did the respondents make any grievance regarding actual test run of the machine as for the first time made in its affidavit dated 26th February 2002. He asserted that had the respondents wanted to actually see the machine run at the speed claimed by the petitioners, they could have done so at the premises of the petitioners where the machine is run for last 14 years after its clearance was allowed. He denied that any search was carried out at the office of the petitioners at Bhopal as alleged in the affidavit of the respondents dated 26th February 2002 and requested us to put the department to the strict proof in support of their allegations. He further tried to plead mistake in delivering leaflet showing the speed of the machine as 25,000 and tried to reiterate the alleged modifications alleged to have been carried out in the machine/model in question and also tried to emphasize that it was not necessary for the manufacturer to mention modifications in the leaflet so long as it mentioned the actual speed of the machine. He lastly relied upon the documents produced on record in support of his submission.

17. The learned Counsel for the respondents submitted that the affidavit dated 19th March 2002 filed by the petitioners to deny the search" and seizure carried out by the Customs at their office is based on hearsay evidence, as such cannot be relied upon to disbelieve the case set up by the department. He thus prayed that the petition be dismissed as not maintainable.

ISSUE

18. The substantive issue, on the rival contentions of the parties, is as under:

Whether the petitioners prove that the machine imported by them, shown as, Model Harris Graphics vis-avis. Web Offset Press in Bill of Entry and described as HARRIS GRAPHICS V-15 WEB OFFSET PRESS is covered by OGL under Appendix-I, Part-B. Serial No. 11(17) of the Import Policy having output of more than 35,000 composite impressions or copies per hour and is entitled to exemption under Notification No. 114-Cus. dated 19.6.1980 as amended by Notifications No. 236-Cus., dated 29.11.1980, No. 38-Cus., dated 28.2.1982 and No. 176/86-Cus., dated 1.3.1986?

BURDEN OF PROOF:

19. Before adverting to the issue in question basic legal issue which needs to be

addressed is on whom burden of proof lies. Factual matrix reveal that as per Import Policy, it was not open for the petitioners to import under OGL any printing machine having output of less than 35,000 composite impressions or copies per hour. In other words, any import of printing machine not having output of more than 35,000 composite impression or copies per hour was not permissible under OGL. The petitioners having imported the printing machine under OGL, were asserting that the machine imported by them was capable of giving more than 35,000 copies per hour and was as such covered under Import Policy and entitled to claim Exemption under Notification No. 1114/Cus. (sic) dated 19th June 1980. The general rule is that the burden of proof lies on the party asserting a particular fact to be true. The petitioners have invoked the writ jurisdiction of this Court. The petitioners desire this Court to give judgment as to their legal right on existence of facts which they have asserted in the petition. It is therefore for the petitioners to prove that those facts exist. The burden of proof in a proceeding lies on that person who would fail, if no evidence at all was given on either side. Applying this settled principle flowing from Section 102 of the Evidence Act. It is the petitioners who would fail in their petition, if no evidence is given on either side. It is the petitioners who desire that this Court should hold that the printing machine imported by them was having capacity to give output of more than 35,000 composite impression or copies per hour, therefore, the burden of proof lies on the petitioners.

20. We may make it clear that the evidence on record referred to by the rival parties basically involves appreciation of disputed questions of fact. We were reluctant to undertake this exercise in our writ jurisdiction keeping in view the guide lines with respect to the exercise of writ jurisdiction laid down by Apex Court followed by this Court from time to time. However, in the following circumstances we are required to exercise our writ jurisdiction and decide this controversy on merits.

WHY DECISION ON MERITS:

21. The long pendency of this petition for 14 years and the peculiar stand taken by the petitioners prevented us from remitting this matter to the adjudicating authorities under the Act to determine the disputed questions of fact. Left with no other alternative, we are constrained to decide this matter on merits on appreciation of evidence for the following reasons:

- (a) The printing machine in question was imported in India on 24.11.1987.
- (b) The respondents did not permit clearance of machine as in their belief the import of the said machine under OGL was not permissible.
- (c) The petitioners filed this writ petition on 29.4.1988 and obtained interim relief on 3.10.1988 and got the goods cleared under interim order in 1988 itself.
- (d) The subject machine is under constant use since 1988 for printing Daily News Paper "Nai-Duniya" published from Bhopal (Madhya Pradesh).

