

(1977) 09 CAL CK 0007
In the Calcutta High Court
Case No : A.O.D. No. 296 of 1972

East Jamuria Co. (P) Ltd.

APPELLANT

Vs

Collector of Customs and Another

RESPONDENT

Date of Decision : 27-09-1977

Acts Referred:

Constitution of India, 1950 — Article 226(1), 226(1)
Customs Act, 1962 — Section 11, 112, 130, 130(1), 152
Evidence Act, 1872 — Section 101, 102, 106
Imports and Exports (Control) Act, 1947 — Section 1, 3, 3(1), 3(2), 4A

Citation : 82 CWN 156

Hon'ble Judges : Mitra, C.J;S.K. Dutta, J

Bench : Division Bench

Advocate : Somnath Chatterjee, Subas Chandra Sen and Tapan Mitra, for the Appellant; G.P. Kar, Asoke Kumar Banerjee and N. Lahiri, for the Respondent

Final Decision : Dismissed

Judgement

Salil Kumar Dutta, J.—This is an appeal against the judgment and order of Sabyasachi Mukharji, J. dated September 1, 1977 dismissing the application filed by the appellant under Article 226 (1) of the Constitution on contest. The appellant carries on business or execution of contracts involving construction and site preparation including earth moving operations. For the purpose, of his business, the appellant, according to his case requires various type of machinery and equipment including inter alia drills, pumps, bulldozers, tractors, trucks, jeeps and other vehicles. The appellant has a branch office at Nanpara in United Provinces.

2. The appellant was granted an import licence on August 31, 1964 to import construction equipment as per two lists. The first list comprised of (1) Crawler Tractor with bulgrader and necessary accessories and spare parts. (11) Ball bearings for motor other than banned/restricted items. The second list consisted of Pionjer petrol driving rock drills and pavement breaker etc., the total c. i. f. value in all allowed to be imported was Rs. 2 lacs.

3. The appellant imported Crawler tractor which was duly cleared for home consumption through licence. Thereafter the appellant imported ball bearings, pistons and piston rings as par particular below :

PARTICULARS.

Name of Ship.

Goods.

Quantity.

Dt. of arrival.

1. S. S. Maidan

Ball Bearings.

6 cases.

2. S. S. Magdala

-do-

12 cases.

Already cleared.

3. S. S. Mansar

-do-

4 cases.

4. S. S. Indian Strength

-do-

3 cases.

5. S. S. Jalazad

-do-

8 cases.

Already cleared.

6. S. S. Indian Strength

-do-

6 cases.

March, 1966.

7. S. S. Maskeliya

Piston & Piston rings.

8 cases.

August, 1965

8. S. S. Mangala

-do-

1 case.

February, 1965

9. S. S. Vishvaprabha

-do-

2 cases.

February, 1966

4. The goods under serials 1 to 5 were duly entered for home consumption and the proper customs officer, on being satisfied that the import in respect thereof was permitted under the said import licence, permitted clearance of the goods for home consumption on payment of the import duty. The orders at Nanpara and various article include dates of 20th, 23rd and 25th November 1965. The goods of serials 6 to 9 were yet to be cleared for which show cause notices referred hereafter were issued.

5. On or about 30th and 31st July, 1966 a search was conducted by the authorities at the appellant's premises at Nanpara and various articles including more than 8000 ball bearings of various specifications were seized. Thereafter the appellant was served with four show cause notices by the Collector of Customs, Calcutta in respect of above imports alleging that the pistons, piston rings and ball bearings had been imported in contravention of the provisions of Section 3(1) and 3(2) of the Imports and Exports (Control) Act, 1947 (hereinafter referred to as I & E (C) Act) read with Government of India, Ministry of Commerce and Industry Order 17/55. The appellant was required to produce valid import licence for such goods or alternatively to show cause why the said goods (including ball bearings already cleared for home consumption) should not be confiscated and why penal action should not be taken against the appellant. Two earlier show cause notices were partially modified by addendum dated January 25, 1967 calling upon the appellant to show cause why the order releasing the ball bearings by the Customs Officer should not be reviewed by the Collector of Customs u/s 130 of the Customs Act, 1962 and why penal action should not be taken u/s 112. The appellant showed cause to the same followed by prolonged correspondence and the proceedings under all those notices came up for hearing before the Collector of Customs, Mr. M. G. Abrol on September 1, 1967. One N. I. Ramanathan, stated to the Principal Appraiser of the Government with considerable experience was present at the hearing. It is

alleged that in course of proceeding Ramanathan made statements of fact recorded as expert evidence interspersed with his arguments. The appellant's counsel was asked to cross-examine him at once on his statement of facts which was done under protest and compulsion but no portion of his statement in the cross-examination was recorded. All these were done in gross violation of the principles of natural justice. On the Collector's insistence again, the appellant was compelled to adduce his own evidence though the burden of proof was on the Customs authority in the quasi-criminal proceedings before him.

