

(1992) 03 CAL CK 0003
In the Calcutta High Court
Case No : Matter No. 3041 of 1990

H.C.L. Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 06-03-1992

Acts Referred:

Customs Act, 1962 — Section 111, 112

Citation : (1993) 1 CALLT 1 : (1992) 40 ECC 257 : (1992) 59 ELT 507

Hon'ble Judges : Ajoy Nath Ray, J

Bench : Single Bench

Advocate : Laxmi Narayan, Madhav Rao and Nuline Ray, for the Appellant; P.K. Dutta, for the Respondent

Final Decision : Allowed

Judgement

Ajoy Nath Ray, J.—This is a case where the facts ultimately resolve to be simple and undisputed, though the money value involved in the subject matter of the litigation is quite large.

2. The matter arises in this way-the petitioners, that is, Hindustan Copiers Ltd., who call themselves H.C.L. Ltd., produce and sell copying machines. These are at present quite in demand in the market. For the purpose of their business the petitioners brought in consignments relating to 1,400 copier machines of which 1,000 were of the model known as BD-3110 and 400 were of the model BD-5100.

3. These machines were not brought into India as complete machines. They came into the country in a semi-knocked down condition called technically S.K.D. condition. The consignments were received in different ports and different airports. The dates were also naturally different in this regard.

4. The petitioner has agreed and conceded before this Court, as it has agreed and conceded before the adjudicating authority, that excepting for the photo-copier drum these separate consignments could be assembled into the complete photo-copying machines of the above description, (of course, without the drums).

5. It is agreed also by the petitioners that the value of the drums in relation to the machines would not exceed roughly 10 per cent of the total machine cost. As such, in my opinion, it has to be assumed for the legal purpose of disposal of the instant application that substantially all the parts of the photo-copier machine were imported by the petitioner in a knocked down or disassembled condition.

6. The further admitted position is that the petitioners possess licences on the phased manufacturing programme, known as the PMP basis, by virtue of which they are entitled to import component parts to the extent of roughly 20 per cent of the value of the machines. It is also not in dispute that at the time of importation it was permissible for the petitioners to buy within the country import licence of other individuals and parties if necessary, at a premium, which could be utilised by the petitioner for further importation of parts of the photo-copiers in the SKD condition.

7. The next point where parties are ad idem is that the petitioners at no point of time had licences for importation of the whole copying machines as such.

7A. In this matter an interim order was passed on the 6.9.90 by Justice K. M. Yusuf and his Lordship's order was in the following terms :

"Upon the petitioner paying in cash or bank draft of a sum of 1,24,19,258/- (Rupees one crore twenty four lakhs nineteen thousand two hundred and fifty eight) only being the admitted amount of duty and furnishing a bank guarantee on any nationalised bank in favour of the Collector of Customs, Calcutta, to the tune of Rs. 2,50,00,000/- (Rupees Two Crore fifty lakhs) splitted into six bank guarantee for each consignment @ 200% of the provisionally assessed duty and also furnishing a P.D. Bond for Rs. 34,00,000/- (Rupees Thirty four lakhs) being the balance amount of disputed duty the goods shall be released within a week there from. There shall be an injunction restraining the petitioner company and its servants, agents and assigns from in any way or manner alienating selling or encumbering the petitioner company's immovable properties and assets wherever located, except that this will not prevent the petitioner company from mortgaging or hypothecating the said immovable properties and assets for the purpose of furnishing the bank guarantee in terms of this order, if required. Mr. Dipak Deb and Mr. Pranab Kumar Datta are appointed joint Special Officers for the purpose of preparing an inventory of the company's assets including assets situated in Dehradun at the cost, charges and expenses of the petitioner. Initial remuneration of the Special Officers are fixed at Rs. 5,000/- (Rupees five thousand) each to be paid by the petitioner.

This order will however not prevent the authorities from carrying on the investigation and adjudication proceedings in accordance with law. It is also made clear that the petitioner No. 2 and other persons who have been summoned shall co-operate with the authorities in completing the proceedings. However, if the order in the adjudication proceedings is passed, goes against the petitioner they will be at liberty to file a supplementary affidavit bringing the

subsequent fact on record and the said order shall not be given effect to without the leave of the Court though the same should be communicated to the petitioners. The petitioners undertake that the bank guarantee to be furnished will be renewed from time to time upon giving 15 days prior notice to the respondents before such expiry. The goods shall be released upon keeping samples of all items.