(e) Since the clearance of subject machine was allowed to be under interim order of this Court in terms of prayer Clause (c-i) read in the light of declaration sought by the petitioners in prayer Clause (a), the respondents for want of any leave from this Court, did not issue any show cause notice u/s 11A of the Act, which prescribes six months period of limitation for issuing such show cause notice.

(f) The petitioners during the course of their submissions made it clear that after 14 years it was not possible for them to produce any other evidence other than the evidence already tendered on record.

(g) The petitioners to our query replied that the production data to justify capacity of machine to print more than 35,000 copies per hour may not be available. The machine may not have been run to its maximum capacity or to the capacity of producing more than 35,000 copies per hour, as such no useful purpose would be served by directing the parties to produce their evidence before the fact finding authority to be designated by this Court. In other words, the petitioner were reluctant to appear before the authority to be designated by this Court to collect evidence and to return findings on fact on the issue in question.

In the aforesaid circumstances, though we initially thought of getting the issue adjudicated through the adjudicating authority by directing the respondents to issue show cause notice u/s 11A of the Act, so as to afford reasonable opportunity to both parties to place their case before the adjudicating authority leaving on merits all the rival contentions open, the petitioners vehemently opposed this approach and placed reliance on the judgment of the Apex Court in the case of Gokak Patel Volkart Limited Vs. Collector of Central Excise, Belgaum, so as to contend that show cause notice cannot be issued beyond six months u/s 11A of the Act, and that after 14 years, petitioners cannot be asked to face the adjudication process. This is how the petitioners pressed for the decision on merits.

22. The learned Counsel for the petitioners contended that this Court would not be justified in dismissing the petition as not maintainable on the ground of availability of alternate remedy especially when the petition was entertained, kept pending for 14 years and when it is being heard on merits. He also raised a contention that the availability of alternate remedy does not affect the jurisdiction of the Court to issue writ. He also brought to our notice judgment of Division Bench of this Court in the case of Nehawa Steel Traders Vs. Union of India, . The petitioners therein were permitted to clear the consignment on certain terms under interim order which specifically provided that the respondents would be at liberty to serve show cause notice and pass appropriate adjudication order. The respondents having failed to take any follow up action for more than 10 years, this Court in that case had observed that no fruitful purpose would be served by permitting the respondents to commence adjudication proceedings hereinafter. In this view of the matter, submission was made to decide this petition on its own merits on the available material. We have also

given our thoughtful consideration to these various aspects placed before us and thought that, if we refuse to adjudicate the issue on merits and direct the respondents to proceed with adjudication process, the show cause notice, if issued, may not sustain the challenge based on limitation, with the result, any demand made would be exposed to illegality for want of compliance with the statutory requirement, and ultimately, revenue might suffer in this legal battle only on a technical ground. At the same time, the issue raised by the petitioners would also remain unresolved for no fault on their part. The Apex Court in the case of L. Hirday Narain Vs. Income Tax Officer, Bareilly, ruled that High Court should not dismiss petition which was entertained and was heard on merits, on the ground of not availing alternate remedy. In the case of Union of India v. T.R. Verma 1957 SC 882 the Apex Court held that availability of alternate remedy would not affect the jurisdiction of the Court to issue writ. In this view of the matter, we are constrained to decide this petition on merits.

CONSIDERATION ON MERITS

23. We have heard learned Counsel for the parties and perused record. Having determined the question of burden of proof, now let us examine the issue on merits, on the basis of" evidence placed on record.

23.1. The documentary evidence placed on records by the petitioners can conveniently be divided in two parts. One part of document consists of two leaflets furnishing technical data and description of the printing machine in question along with bill of entry and certificate showing date "8/24/87" (correct date may be 8/2/87) issued by the manufacturer of the machine M/s. Harris Graphics Corporation, U.S.A. The other part of the document is nothing but a correspondence made by the petitioners. their clearing and holding agent (CHA) and one M/s. S.L. Kulkarni & Co., dealers in printing machinery, projecting themselves to be the Indian agent of M/s. Harris Graphics Corporation, U.S.A. The said second part of the documents can well be described as self serving evidence.