6. There was further hearing on September 29, 1967 when the appellant's witness his engineer C. M. Agarwal, who gave evidence, disclosed that ball bearings had been ordered upon on basis of lists prepared by the appellant. On requisition, it was said that the original list was untraced and its solicitor forwarded a statement containing a reconstructed list. Thereafter the Collector passed the following four orders in respect of the said notices, one order each for serials 1, 2 and 6, and the fourth order in respect of serials 3, 4, 5 together, confiscating the goods with option to pay compensation in lieu of confiscation as also personal penalty indicated in the statement set out below :--

Notice.

Goods.

C.I.F. Value

Order No.

Penalty in lieu confiscation.

Personal Penalty.

1. S 45/248/66A with addendum for review.

4797 Pcs. Ball bearings.

45555.33

4 dt. 9.10 67, in revision

Rs. 46000|-

46000|-

2. S 45/249/66A with addendum for review.

3247 Pcs. Ball bearings,

10688.57

5 dt. 9.10 67, in revision

20000/-

20000/-

3. S 45/302/66A

750 Pcs. Piston rings 60 sets.

26249.67

153 dt. 24.10.76 67, in revision

26000/-

26000/-

4. S 45/304/66A

156 set Piston rings.

14820.00

-do-

7500/-

7500/-

5. S 45/305/66A

145 set Piston rings.

13775.00

-do-

7000/-

7000!/-

6. S 45/303/66A

FAG bearings 190

11032.91

154 dt. 24.10.67.

11000/-

11000/-

7. The appellant failed and neglected to pay the amount of personal penalty, and notices were issued by the Customs Authorities on the appellant in January/ February 1968 informing that the goods in their control would be sold without prejudice to other modes of recovery of the dues. On receipt of this notice, the appellant, on service of demand of notice, moved this Court on April 23, 1968 under Article 226(1) of the Constitution praying for the issue of a writ in the nature of certiorari quashing the aforesaid show cause notices as also the orders thereon, praying further for the issue of a writ in the nature of prohibition and/or

mandamus forbearing them from proceeding with the demands. This application giving rise to Matter No. 281 of 1968 was heard as a contested application on affidavits and was dismissed on September 1, 1972. The appeal is against this decision.

8. Before we proceed to consider the respective contentions of the parties, it will be necessary to consider the factual position in the context of the existing law. The Import Trade Control was first introduced in May 1940 as a war-time measure under Rule 84 of the Defence of India Rules primarily for conserving India's foreign exchange resources. The control was originally limited to certain commodities but was expanded to ensure economic stability of the country. With the cessation of hostilities the Defence of India Rules lapsed in September 1946 but the import and export control was kept alive by Emergency Provisions (Continuance) Ordinance, 1946 for a period of one year and was replaced by the Imports and Exports (Control) Act, 1947 to continue for a limited period with powers to prohibit, restrict and otherwise control imports and exports. By statutes enacted from time to time the life of the Act was extended lastly to March 31, 1971. By an amendment Act (Act 7 of 1971), the words in respect of the Act "to continue for a limited period powers" in the long title and preamble as also the words "and shall remain in force until the 31st day of March, 1947" in Section 1 of the principal Act were omitted. So that the Act is now a permanent statute of the country.

9. Section 3 Sub-section (1) provides that Government may by order make provision for prohibiting, restricting or otherwise controlling import, export or carriage of goods of any specified description. Sub-section (2) of Section 3 provides :--

(2) All goods to which any order under Sub-section (1) applies shall be deemed to be goods of which the import or export has been prohibited u/s 11 of the Customs Act, 1962 and all the provisions of that Act shall have effect accordingly.