Liberty is given to the parties to mention and apply.

All parties including the Special Officers to act on the signed xerox copy of this dictated order on the usual undertaking."

8. Pursuant to the aforesaid order, an order of the Collector of Customs has now been made and published and the same was relied upon in its entirety before me by both the petitioners and the respondents. The date of the order is 9.12.91. It would be better to set out the entirety of the order as part of this judgment, but for the purpose of saving some length, I set out only the portion occurring at the end thereof which also is the most material portion for our purpose.

"Coming now to the allegation in the show-cause notice that 400 Nos. complete BD-5110 machines, and 1000 Nos. BD-3110 machines have been imported in violation of the ITC policy, the fact of such import of full machine (without drums) has not been denied by the importer. The components covered by the twelve invoices comprising the 9 consignments which are subject matter of this adjudication have been examined with reference to the CKD/SKD price lists of Toshiba and the relevant catalogues and the executives and technical personnel of M/s. H.C.L. have themselves identified 60 varieties of components in the consignment which when put together would form one complete BD-5110 machine, and similarly 29 types of components which when assembled would go into making one complete BD-3110 machine, but without drum. Detailed inventory conducted in their presence has confirmed that in this way, out of the components and sub-assemblies comprising the 9 consignments in question, 400 Nos. of BD-5110 photocopying machines, and 1000 Nos. BD-3110 photocopying machines can be assembled, which would be complete in all respect except for the drum, which has not been imported.

In defence, it has been argued on behalf of the importers that in the first place complete photocopying machines have not been imported since the photoconductor drum which imparts the essential characteristic to the machine does not form part of the consignment, and secondly, there is no bar to the import of components which when put together form a complete machine, so long as such components are covered by licences.

As already detailed earlier, M/s. HCL, after entering into the PCA with Toshiba, obtained quotations from the latter in 1988-89 for full machines (without drum) as also for components in SKD and CKD form, of both the models of photo-copiers. Finding the quotations of M/s. Toshiba for the SKD and CKD components to be too high and uneconomical, HCL entered into the so-called tripartite

agreement with Toshiba, and Redington of Singapore and negotiated with Toshiba for supply of the 400 Nos. BD-5110 and 1000 Nos. BD-3110 complete machines to M/s. Redington at the same favourable rates as were offered to HCL directly. As per documentary evidence, and as admitted by HCL, these complete machines were in fact shipped from Japan to Singapore, where M/s. Redington, as per the requirements and under the supervision of M/s. HCL, dismantled the machines into convenient SKD sub-assemblies and components, and shipped them to India to M/s. HCL and M/s. R. Martin. It is seen that even while negotiating the price with M/s. Redington for the SKD components M/s. HCL have retained the emphasis and focus on the machines in their assembled form. Shri T. C. Prabhu, while being questioned regarding the basis on which the components were valued in the respective invoices of Redington and other Singapore parties, has clearly conceded in his statement dated 27.11.1990 that these values cannot be exactly justified with reference to the PMP declared values and the SKD/CKD price lists of Toshiba, since M/s. HCL have not negotiated with M/s. Redington for individual components, but for recovery of total cost plus margin of profit for the full machines by M/s. Redington. Similarly, Shri M. Raghunandan in his statement dated 24.11.1990 has deposed that the values declared in the invoices are based on the full value of the machines plus Redington's costs.

9. M/s. HCL had the option importing the components either in SKD form or in CKD form, directly from M/s. Toshiba of Japan, but since according to their calculations import at the Toshiba quoted prices would be uneconomical, M/s. HCL adopted the expedient of importing the full machines to Singapore, where they would be disassembled into SKD form and shipped on to India.

This procedure adopted by HCL is opposed both in letter and in spirit to the ITC provisions. The ITC policy permits the import of only components of photocopying machines under Appendix 2, 3 etc., and the device adopted by M/s. HCL of arranging for the purchase of complete machines which are broken down into roughly SKD parts before shipment to India is exactly what has been termed as "a complete fraud on the import policy itself" by the Hon'ble Supreme Court in their judgment in the case of M/s. Sharp Business Machines referred to earlier. What M/s. HCL have done in the instant case is to import complete photocopying machines in the guise of components. Photocopying equipment require a specific licence since they fall under Appendix 1, Part-A, Sl. No. 6(17) of the ITC Policy AM 1988-91 and M/s. HCL have not been able to produce any such licence.