24. The respondents have also filed their affidavit-in-reply and produced certain documents which can also be divided in two parts. One part represents the document in the nature of inspection report based on examination of the entire consignment which was completed on 28th September 1988; while complying with the part of the directions issued by this Court under order dated 2nd September 1988. The other part of documents is basically the reproduction of documents supplied by the petitioners themselves.

25. The short question involved in this petition as framed herein-above is whether petitioners have discharged their burden to prove that the subject printing machine imported by them under OGL was having an output of more than 35,000 copies per hour so as to entitle them to claim exemption benefit of Notification 114-Cus. dated 19.6.1980 as amended by Notifications No. 236-Cus., dated 29.11.1980; No. 38-Cus., dated 28.2.1982 and No. 176/86-Cus., dated

1.3.1986.

26. Now, let us turn to examine and appreciate the evidence produced by the parties to the petition.

26.1. The first document placed on record is a bill of entry (Exh. "A") which admittedly does not refer to the printing capacity of the machine in question. The description of machine given in the bill of entry is as under:

One (1) New Harris Model-V-15-H Web-feb High Speed Offset Rotary Printing Machine.

27. Omission to mention printing capacity of the machine in bill of entry, in our opinion, is a vital omission going to the root of the issue especially when two models of the same machine, one capable of printing 25,000 copies per hour and another giving output of more than 35,000 copies per hour, were in production as per the case sought to be made out by the petitioners as well as manufacturer and supplier of the printing machine in question. As per the leaflets and/or literature of the machine distinguishing factor between two models is only with respect to the printing capacity of the machine, all other specifications of both models remaining the same. This was arbitral character of the machine and cannot escape attention unless it is a machine not having capacity to print more than 35,000 copies per hour. In the circumstances this is a case for drawing an inference for want of mention in the invoice and/or Bill of Entry that machine in question had no such capacity to give output of more than 35,000 copies per hour. At any rate, we are of the opinion that this document is of no assistance to the petitioner, rather it proves the case of the respondents, if one has to draw an adverse inference based on omission to mention its printing capacity in the said document, namely, bill of entry.

28. The second document, which is not in dispute, is the printed literature of the machine which is referred to as a leaflet in the petition, which was handed over to the Customs by the petitioners themselves, at the time of presentation of bill of entry of the subject machine (for the sake of identification the same is referred to as "leaflet-A"). As per the said leaflet-A. the printing of capacity or the print area or the speed thereof was shown as 25,000 copies. This leaflet has given rise to the query memo dated 16th November 1987 reproduced in para-7 supra. In reply to the query ,no explanation was furnished or no circumstances were brought on record as to how the said leaflet came to be delivered to the Customs along with bill of entry but a fresh copy of another leaflet/catalogue was produced showing speed of the machine (print area) as 36,000. No explanation was furnished, so as to establish any nexus between the subject machine and the said leaflet which showed print area (printing capacity) as 36,000 copies. Both leaflets nowhere prescribe duration of printing period or print area or, in other words, the period or duration during which the machine can give the output of 25,000 or 35,000 copies. It appears that the parties have assumed or taken and/or presumed that the print area is based on the duration of one hour.

We, therefore, assume it to be the same.