10. The Central Government by Order No. 17/55 in exercise of the powers conferred by sections 3 and 4A (which provides for fees for applications for, and issue or renewal of, licences) provided under Rule 3 prohibiting import of any goods of the description specified in Schedule 1 except under and in accordance with licence granted by the General Government. Items 19 and 293, 295 and 297 of part II of, the schedule of the said order as amended respectively cover the ball bearings, pistons and pistons rings which thus cannot be imported without import licence granted under the aforesaid order. There is in fact no dispute over this position. It is also obvious that if any goods are imported in violation of the provisions of Section 3 of Imports and Exports (Control) Act, 1947, they would be deemed to be imported in violation of Section 11 of the Customs Act, 1962 and all the provisions of the Customs Act would be applicable as held by us in Collector of Customs and Central Excise, West Bengal and Others Vs. Hindustan Motors Ltd. and Another, .

11. Mr. Suhas C. Sen, learned counsel for the appellant, firstly contended that the burden of proof to establish violation of the provisions of I & E (C) Act lies on the customs authority which must be discharged by positive evidence. Such burden cannot be deemed to be discharged on the ground of inadequate explanation by the alleged delinquent. In support he relied on the decision in *Ambalal vs. Union of India* AIR 1961 S.C. 264 in which the Court observed that the provisions of the Sea Customs Act and the Land Customs Act are penal in character and accordingly :--

To such a situation, though the provisions of the Code of Criminal Procedure or the Evidence Act may not apply except in so far as they are statutorily made applicable, the fundamental principles of criminal jurisprudence and natural justice must necessarily apply. If so, the burden of proof is on the custom authorities and they have to bring home the guilt to the person alleged to have committed a particular offence under the said Acts by adducing satisfactory evidence.

It was further held in that case that where the accused contended that the goods were imported from Pakistan before the customs barrier was established the onus is on the customs authorities to prove that they were imported after the barrier was put up.

The Privy Council in AIR 1949 278 (Privy Council) observed.

What is called the burden of proof on the pleadings should not be confused with the burden of adducing evidence which is described as "Shifting". The burden of proof on the pleadings never shifts, it always remains constant (See *Pickup vs. Thomas Insurance Co.* (1878) 3 Q.B.D. 594....)

Referring to sections 101 and 102 of the Evidence Act, it was further observed:--

This section shows that the initial burden of proving a prima facie case in his favour is cast on the plaintiff; when he gives such evidence as will support a prima facie case, the onus shifts on the defendant to adduce rebutting evidence to meet the case made out by the plaintiff. As the case continues to develop, the onus may shift back again to the plaintiff. It is not easy to decide at what particular stage in the course of the evidence the onus shifts from one side to the other. When after the entire evidence is adduced, the tribunal feels it cannot make up its mind as to which of the versions is true, it will hold that the party on whom the burden lies has not discharged the burden; but if it has on the evidence no difficulty in arriving at a definite conclusion then the burden of proof on the pleading recedes on the background.

12. Mr. G. P. Kar and later on Mr. Asoke K. Banerjee, learned counsel appearing for the respondents, the customs authorities, contended that the burden of proof was duly discharged by the Customs authorities. The importation of the seized goods as also goods uncleared were prima facie cases of illegal importation, when such commodities could not be imported without a valid import licence

covering the said goods. In this state of affairs, it was incumbent on the appellant to establish that the import of commodities made by them were covered by a valid licence. Reliance was placed on the decision in Collector of Customs, Madras and Others Vs. D. Bhoomall, in which the Court following other decisions laid down the law relating the burden of proof and onus on the parties in respect of alleged illegal importation, while at the same time referring that Ambalal's case stands on its own facts. The Court observed :--

It cannot be disputed that in proceedings for imposing penalties under clause (8) of section 167 (of the Sea Customs Act, 1878 for confiscation of goods)the burden of proving that the goods are smuggled goods is on the Department. This is a fundamental rule relating to proof in all criminal and quasi-criminal proceedings, where there is no statutory provision to the contrary.

The Court then referred to the other kindred principle, no less fundamental, of universal application observing that:

One of them is that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable degree.

.....All that it requires is that establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus legal proof is not necessarily perfect proof. Often it is nothing more than prudent man's estimate as to the probabilities of the case.

.....Smuggling is clandestine conveying of goods to avoid legal duties, Secrecy and stealth being its covering guard's. It is impossible for the Preventive Department to unravel every link of the process. Many facts relating to this illicit business remain in the special or peculiar knowledge of the person concerned in it. On the principle underlying section 106, Evidence Act, the burden to establish those facts is cast on the person concerned, and if he fails to establish or explain those facts, an adverse inference of facts may arise against him, which coupled with presumptive evidence adduced by the prosecution or the Department would rebut the initial presumption of innocence in favour of that person and in the result prove him guilty.....However this does not mean that the special or peculiar knowledge of the person proceeded against will relieve the prosecution or the Department altogether of the burden of producing some evidence, in respect of that fact in issue. It will only alleviate that burden to discharge which very slight evidence may suffice.