As regards the contention of M/s. HCL that they have not imported complete machines in as much as the photoconductor drum which is an essential part of a photocopying machine, and which imports and essential characteristic to the machine, is absent in the consignments, the same is without merit and is a feeble attempt by the importers to extricate themselves. Notwithstanding the certificates of the I.I.T. and CSIR authorities to the effect that the photoconductor is an essential part of a photocopying machine, the fact remains

that these drums are only in the nature of consumables, and the photocopying machine retains its character as such even without the drum. We have it on the authority of no less a person than Shri M. Raghunandan himself, a graduate in Mech. Engineering from I.I.T., Madras, and who is GM (Mfg.) of the Reprographic Division of M/s. HCL in charge of production, design and development vide his statement dated 19.7.90 that "the selenium drum is normally supplied by HCL and Toshiba as a consumable, although the DGDT clarification is that they are components." There is therefore no doubt that the drum is only a consumable, and it cannot be an essential part of a photocopying machine so as to impart to the machine its essential character. A photocopying machine is as complete without a drum as a ball point pen would be without a refill, a table-lamp without a bulb or a typewriter without its carbon ribbon or cartridge.

Therefore, what has been imported in the instant case is complete photocopying machines in the guise of SDK components. This has been a deliberate attempt on the part of M/s. HCL, as is evidenced by the fact that the entire transaction has been shrouded in secrecy, and there is no written contract or other correspondence between the parties indicating the whole operation of import of full machines into Singapore, and their further shipment to India in dismantled form. The clandestine nature of this device is further evidenced by the fact that the disassembled parts have been split up under 12 separate invoices drawn by three separate consignors in Singapore, and have been shipped to India as 9 separate consignments arriving at different times at three different ports/airports in India.

Therefore, the components totally valued at 122,029,800 (CIF) covered, by 11 of the invoices, and which put together constitute 400 Nos. of BD- 5110 photocopying machines and 1000 Nos. of BD-3110 photocopying machines are liable to confiscation u/s 111(d) of the Customs Act 1962.

The importers are, therefore, also liable to penalty u/s 112(a) of the Customs Act.

ORDER

The goods totally valued at 122,029,800 (CDF) equivalent to Rs. 1,37,88,678 (CIF) covered by invoice Nos. 2233/90, 2243/90, 2244/90, 2284/90, 2285/90, 2375/90, 2548/90, 2245/90, 2272/90, 2287/90 and 5013/90 were liable to confiscation u/s 111(d) of the Customs Act, 1962. However, these goods have been released at various times on the strength of ITC Bonds executed by the importers. Accordingly, I order that a sum of Rs. 1,35,00,000/- (Rupees one crore thirty five lakhs only) towards the value of the goods be appropriated to Government in terms of the ITC bonds executed by M/s. HCL in respect of the said consignments.

I also impose a penalty of Rs. 25 lakhs (Rupees twenty five lakhs only) on M/s. Hindustan Computer Limited (Reprographic Divn.) New Delhi, u/s 112(a) of the Customs Act, 1962.

The total invoice value of 130,484,724 (CIF) for the 9 consignments in question is ordered to be accepted as the transaction value for purposes of assessment. It is open to the department to finalise the assessment on this basis by making the appropriate adjustments, if found necessary, in terms of Rule 9(1) (c) of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988.

R. Ramachandra, 6.12.91

Collector of Customs (Judicial)"

10. Reading the order of the Collector of Customs, it appears that the petitioners agreed with M/s. Toshiba of Japan to obtain the parts of the photocopier machines from them. Since they did not have importation licence for the whole machine, they wanted to import the parts in knocked down condition. Such an importation of different parts from Toshiba proved to be an uneconomical proposition because of the mechanical production line of Toshiba. This stand of the petitioners was also taken before the Collector.

11. The petitioners accordingly had the machines purchased from Toshiba and sent over to Singapore for the purpose of knocking down the machines into an SKD condition. This was performed by a company of Singapore called M/s. Redington. After the completion of the process of taking the machines apart these were brought into India under the licences permitting the importation of component parts. The entire process has come out before the Collector and the petitioner has not tried to suppress or misdescribe there or before this Court this method of bringing in the component parts which could be assembled into the whole machine. 12. The point which arises for consideration is whether such a procedure as was adopted by the petitioner is permitted in law. The first thing to note in this regard is that there is nothing in the law of the land to prevent by express words importation by the petitioner of component parts of the photocopier machine, as such components, even if the same could be assembled into whole photocopier machines.