29. The third document, a leaflet as already referred to hereinabove has come on the scene from the custody of the petitioners in the circumstances enumerated herein above (for the sake of identification it is referred to as "leaflet-B"). This "leaflet-B" is showing print area or printing capacity of the Model as 36,000 without referring to the alleged improvement alleged to have been made in the said model. Both leaflet-A and leaflet-B, referred to hereinabove, are showing identical details so far as another specifications of the model are concerned except the printing area. In one catalogue i.e. leaflet-A, print area has been shown as 25,000, whereas in another i.e. leaflet-B it is shown as 36,000. The alleged modifications alleged to have been made in the model having print area of 36,000 nowhere appear in the leaflet-B supplied by the petitioners. In the natural course of regular business, especially in the competitive marketing and advertising world, no manufacturer will omit to highlight the special advantageous or features of its product in the catalogue printed for advertising its product or in a leaflet supplied to its customers, especially when, India, at the relevant time, was one of the potential markets available for the exporters of such product keeping in view the relaxation provided in the Import Export Policy of India for the printing machines having output of more than 35,000 copies per hour. Absence of details and special mention to the modified high lights of the model compel us to draw a reasonable inference that the literature was specifically printed for Indian market without modifying the model so as to fit in the scheme qualifying for clearance of such machine or model under OGL, with a view to claim benefit of lower rate of duty, the duty exemption being substantial which was near about 55% of c.i.f. value.

30. The fourth document brought on record is a letter, may be dated 8.2.1987 (Exh. "D"), a certificate issued by the manufacturer of the subject machine M/s. Harris Graphics Corporation (U.S.A.) certifying that the goods shipped conform to the purchase contract No. NIL dated 24th March 1987 and that all the terms and conditions of the contract are complied with. We do not find any evidence with respect to the printing area of the machine except that the contract to purchase machine was dated 24th March 1987. This contract document dated 24th March 1987 has not been produced on record. In our opinion, this being one of the important document ought to have been produced on record. Normally, such documents do have the details of the order placed on the supplier including the specifications of the goods supplied or purchased coupled with reciprocal obligations inured by the parties. In our opinion, this document would have been one of the vital, important and best piece of evidence to throw light on the controversy in question. However, this document is not on record. The custody of this document in normal circumstance ought to be with the petitioners. It was thus obligatory on the part of the petitioners to produce this document on record. No explanation is to be found in the petition for omission to file this vital document on record or at least denying custody thereof.

31. The petitioner cannot be allowed to rely upon the abstract doctrine of onus of proof and contend that it was no part of its duty to produce this document unless called upon to produce the same. In this behalf the observations of the Apex Court in the case of Hiralal and Others Vs. Badkulal and Others, are relevant which we quote as under:

Evidence Act (1872), Sections 101 to 103 and 114 Ill.(g) - Accounts and their non-production (Civil P.C. (1908), Order 13, Rule 2)

Suit for recovery of amount due on basis of adjustment of accounts signed by defendant. Defendant denying correctness of amount found due. Defendant who is in possession of account books kept by him and from which the balance could be ascertained should produce them before Court. He cannot be heard to say, relying upon the abstract doctrine of onus of proof, that it was no part of his duty to produce them unless he was called upon to do so.

32. The Apex Court in the case of Khushalbhai Mahijibhai Patel Vs. A Firm of Mohmadhussain Rahimbux, held that failure to produce best evidence. presumption that evidence would have gone against the petitioner can be drawn. In our opinion, this is a fit case for drawing adverse inference against the petitioners for withholding this best piece of documentary evidence.

33. Let us first turn to the letter of M/s. S.L. Kulkarni & Co. dated 21st January 1988 (Exh. "J"). The first para of the said letter reads as under:

1. We are sending a telex to our Principals to send us operator manual of the machine and shall furnish you the same when received.

This letter is dated 21st January 1988. The petitioners were heard by us on 4th April 2002. In spite of lapse of more than 14 years, no material is available on record to show that at any point of time operation manual of the said machine had been furnished to the respondents. No such manual has been produced before us. Had it been produced, it would have definitely thrown light on the specifications, alleged modifications of the model of the machine in question. It was obligatory on the part of the petitioners to get this manual and produce in the proceedings to resolve the issue in question. Again, omission to produce this document compels us to draw an adverse inference against the petitioners for the reasons stated above.

34. The Apex Court in Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others, observed as under:

A party in possession of best evidence which would throw light on the issue in controversy withholding it - Court ought to draw an adverse inference against him notwithstanding that onus of proof does not lie on him....