13. In this case before us there were importations of ball bearings for motor vehicles (notices S 45/248 and 249) and pistons complete and piston rings for motor vehicles (notices S 45/302, 304 and 305) and also ball bearings for motor vehicles and industrial ball bearings (notice S 45/303). In the show cause notices, in respect of ball bearings, it was stated that the import licence granted to the appellant was valid for ball bearings neither banned nor restricted, adapted for use on motors while the ball bearings imported according to manufacturer's catalogues were adapted for mounting in motor vehicles or were

industrial bearings. As to piston and pistons rings specific licence for import of subject goods under Sl. No. 293, 295 and 297 of Part IV of I. T. C. schedule was necessary. Accordingly the show cause notices indicated that the importations which were of the type indicated above were not covered by the licence granted to the appellant and the appellant was asked to produce import licences covering the said commodities.

14. On the principles laid down in the authorities cited above, it is obvious that the burden of proof supporting a Prima facie case on the face of such admitted importations being without licence was duly discharged by the Customs authority. In fact the appellant was fully aware of the position disclosed in the show cause notices and their contention was that they were fully covered by the import licence, but, as the records indicate, the matters being within his special knowledge, he failed to establish that the Importations were covered by the import licence and thus to discharge their onus which shifted on him in spite of ample opportunity afforded for the purpose. We accordingly hold that the initial burden of proof; for the prima facie case against the appellant was duly discharged by the Customs authorities.

15. Mr. Sen next submitted that the show cause notices and the impugned orders were at variance, inasmuch as the offences alleged in the show cause notice had not been sustained in the orders passed which thus vitiated the entire proceeding. The show cause notices called upon to the appellant to produce satisfactory evidence to prove that the ball bearings in question were adapted for use on motor as provided in the licence or to produce valid import licence for the importations. In respect of piston and piston rings for motor vehicles as imported, the show cause notice stated that the importations were not covered by the import licence and accordingly the appellants were asked to produce valid import licence for import of the subject goods.

16. In respect of the ball bearings; the relevant orders are order Nos. 4 and 5 both dated October 9, 1967 as also order No. 154 dated October 24, 1967. The two earlier orders were passed in revision of the order of the officer of customs clearing the goods, by the Collector u/s 130 of the Customs Act, 1962. It was contended that as the officer of customs cleared the subject consignment by a mark, there was no scope to examine the record of any proceeding for revision by the Collector as a delegated authority for the Board in terms of order of the Central Government u/s 152 (over which there is no dispute) while exercising functions u/s 130 (1). It may be that there was no other record except the respective bills of entry on which, it is said, the mark of clearance was put. The bill of entry and mark of clearance thereon constituted in such cases the record of proceeding before the officer of customs.

17. In respect of the impugned order passed on evidence adduced in personal hearing, it appears that the Collector came to the finding that the appellants failed to establish that the ball bearings imported in the subject consignments were adapted for use in motors used in the construction equipments by the

importers. It was observed that the appellant's contention that the licence covered all types of ball bearings including those for motor vehicles was not acceptable as the word "motor", it was held, meant electric motor and not a motor vehicle. The question of provision for, spare parts and accessories did not arise, even in the context of huge and disproportionate imports, as the appellant failed to prove that the ball bearings imported were for use on motors in the crawler tractor or in the machines used by them.

18. The Collector called upon the appellant to produce satisfactory evidence to prove the ball bearings in question were adapted for use on motor in their machines. It was said that a list of such bearings was prepared by the appellant's engineers at the time of placing the order for import and the appellant was directed to produce such list. After completion of hearing a list was furnished by the appellant's solicitor. The Collector found that the list was incomplete in many respects, no catalogue or particulars there of was produced as would show that the ball bearings imported in the subject consignments were adapted for use on motors used in the construction equipments by the importers. Since the appellant's case was not proved nor it was the appellant's case that there were valid licences for such importations, the impugned orders of confiscation and personal penalty were passed. We accordingly do not find any variance between the allegations of offences in the show cause notices and in the orders passed in the said proceedings on the case made out by the appellant.