13. One matter must be clarified here. Even though no letter of the law prohibits such importation of knocked down parts which could be assembled into the whole machine, yet the law does prohibit such importation in case of a consignment which, though described as a knocked down component, is not in reality such a knocked down component at all, but is in essence the photocopier machine itself. Indeed, the same would cover the case of misdescription of the consignment as a knocked down component.

14. The letter of the law which prevents importation of such whole machine under the misdescription of an SKD item is Clause 2(a) of the first schedule of the Customs Tariff Act of 1985. The said sub-clause is reproduced below :

"2(a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete

or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or dis-assembled."

When this matter is removed from our consideration, and it need not occupy us for too long, because it was nobody's case that the components under SKD descriptions were themselves substantially whole of the photocopier machine or that those were themselves complete or finished articles, We come back to the original and the single most important question in this case as to whether under the licences of the petitioner it could import substantially 100% of the component parts as components even though it; wished to assemble them into whole machines in India (including their own drum) notwithstanding the petitioner not possessing a licence for importation of the whole machine as such.

I shall, of course, be referring to the relevant Supreme Court cases in this regard, but the general principle and the general reason for my decision must first be stated in simply terms:"

15. As it appears to me, there is no law in India which permits the punishment of or action against a citizen who is not guilty of violation of the letter of a fiscal or taxing statute. There is no law which permits such punishment or action in case of breach of what is sometimes termed as the spirit of the fiscal or taxing statute. Fiscal and taxing statutes expressly make known a Government policy. What is illegal in one year is made legal in another year. These legislations are not legislations of moral values but that these are legislations for enforcing economic policies. Such policies are to be clearly spelt out and parties are to govern the conduct of their business on the basis of the letter of these fiscal or taxing statutes. The liability is direct and statutory. If a person with the best of intention violates import conditions by violating the terms of import licence his goods would be liable to confiscation notwithstanding complete innocence and undeniable bona fides. On the other hand a person who goes into a complicated economic or business manoeuvre for the purpose of saving money or for expanding business, keeping all the time within the four corners of the express words of the fiscal or taxing statute, that person would not be guilty in law ; whatever other description might be appropriate to such a person does not concern us in the Court of law.

16. If what I have ventured to state above is correct, then it would automatically follow that there is no general law in fiscal and taxing matters which prohibits the doing of something indirectly in case the same could not be done directly. What cannot be done directly is prohibited by the letter of the law. What cannot be done indirectly, is prohibited by some matter of discretion or some such other power which is exercised on principles which are not exactly formulated by words and letters. These situations are ordinarily situations arising in matters where the Old Courts of Equity would intervene. Those are a far cry from writ courts when those courts are dealing with customs entries or taxing entries or other law relating to formulation of the economic policy of any particular financial year.

17. The above discussion upon the general aspect of the matter would be enough to exonerate the petitioner from all charges: whatsoever. The Collector in his order has exonerated the petitioner from any charges of undervaluing the components imported or misdescribing the components imported. The only charge which the Collector found substantiated against the petitioner is the charge of importing whole machines even though the petitioner had only import licences for component parts. The whole machines were not imported in fact. Even the Collector has not found that whole machines useable as such ever or at any place crossed the Indian frontiers. It is the admitted case that the petitioner pays excise duty for the manufacturing activity of making the machines complete, workable and marketable; The petitioner never even claimed before the Excise authorities that they were not undertaking any manufacturing activity as they had imported the whole machines. The Excise authorities would, to my mind, be extremely surprised if such an extreme contention of "no manufacturing activity" had been put forward before them.

18. The order of the Collector of Central Excise in the matter of payment of excise duty by the petitioners has been produced in the shape of a copy before me and I direct that the same be kept on the records of these proceedings countersigned by the Court Officer.

19. When the Collector stated that the procedure adopted by HCL is opposed both in letter and in spirit to the Import Trade Control provisions, in my opinion, with respect to the learned Collector, he committed in both these assessments error of law manifest upon the face of the record. The error in law is also of crucial and primary importance. In case the same is an error, it would be a classic situation where the writ court would intervene to correct such an error apparent on the face of the record and also make all necessary subsequent corrections therefor. The possibility of an alternative remedy by way of approaching an Appellate Tribunal would not stand in the way of such a correction.

