

(1997) 09 MAD CK 0058

In the Madras High Court

Case No : Reference Case No. 1 of 1991

Haniff Shabbir Brothers

APPELLANT

Vs

Collector of Customs, Madras

RESPONDENT

Date of Decision : 12-09-1997

Acts Referred:

Customs Act, 1962 — Section 111, 112, 130, 131, 131B

Citation : (1997) 96 ELT 27

Hon'ble Judges : Raju, J;M.S. Liberhan, J

Bench : Division Bench

Advocate : Shri Habibullah Badsha, for E.S. Govindan, for the Appellant; Shri S.R. Sundaram, Additional Central Government Standing Counsel, for the Respondent

Judgement

D. Raju, J.—The above reference arises out of the order of the Customs, Excise and Gold (Control) Appellate Tribunal, South Regional

Bench at Madras, in C(T) Appeal No. 199 of 1981 (MAS), dated 24-12-1985 and came to be made to this Court under the orders of this Court

in R.C.P. No. 15 of 1986 directing the Tribunal u/s 130(3) of the Customs Act, 1962, hereinafter referred to as "the Act", to state the following

questions of law, for the decision of this Court :-

(1) Whether the Tribunal was correct in setting aside the order after holding that an imposition of penalty in Section 112 could not be legal when

there was no finding in regard to the liability of the goods to confiscation; and

(2) Whether the Tribunal was correct in setting aside the order of the Central Board of Excise and Customs without considering the order of the

finding of the Board that there were no materials suggesting involvement of the applicants in arranging importation of the goods knowing the

shipment to be after the expiry of the validity of the licence.

2. The petitioner had brought 658 drums of R.B.D. Palmolein by the vessel ""M.V. LADY KRISHTINA"" which arrived at the Port of Madras and

sought clearance against a licence issued by the Chief Controller of Imports and Exports valid for importation of goods shipped on or before 27-3-

1979 and the goods were also had been initially allowed clearance free of duty, against a bond with a Bank Guarantee in terms of the order of the

Delhi High Court, and the goods were actually released on payment of 12 1/2% duty and execution of Bank Guarantee for Rs. 16 lakhs towards

the value of the goods and potential penalty, if the ultimate finding on the conclusion of the enquiry was against the petitioner. The Bill of Lading

produced was dated 26-3-1979. Subsequently, it came to be known the very vessel noticed above was itself berthed at Singapore only on 10-4-

1979 and consequently, on the view that the goods in question could not have been loaded on 26-3-1979 and that the Bill of Lading was really

manipulated to suit the validity of the licence period, which expired on 28-3-1979 and, therefore, the goods could not have been shipped during

the currency and validity period of the licence, the Collector of Customs issued a show cause notice dated 3-1-1980 to the petitioner alleging

contravention of Clause 3 of the Import (Control) Order, 1955 and with Section 3 of the Imports and Exports (Control) Act, 1947, and calling

upon the petitioner to show cause as to why the goods should not be confiscated u/s 111(d) of the Act and also as to why a penalty should not be

imposed on them u/s 112 of the Act. The petitioner submitted a reply dated 25-1-1980 reiterating their earlier reply dated 8-10-1979 to the

department's letter dated 6-10-1979 with supporting materials and records to substantiate their stand and that no action can be taken against them

in the absence of authentic information and evidence, merely acting on presumptions, assumptions and surmises. Reliance was also placed upon

Section 3 of the Bill of Lading Act and they denied the accusation that the Bill of Lading was a manipulated document. The Collector, by his

proceedings dated 29-9-1980, while confirming the stand taken in the show cause notice that the shipment could not have been on 26-3-1979,

held that it is the importers who stood to benefit rather than the shippers by the Bill of Lading and consequently, ordered ""Having due regard to all

the facts and circumstances of the case, I impose on the importers a penalty of Rs. 3,50,000/- (Rupees Three Lakhs Fifty Thousand only) u/s 112

of the Customs Act, 1962. The penalty should be paid forthwith"". It may be noticed even at this stage that the proposal to confiscate the goods u/s

111(d) was virtually abandoned and given up.

3. On further appeal by the petitioner before the Central Board of Excise and Customs, by an Order No. 153A of 1981, dated 19-3-1981, the

Board set aside the order of the Collector and allowed the appeal. In paragraph 4 of the order of the Board, on a comparative assessment and an

analysis of the materials produced by the petitioner and those available with the department, it was held that there was no case for any strict

interpretation of rules and regulations, that the conclusions of the Collector on the materials relied upon was nothing but in the nature of surmises

and the petitioner is entitled to the benefit of doubt and consequently, there was no jurisdiction for the imposition of penalty upon the petitioner. It

was also held that the Collector's Order also does not speak of any materials suggesting involvement of the petitioner in arranging importation of

the goods knowing that the shipment was made after the expiry of the Import Licence and that in the absence of any order of confiscation of the

goods as such, there cannot be any imposition of merely penalty u/s 112 of the Act. The appeal was allowed.