35. Turning to the second para of the aforesaid letter dated 21st January 1988 (Exh. "J"), it further reads as under:

2. Our Principals have informed us that V-15H models exported to India are

modified to run at 36,000 speed. The modification pertains to design changes in JF-25 folder of the machine to run at that speed. And to take additional load due to higher speed, the horse power of the machines are suitably modified. A copy of manufacturer's certificate is enclosed.

The manufacturer's certificate referred to in the above referred letter is dated 8/24/87 (may be dated 8/2/87} the same is produced on record (Exh. "D"), which reads as under:

CERTIFICATE

This is to certify that goods shipped conform to purchase Contract No. NIL dated 24.3.1987 of Harris Graphics, New Hampshire and that all the terms and conditions thereof have been complied with.

The conjoint reading of above two documents unequivocally try to suggest that V-15H Model exported to India is modified to run at 36,000 speed. The modification pertains to design changes in JF-25 folder of the machine to run at that speed and to take additional load due to higher speed, the horse power of the machines are suitably modified to comply with current import policy, so as to give a maximum output at the rate of 36,000 copies per hour.

36. The dissection made in the letter dated 21st January 1988 further reveals that the modification pertains to design changes in JF-25 folder of the machine to run at higher speed and to take load of the additional higher speed. This assertion made by the petitioners stands belied by both the leaflets (A and B), if examined case fully. The specifications of the folder in both leaflets (A and B) (one showing printing area as 25,000 and other showing it as 36,000), if compared, would demonstrate in unequivocal terms that there is absolutely no change in folder of both alleged models. The description of folder with respect to both alleged models including pictorial image is identically same. The description of data, to demonstrate identical similarity with respect to both alleged models, is reproduced here in below:

	Taken from leaflet-A	Taken from leaflet-B
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JF-25B Folder	JF-25B Folder	Standard folder for the V-15H is the Standard folder for the V-15H is the JF-25B, which can deliver broad- JF-25B, which can deliver broad- sheet, tabloid and quarter-folded sheet, tabloid and quarter-folded products. With the optional double products. With the optional double-parallel attachment, digest-size products parallel attachment, digest-size products can be delivered two-up. When can be delivered two-up. When quarter folding, the JF-25B can handle quarter folding, the JF-25B can handdle two webs of up to 70 pound two webs of up to 70 pound stock. A short former is standard, but stock. A short former is standard, but a tall air former is available as an optional a tall air former is available as an optional feature. feature.
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37. The certificate issued by the manufacturer dated 3rd June 1986 further gives a picture that to comply with the current Indian Import Policy they modified Web-feb speed offset rotary printing machines sold in India to give maximum output at the rate of 36,000 copies per hour. The description of the Model is shown as under:

Model-15-H (with JF-25, JF-4, JF-10 Folders only).

38. The bare reading of the above certificate gives a picture that Model-15-H is with JF-25, JF-4, JF-10. If this certificate is read in the light of leaflets referred to hereinabove, the relevant portions of which are extracted in the above para, it would be clear that the manufacturer wants to suggest that the folder JF-25-B has been upgraded to JF-25, with additional folders JF-4 and JF-10. Firstly, as already stated, the leaflets do not support this picture sought to be projected through the above certificate dated 3rd June 1986. Secondly, had it been so, the subsequent leaflet alleged to be a catalogue of modified model would not have omitted to mention this special feature of the upgraded model. It does not support the assertion sought to be made in the certificate in question. No reference is to be found to the additional folders styled as JF-4 and JF-10 in the said literature. Thirdly, the inspection report of the machine furnished by the Customs based on the inspection completed before 28th September 1988 shows that the folder base of the machine in question was found as JF-25-B model. Had the folder been upgraded from JF-25B to JF-25 then the machine in question ought to have been with modified folder JF-25 and could not have been with folder base JF-25-B. Fourthly, other modified folders JF-4 and JF-10 are not to be found in the inspection note, obviously, for want of such machine or model with such modified folders. This inspection note has not been objected to by the petitioners. Thus, it can be safely treated as undisputed document. One more shade of the same evidence needs further appreciation. The letter of M/s. S.L. Kulkarni & Co. dated 21st January 1988 (Exh. "J") makes out a case that the original Model V-15-H exported to India has been modified to run at 36,000 speed. The modification pertains to design changes in folder of the machine to run at that speed and to take additional load due to higher speed, the horse power of the machine has also been suitably modified is the case sought to be made out. We have already observed and recorded our finding that no evidence is available on record to establish modification of the folder base of the machine or model in question. If this be our finding, then the logical conclusion is that no modifications have been made in the folder base of the machine or model in question. If that be so, then in absence of modification of the folder base, machine cannot be said to be capable of taking additional load. Therefore, it cannot give higher speed so as to give higher production to the extent of more than 35,000 copies per hour. The certificate and the letter of M/s. S.L. Kulkarni & Co., therefore, cannot be relied upon. The same cannot be given any credence. The said evidence, for the aforesaid reasons, is not acceptable to us.