19. As to piston and piston rings, the Collector noted that the licence permitted the appellant to import necessary accessories and spare parts for the Crawler tractor imported by them. The appellant in spite of opportunities given failed to produce any evidence, which was within their special knowledge, that the pistons and piston rings were for the tractor imported by them. The Collector found that the tractor is powered by a Caterpillar engine having the bore size 4.5 whereas the parking engine of which the imported pistons and rings were components had a bore of 3.5. The Collector accordingly came to the conclusion that the imported pistons and piston rings in the three consignments were obviously unsuitable to be used as accessories of the tractor in question apart from the fact that the manufacturers of the tractors themselves did not use parking engine. In this case also we do not find any variation between the allegations in the notice and the impugned orders passed by the Collector.

20. Mr. Sen further contended that the licence was for import of ball bearings for motor which included ball bearings for use in the machines the appellant had. This contention rightly rejected by the Collector as also by the learned Judge as the licence was an actual user's licence for ball bearings for motor of a submersible pump forming auxiliary unit of Crawler tractor even though it was not clearly mentioned. The licence was for ball bearings on motors for the machines and did not cover ball bearings used in other parts of the machines or motor vehicles. No evidence as already indicated, was adduced to establish that the ball bearings were meant for use on the motors of the machines. We

accordingly do not find any substance in this contention raised on behalf of the appellant.

21. The last contention raised on behalf of the appellant relates to the observance of the principles of natural justice in the proceedings before the Collector of Customs. Mr. Chatterjee submitted that the administrative authorities deciding cases involving rights of parties and penal consequences are enjoined by accepted norms of fundamental justice and fair play to follow the principles of natural justice. It has been said that the authorities under the Customs Act conduct themselves in most arbitrary and high handed manner, ignoring the basic principles of natural justice to the grave prejudice of parties. The evidence given by witnesses in examination and cross-examination in such proceeding is not always recorded or if recorded, it is not done correctly, entirely depending on the discretion or caprice of such authorities. In this case also, evidence of witnesses had not been recorded at all and had only been stated in the impugned orders when dealing with any particular point. There is no recording of cross-examination of Ramanathan, the witness on behalf of the Customs, which would otherwise establish the invalidity of the charges against the appellant, while his ipse dixit was accepted as evidence. Mr. Chatterjee desired the court to condemn such practice and to direct the authorities to act in proceedings before them in accordance with the fundamental concepts of justice and fairplay. It was further submitted that in the instant case, there has been gross violation of the principles of natural justice, as the Collector relied on evidence given by Ramanathan without recording his evidence in particular the cross-examination.

22. Administrative Tribunals or officers of statutory powers are features of present day administration and they have to decide rights of parties within spheres limited by law. The determination of such rights involves at times penal consequence in addition and such cases accordingly should be heard and decided in judicial spirit in accordance with the fundamental concepts of justice. In such proceeding though the Evidence Act is not applicable by its own force except as otherwise provided the principles as to burden of proof and onus as also of the procedure for examination of witnesses, though not always on oath, are inevitably followed as the basis for judicial determination. Such procedure ensures observance of the principles of natural justice though they are not inflexible rules of universal application. It may not always be necessary to record evidence in the context of particular issues before the Tribunal or authority, but when serious question of rights of parties are involved and the determination may involve penal consequences like confiscation of goods and personal penalty, it is necessary that the Tribunal or authority in such cases discharge its functions in proper judicial manner and spirit. In such proceedings where decision is dependent on existence of facts to be established by evidence and the order passed is subject to further scrutiny departmentally, and also by the Court on proper grounds, it is only fit and proper that the Tribunal or authority should record the evidence produced through witnesses by parties in examination as also in cross-examination. This will ensure substantial justice while affording the

basis for the decisions of the Tribunal or the authority through speaking orders which are subject to further scrutiny. No evidence has been recorded in this case but in the circumstances of the case, that has not caused any miscarriage of justice in violation of the principles of natural justice. The question before us was one of scope and extent of the licence for importation and the other question was whether the importations were covered by the licence. The scope and extent of the licence was determined on its terms by the Collector as not covering the importations with which the learned Judge as also this Court is in agreement. The other question was whether the appellant had been able to establish by evidence that the subjects of importations were covered by any other licence which even was not the appellant's case and accordingly he did not adduce any relevant evidence to support such case, as a result where of orders adverse to him were passed which have been challenged in this proceeding. In the facts and circumstances of the case, we feel that there has been no violation of the principles of natural justice.

As all contentions raised by the appellant fail, this appeal is dismissed, without any order for costs in the circumstances.

Sankar Prasad Mitra, Chief Justice

I agree.