20. The Court is bound in duty to check excesses of jurisdiction and rectify errors apparent, and refusing to exercise such jurisdiction even in appropriate circumstances on the ground of existence of an alternative remedy would be, in my opinion, a mechanical application of the rule which is not desirable. An alternative remedy is to be directed to be resorted to by the petitioner in case the issue arising is more appropriately to be determined by the statutory appellate forum and cannot be resolved before the writ court itself at the time the petitioner approaches it. On the other hand, if the issue is a pure matter of law and the facts are not in dispute then the same issue would remain open to be challenged in a writ court notwithstanding the decision of another statutory Appellate Tribunal. Under these circumstances compelling the exhaustion of such an alternative remedy would be a futile exercise because one party or the other would be still free to approach the Court for a rectification of the error in law already apparent on the face of the records of the case.

21. Now for the authorities regarding importation of component parts which can be assembled into a whole notwithstanding the whole being un- importable for some particular law operating at the time of import. The first case is the case of *Girdharilal Bansidhar Vs. Union of India (UOI)*, .

22. In that matter, certain nuts and bolts were sought to be imported by the importer and it was held that there was a certain misdescription of the consignments. A certain "Jackson type" goods was completely prohibited from importation at that time. The consignments were found to be component parts of the Jackson type fastener. The five Judge Supreme Court Bench said, *inter alia*, in the 6th paragraph, to this effect, that if a certain item is prohibited from importation then it would be a normal construction that all components of such item were also to be construed as prohibited from such importation. A contrary interpretation would permit the importation of the goods themselves by importation of the components. Thus, in the manner, I ventured to read the case, the letter of the broken. I set out in this regard the portion from the above paragraph 6 which to my mind is the most relevant.

"It appears to us that it does not stand to reason that a component part which has no use other than as a component of an article whose importation is prohibited is not included in a ban or restriction as regards the importation of that article. Expressed in other terms, we cannot accede to the position that it is the intention of the rule that importers are permitted to do indirectly what they are forbidden to do directly, and that it permits the importation separately of components which have no use other than as components of an article whose importation is prohibited, and that an importer is thereby enabled to assemble them here as a complete article though if they were assembled beyond the Customs Frontiers the importation of the assembled article into India is prohibited. Learned counsel, however, relied upon an unreported judgment of the Bombay High Court delivered by Mr. Justice Mudholkar when a Judge of that Court, in Appeal No. 4 of 1959 (Bom.) *D.P. Anand v. T. M. Thakore and Co.* in support of his submission that a, ban on a completed article, having regard to the phraseology employed in the Hand book cannot be read as a restriction or prohibition of the separate importation of the component parts which when assembled result in the article whose import is prohibited. We do not read the judgment in the manner suggested by learned counsel. The learned Judge in the judgment recorded an admission that the articles imported which were components of a motor-bicycle, would not when assembled form a complete cycle which was the article whose importation was restricted because of the lack of certain essential parts which were admittedly not available in India and could not be imported."

23. The case next in point of time is the case of *Union of India (UOI) Vs. Tarachand Gupta and Bros.*, . The case concerns importation of component parts which was permitted under entry 295. In entry 294 the whole goods could also be imported but under separate and different importation documents which the

importer in that case did not possess.

24. It was held in that case that notwithstanding the possibility of creating the whole goods from the imported parts the importer could not be held guilty of violation of any provision of law. The following passage occurs at the beginning of the 13th paragraph of the said judgment:

"The argument apparently looks attractive. But the question is what have the respondents done indirectly what they could not have done directly. In the absence of any restriction in entry 295, namely, that a licence in respect of goods covered by entry 295 would not be valid for import of parts and accessories which, when taken together, would, make them motor cycles and scooters in C.K.D. condition, the respondents could import under their licence all kinds and types of parts and accessories. Therefore, the mere fact, that the goods imported by them were so complete that when put together would make them motorcycles and scooters in C.K.D. condition, would not amount to a breach of the licence or of entry 295."