39. One more aspect of the above certificate needs to be noticed. This certificate

of the manufacturer is dated 3rd June 1986. The contract to purchase machine in question has been shown to be dated 24th March 1987. The copy of the contract dated 24th March 1987 as already observed hereinabove has not been produced on record. One more documents styled as agreement dated 24th April 1986 (Exh. "G") is produced on record. Both these documents are prior to the date of formation of contract i.e. 24th March 1987. No evidence is on record to connect these documents with the subject contract dated 24th March 1987 or with the machine in question. It is not known whether the same agreement culminated in the final contract dated 24th March 1987 or the same was modified or a new contract has taken place. It is settled principle of law of contract that the document prior to formation of contract cannot be taken into account to interpret or to understand the contract in question unless it is shown to be a part of the same contract or negotiation. Therefore, for want of material on record, the said documents cannot be treated as part of the same contract. Even otherwise the time gap between the alleged agreement dated 24th April 1986 (Exh. "G") and contract (dated 24th March 1987) is such that it was all the more necessary to prove that the said document was the part of the subsequently concluded contract.

40. One more important event which has taken place during the pendency of the petition has also a vital bearing on the ultimate decision of this petition. In the present petition, the learned single Judge Mr. Justice Daud (as he then was), had passed order on 2nd September 1988 directing the parties to inspect and test the consignment under the supervision of the Court appointed Officer. The testing and inspection was to be done within five days from 2nd September 1988 and the adjudicating authority was directed to pass an order within seven days from the inspection and testing. Extract of the said order has already been reproduced in the opening part of this judgment. As the respondents could not complete inspection and testing of machine as directed by this Court, the Customs Authorities sought for extension of time which was granted up to 28th September 1988 vide order dated 20th September 1988. The Assistant Collector of Customs (SUB) vide his affidavit dated 25th October 1988 submitted that the examination of the entire consignment was completed on 28th September 1988. The inspection report was placed on record along with the said affidavit to which reference has already been made in the earlier paras of the judgment.

41. Turning back to the order dated 2nd September 1988, it is clear that parties were directed to carry out inspection and testing of the consignment under the supervision of the Court appointed officer. However, it appears that inspection has been carried out, but no testing of the machine was done, at any rate no such report is available on record. On being questioned, learned Counsel for the parties did admit that testing of the machine has not been carried out at any time much less under the supervision of the Court appointed officer and no testing report is on record.

42. On the aforesaid backdrop, the order of the learned single Judge dated 2nd

September 1988 could be said to be referable to the provisions of Order 26 Rule 10 read with Rule 10A of Code of Civil Procedure, 1908 ("C.P.C." for short). It was thus obligatory on the part of both parties to carry out testing of the consignment under supervision of the Court appointed officer. Had it been carried out, the report of the Court appointed officer would have formed part of the record and could have been treated as a piece of evidence. The parties could have been given opportunity to file their objections and factual evidence could have been on record with respect to the printing capacity of the machine and/or model in question.