4. Thereafter, the Government of India seems to have invoked their power of Revision u/s 131(3) (prior to its amendment) and after the

constitution of the Tribunal, transferred the same u/s 131B of the Act to the Tribunal for being dealt with as an appeal. The Tribunal, by its Order in

C(T) Appeal No. 199 of 1981 (MAS), dated 24-12-1985, noticed the fact that a finding as such is lacking in the order of the Collector that the

goods are liable to confiscation and the plea of the petitioner that there is no finding in regard to liability of the goods to confiscation and hence the

order of imposition of penalty u/s 112 would not be legal is a valid one. In spite of such a conclusion arrived at by the Tribunal itself, it proceeded

to state that the failure to mention in the order of Collector that the goods are liable to confiscation is ""an understandable omission"", and, therefore,

the order of the Board and of the Collector are set aside without prejudice to the right of the adjudicating authority to pass appropriate orders on

the case, if so advised. Aggrieved, the petitioner filed an application for reference, certain question of law, to this Court for its decision but the

Tribunal by its order dated 13-5-1986 rejected the claim for reference. Hence, R.C.P. No. 15 of 1986 came to be filed and this Court directed

the Tribunal to make a reference of the two questions of law, as noticed above and consequently, the Tribunal made the above reference to this

Court.

5. Mr. Habibullah Badsha, learned Senior Counsel appearing for the petitioner, while reiterating the two questions of law referred to, contended

that the order of the Tribunal mechanically setting aside the orders of the Board as also that of the Collector, without specifically dealing with or

setting aside the findings of fact recorded by the Board and ignoring the vital absence of the finding guilt warranting confiscation of the goods, in

spite of specific proposal in the show cause notice is contrary to law, all the more so when the position in law that in the absence of an order of

confiscation there was no scope for levying penalty u/s 112, was also approved and sustained by the Tribunal. Per contra, Mr. S. R. Sundaram,

learned Additional Central Government Standing Counsel, while adopting the reasoning of the Tribunal, contended that the host of materials

available would lead to the conclusion that the goods are liable for confiscation and the adjudicating authority was rightly directed to deal with the

matter relating to confiscation, afresh. Both the learned Counsel invited our attention to the relevant provisions of the Act and also the orders

passed by the various authorities to support their respective stand.

6. We have carefully considered the submissions of the learned Counsel appearing on either side and we are of the view that the grievance of the

petitioner cannot be considered to be of no substance. The facts noticed supra would go to show that though the Adjudicating Authority proposed

to pass an order of confiscation also, the same has not been pursued but only a penalty has been imposed. The Board which alone could have, as

the provisions of the Act then stood, also exercised its suo motu powers to deal with the order of the adjudicating authority has not chosen to do

so and merely dealt with the appeal filed by the petitioner, and allowed the same, thereby setting aside the penalty imposed. The Government of

India which has suo motu revisional powers as the provisions then stood could

have dealt with only the order of the Board and not directly dealt with the order of the adjudicating authority or that part of the order of the adjudicating authority which was not the subject matter of the Appeal before the Appellate Authority (in this case the Board) and, therefore, the Tribunal could not have chosen to set aside that part of the order of the Collector of Customs which was not the subject matter of the appeal before the Board and direct the Collector to proceed in the matter afresh, in that respect. The Tribunal also did not specifically record any finding objectively as to how and in what respect the order of the Board or the order of the Collector in this case stood vitiated, and instead it merely chose to give a fresh opportunity to the original authority to do something afresh which that authority earlier failed to do so, in our view consciously - we say consciously because though the show cause notice proposed such confiscation also in addition to levy of penalty no such order of confiscation was made at all and only penalty simpliciter was imposed. Even if it is a lapse or miss on the part of the Adjudicating Authority, the question of confiscation, as the provisions of the Act then stood, had gone beyond the reach and consequently, the Tribunal could not attempt to set the clock back, at any rate, on the peculiar facts and circumstances of the case. In our view, no exception could be taken to the order of the Board and as a matter of fact, the Tribunal also did not record any finding that the order of the Board suffered any infirmity warranting the interference of the Tribunal, in the matter. Consequently, once the Tribunal also came to the conclusion that the stand taken by the Petitioner before the Board and which had the approval or acceptance of the Board, as the Appellate Authority, is a valid one, there was nothing left for the Tribunal to set aside the orders of the Board or the Collector. All the more so, when the Tribunal, as noticed earlier, has not arrived at any conclusion to disturb the finding of the Board that there were no materials suggesting involvement of the petitioner for importing the goods, knowing the shipment to be after the expiry of the validity of licence.

7. For all the reasons stated above, we answer the two questions referred to for our decision, in the negative and against the department but in favour of the petitioner. No costs.