25. The case of Tarachand Gupta and its import have been summarised in a recent Supreme Court case being that of Dynamatic Hydraulics Ltd. v. Collector of Customs reported in 1991 Judgments Today, Volume 6. page 1 and also alternatively in Volume 37 Excise and Customs case page 10; the summary of the case of Tarachand Gupta occurs in paragraph 5 where, with the said summary, the Learned Judges of the Supreme Court also set out certain submissions made by counsel for the importer without in any other part of the judgment making any adverse comments on such submission of the counsel. The said 5th paragraph is set out below :-

"Sri Salve, learned counsel for the appellant submits that, even if it is assumed that there was some technical violation here or there, this was not a case in which such heavy penalties and fines should have been imposed. He invites our attention to the decision of this Court in Union of India (UOI) Vs. Tarachand Gupta and Bros, . In that case, under entry 294 of the relevant schedule of the Import Trade Policy, the import of motorcycles and scooters was permitted under an appropriate licence but such a licence could not be used for their import in a completely knocked down condition except by approved manufacturers. Under entry 295 parts of motor-cycles and scooters (except for tyres and tubes) could be imported under an appropriate licence. The respondents before the Supreme Court had a licence for imports under entry 295 and they imported all the component parts of scooters and motor-cycles (except tyres and tubes) in two separate consignments in such manner that putting the goods of both consignments together, a scooter or motor-cycle (less tyres and tubes) could be assembled. The goods were confiscated and fines and penalties imposed. This Court, however, held to quote the headnotes :

" (1) The mere fact that the goods imported by the respondents were so complete that when put together would make motor-cycles and scooters in

C.K.D. condition would not amount to a breach of the licence or of entry 295. The restriction not to import motor-cycles and scooters in C.K.D. condition was against an importer holding a licence in respect of the goods covered by entry 294 under which he could import complete and assembled motor-cycles and scooters and not against an importer who had a licence to import parts and accessories under entry 295.

(2) When the Collector examines goods imported under a licence in respect of goods covered by entry 295, what he has to ascertain is whether the goods are parts and accessories and not whether the goods, though parts and accessories, are so comprehensive that if put together would constitute motor-cycles and scooters in C.K.D. condition, because, it would then mean that there is in the entry a limitation against importation of all parts and accessories of motor-cycles and scooters. Such an approach, would be acting contrary to and beyond entry 295, and in non-compliance of the entry and would lead to the anomalous result that even if the importer had sold away one consignment or part of it, the Collector could still say that had the importer desired it was possible for him to assemble all parts and make motor-cycles and scooters in C.K.D. condition.

On the same principle, counsel submits, so long as the present appellant was found only to have imported component parts of a photo-copier for which he had a licence, it cannot be a valid objection that the parts, so imported, could be assembled together to make up 70% or even 100% of a complete photo-copier machine. He submits that the main objection of the Tribunal was that the licence permitted the appellant to import only the "main frame" and, interpreting this expression strictly, they have held that the import of certain component parts fitted on to the frame was not permissible. He pointed out that, after all, the appellant had only imported component parts of the machine and the value of the imports was well within the value of the licence. In the circumstances, he submits that there was really no violation of the terms of the licence. In this connection, he has drawn our attention to a passage from the relevant Import Control Handbook which provides that, in cases of doubt, the Import Trade Control authorities should be consulted which was not done in this case. Pointing out that no proceedings had been initiated by the Import Trade Control authorities against the appellant for violation of the licence, he submits that the Tribunal should have relieved the appellant of the fines and penalties."

26. There are some observations in paragraph-8 of the above judgment which rather seem to indicate that the Court was somewhat more sympathetically inclined towards the submissions of Mr. Salve; the said passage of paragraph-8 is set out below :-

"So far as the second aspect is concerned, there are certain circumstances that need to be taken into account. It is clear, as pointed out on behalf of the appellant, that the consideration that the component parts imported could be assembled to constitute substantially the whole of the photo-copier machine is irrelevant; the question is, to what extent there was import of unlicensed

component parts."

On the basis of the aforesaid two decisions of Tarachand Gupta and Dynamatic Hydraulics Ltd., it would appear that the basic importation by the petitioner is not to be interpreted as a violation of any law notwithstanding the possibility of the putting together of such components after they have crossed the Indian Frontiers, into whole machines. The next and the last case of the Supreme Court in this regard is the case of Sharp Business Machine Pvt. Ltd. reported in 1990 (49) Excise Law Times page-640.