This direct evidence would have been material for deciding the issue in question. Now the question which needs consideration is: whether the absence of testing report of the consignment, which could have been treated as best piece of evidence, would go to the benefit of the petitioners? As already observed hereinabove, the burden of proof to establish that the imported machine was having output of more than 35,000 copies per hour covered under OGL was on the petitioners. Therefore, it was obligatory on the part of the petitioners to translate the order dated 2nd September 1988 into action. They ought to have encashed this opportunity afforded by the Court to collect and produce best piece of evidence. The testing of the machine could not have been done by the Customs unless the machine was made operative, the same could not have been operated by the Customs Officers in absence of active co-operative from the petitioners. The petitioners even after getting the machine released and installation thereof could have requested this Court to implement the order dated 2nd September 1988 and could have furnished the direct best piece of evidence based on testing of the machine so as to demonstrate that the machine was capable of producing more than 35,000 copies per hour.

43. The petitioners did not take any steps to implement the order of this Court dated 2nd September 1988. The inaction and failure on the part of the petitioners constitute failure on their part to produce best piece of evidence. As already observed hereinabove, this piece of evidence could not have been collected by the Customs without co-operation of the petitioners. The petitioners deliberately did not take any steps after obtaining interim orders for a long period of 14 years which compels us to draw adverse inference. The presumption has, therefore, to be raised against them that if such evidence had been produced or testing of machine had been carried out, the same would have gone against the case propounded by the petitioners. Failure on the part of the petitioners, even to make production data available must be similarly construed and presumption may be drawn for that this evidence also could have gone against the petitioners. It is not possible to presume that during pendency of last 14 years, machine may not have been run by the petitioners continuously for one hour, especially, when the machine was and is being used for printing news paper, namely, Nai-Duniya which has wide circulation in the State of Madhya Pradesh. The judicial note of the fact can be taken that the news papers meant for next morning circulation are required to be printed on a previous night. We

are unable to digest that at no point of time there was an opportunity to the petitioners to run the said machine continuously for a duration of one hour or more. In this backdrop, it is a fit case for drawing adverse inference against the petitioners for failure on their part for testing the consignment and to take advantage of specific order granted by this Court dated 2nd September 1988.

44. It is no doubt true that it was also obligatory on the part of the respondents to get the testing of the consignment under the supervision of the Court appointed officer, but failure on their part cannot go to the benefit of the petitioners and no advantage of this lapse on the part of the respondents can be given to the petitioners. The petitioners must stand on their own legs. At the most, this circumstance can be used to deny the interest on the arrears of duty and the petitioners can be saved from liability of penalty, but the petitioners cannot be absolved of the duty liability which they were liable to pay to the Customs Authorities when the import in question was made. We are however of the view that failure and inaction on the part of the respondents would disentitle them to claim penalty and interest. In view of the failure on the part of the petitioners to establish that the import of the machine in question was permissible under OGL and the said machine was entitled to exemption as claimed by the petitioners, we have no option but to dismiss this petition.

45. In this view of the matter, we hold that the petitioners have failed to establish that, refusal on the part of the Customs Authorities to allow the import of the printing machine in question made under OGL under Appendix-I, Part-B, Serial No. 11(17) of the Import Policy was not justified. The petitioners are directed to pay customs duty in accordance with law, treating the machine imported by them falling under the heading 84.43 of the Customs Tariff Act, 1975 without any right to claim exemption as claimed in this petition. The respondents are directed to determine the duty liability under the directions of this Court after giving reasonable opportunity of being heard to the petitioners only for quantification of the amount of duty liability. This opportunity given to the petitioners should be treated as an opportunity given under this order bereft of any other provision of the Act. It is made clear that the respondents shall not be entitled to levy penalty and claim interest while quantifying the arrears of duty liability. The respondents shall quantify the arrears of duty liability as directed herein within eight weeks from the receipt of this writ of this order and shall serve the calculations thereof on the petitioners. The petitioners shall pay the same within eight weeks from the date of demand, failing which, the arrears of duty liability shall carry interest at the rate of 18% per annum from the date of interim order passed in this petition till the date of payment and shall be recoverable in accordance with law.

In the result, petition is dismissed. Rule is discharged with no order as to costs.

Issuance of certified copy is expedited.