28. In this case three separate consignments were brought in and those consignments together would comprise a whole photo-copier machine. The position in law prevailing at the time of import upon which the Supreme Court's decision was made was substantially different from the position obtaining at the time of present import. As will be clear from paragraphs-9 and 12 of the said judgment in Sharp, at the time of those importations it would not be possible to import, in accordance with law, more than 62% of the copier-machine notwithstanding whatever purchase of import quotas or licence might have been made by the importer within the country. The importation of the whole copier-machine for the Sharp import was, therefore, a violation of the letter of the law. The relevant portion of paragraph-9 is set out below :-

"The company in the present case not only violated the terms and conditions of licence but also committed a complete fraud in importing fully finished copiers which was a totally prohibited item, in the guise of separate components and accessories by dismantling the fully finished copiers."

29. The entire 12th paragraph of the said Sharp decision is also produced below :

"Mr. Dholakia next contended that, the Tribunal itself had set aside the finding of the adjudicating authority on the question of treating SKD/CKD packs of the copiers imported comprised of all the 100% components of copiers. The company had tried to practise a fraud in defeating the import policy itself. The intention and purpose of the import policy was to give incentive and encouragement to the new entrepreneurs establishing small scale industries and in the first phase to import 62% of the components of the copiers and the balance of 38% was to be manufactured by them indigenously. According to the import policy this percentage of 62% was to be reduced in the subsequent years. The import policy was not meant for such entrepreneurs who instead of importing 62% of the components, imported 100% of the components of a fully finished and complete goods manufactured by a foreign country. It is an admitted position that fully finished plain paper-copiers were a prohibited item for import and thus the device, adopted by the company in the present case was a complete fraud on the import policy itself. Apart from the above circumstances in our view the Tribunal was not right in setting aside the finding of the adjudicating authority and in taking the view that one has to look into the respective licence and not to the fact that if all the consignments covered by all the bills of entry assembled

together, there will be a full and complete machinery."

30. It appears, therefore, that in the case of Girdharilal the whole item was banned and in the case of Sharp anything in excess of importation of 62% of the items was banned. Any importation of the components seeking to violate these two provisions would violate not any spirit of any fiscal statute but the fiscal statute itself. Such importations of the whole items either in the situation of Girdharilal or in the situation of Sharp would not be doing indirectly what one cannot do directly, but it would be a case of doing indirectly what one could not do either directly or indirectly.

31. If in our situation we found that the photo-copier machines could not be imported save to a specified percentage of the component items, or that any particular component item was totally prohibited from importation, then and in that event the importation of the separate consignments ultimately, by manufacture, comprising the whole machine, would be illegal. It would be illegal not because of violation of any spirit of the policy but because of violation of the letter of ban upon the import. But that is not so. There is no ban by any letter of the law which the petitioner has violated.

32. Under these circumstances, in my opinion, the importer/writ petitioner cannot be held to be guilty of breaking either 111(d) or 112(a) of the Customs Act, 1962 since the consignments were imported in accordance with the licences held by the petitioner and since even after assembly the importer did not achieve something which the importer could not have legally achieved in any view of the matter. Accordingly the writ petition succeeds.

33. The order of the Collector, in so far as it exonerates writ petition is to stand good, as the entire order has been found as acceptable by the respondents. The relief that the writ petitioner would be entitled to is the relief for quashing only that part of the order of the Collector dated 9th December, 1991 whereby the goods have been sought to be confiscated and whereby penalty has been sought to be imposed u/s 111(d) and 112(a) of the Customs Act, 1962. There shall be a writ absolute in accordance with the above and the same writ shall issue in the nature of a writ of certiorari.

34. The writ petitioner shall also be entitled to be discharged from the bond for Rs. 1,35,00,000/- mentioned in the order of 9th December, 1991 as well as from the bank guarantees for Rs. 2,50,00,000/- furnished pursuant to the interim order passed herein dated 6th September, 1990 as well as the PD bond for Rs. 34,00,000/- mentioned in the said interim order. Within a fortnight of service of: a copy of this order upon the respondents, the bank authorities, or the persons holding or being entitled to the aforesaid bonds, the same shall be returned to the writ petitioner or its authorised representative as fully discharged and the said return is to be effected peremptorily within the time mentioned above,

35. There will be no order as to costs. Stay of operation of order is prayed for but the same is refused as the time scheme mentioned above itself will operate as an

built stay in case any party is aggrieved by this order.

Parties and all other persons concerned who are likely to be affected by the order will act upon an appropriate counter-signed xerox copy of the judgment, and order.