
(1986) 02 CAL CK 0039
In the Calcutta High Court
Case No : Matter No. 1702 of 1981

Indian Cable Co. Ltd. and Another	Vs	APPELLANT
Collector of Customs and Others		RESPONDENT

Date of Decision : 18-02-1986

Acts Referred:

Constitution of India, 1950 — Article 136, 226
Customs Act, 1962 — Section 12, 131(3), 23(1), 23(3), 24

Citation : (1988) 16 ECC 136 : (1988) 17 ECR 748 : (1987) 30 ELT 680

Hon'ble Judges : Padma Khastgir, J

Bench : Single Bench

Advocate : Nirmal Ch. Roy Choudhury, for the Appellant; Jatin Ghosh, for the Respondent

Final Decision : Dismissed

Judgement

Padma Khastgir, J.—The Indian Cable Co. Ltd. being aggrieved by various assessment made by the Collector of Customs on 3rd of June, 1981, 16th of July, 1981, 5th of August, 1981 and 17th of September, 1981 under Tariff Item No. 39.01/06 of the Customs Tariff Act and under Item 5-A of the Central Excises and Salt Act, 1944 had moved the Writ Jurisdiction of this Court for necessary reliefs.

2. In connection with its business of manufacturing various kinds of electrical cables and wires the Petitioner had to import amongst other synthetic rubber sold under the trade name "Hypalon" which is used for insulating wires and cables. According to the Petitioner, the said Hypalon is manufactured in U.S.A. and sold by them throughout the world as synthetic rubber. The Petitioner contended that the Hypalon is in fact a form of synthetic rubber. The Petitioner in that respect craved reference to certain technical literature and specifications. In the Import Trade Policy for the year 1977-78 till 1980-82 the Govt. of India through the Ministry of Commerce included Hypalon under the description Scientific rubber relying upon the Import Trade Control Classification passed on

Brussels Trade Nomenclature. Prior to 1979 for the purpose of importation of Hypalon one had to apply for an import licence from the Chief Controller of Imports and Exports as a result the Petitioner had applied and obtained licence from time to time from the competent authority and hypalon had been imported by virtue of such licence which was cleared by the Customs Authorities, under the description Synthetic rubber. The Petitioner further stated that the Customs Authorities at Madras by their order dated 26th November, 1976 had been pleased to hold Hypalon as synthetic rubber. Even the Appellate Collector of Customs, Calcutta by order dated November 6, 1980 in respect of a consignment of Hypalon imported by the Petitioner had been pleased to hold the same as synthetic rubber which of course is pending by way of review before the Govt. of India. In cases of customs duty on synthetic rubber there in heading No. 40.01/CM whereunder raw rubber, natural or synthetic etc. duty has been imposed at 40% and for additional duty it is assessable under the Central Excises and Salt Act, 1944 under Item No. 16-AA upon which 10% ad valorem duty is leviable on synthetic rubber etc. Over and above auxiliary duty at the rate of 10% ad valorem and special duty at 10% by way of additional duty is leviable.

3. The Petitioner is aggrieved in as much as the Customs Authorities had contended and assessed Hypalon as a synthetic resin under the heading 39.01/06 at 100% Ad valorem + Auxiliary Duty at the rate of 25% Additional Duty at the rate as provided under the Central Excise Tariff Item 15-A(40% + 5% Special Duty).

4. Since February, 1977 the Petitioner had imported various quantities of Hypalon for the purpose of manufacture of electrical cables and wires, under import licence issued by the Chief Controller of Import and Export describing the goods as a synthetic rubber. The goods have been cleared by the Customs Authorities as validity imported goods but they have assessed the said imported goods as synthetic resins. The Petitioner had cleared the said goods under protest but had preferred claims to the Assistant Collector of Customs for refund of excise duty paid. The total claim of the Petitioners were approximately Rs. 12.29 lakhs. All those applications made by the Petitioners have been rejected by the Assistant Collector of Customs refusing refund on the ground that they were time barred u/s 27 of the Customs Act, 1962. The Petitioner had preferred an appeal from the said order. In two months the appeals had been allowed and the order of the Assistant Collector of Customs had been set aside directing refund of a sum of Rs. 1,09,460.39 P. but the others had been rejected on the ground of limitation. Therefrom the Petitioner had preferred an appeal to the Board of Revenue, Ministry of Finance.

5. By order dated 6th November, 1980 the Appellate Collector of Customs had directed re-assessment of Hypalon as Synthetic rubber. The Central Government u/s 131(3) is considering the review of the said orders and as indicated earlier, the same is pending for adjudication. The petitioner on 18th of Duly, 1980 had placed an order with the Union Commercial and Industrial Co. Pvt. Ltd., the local

agents of Dupont for supply of 40 tons of Hypalon. For supply of 40 tons of Hypalon out of the 40 mt. tonnes 70.96240 mt. tonnes under a bill of lading dated 30th November, 1983 arrived at the Calcutta port by the vessel M.V. Okeanis and had been lodged in the bonded warehouse. The Petitioners in view of the urgency of the requirement of the materials prepared a bill of entry for clearance for home consumption .describing the said material as synthetic rubber (synthetic resin) and paid duty at 100% Auxiliary at 25% for clearances of 4.014 mt. tonnes of goods and paid the duty under protest and cleared the goods. Similarly under the same circumstances, the Petitioners cleared 2.0412 mt. tonnes, 2.042 mt. tonnes and 4.082 mt. tonnes by payment of the duty demanded by the Customs Authorities but according to the Petitioner under protest. The petitioners paid duty on the basis of the rate applicable to synthetic resin instead of synthetic rubber. A further consignment of Hypalon arrived on 9th of August, 1981 at the port of Calcutta by the vessel E. Lee under the said contract dated 18th July, 1980 which goods had been stored in the bonded warehouse and had not been cleared. Another consignment of Hypalon arrived at the port of Calcutta on 28th August, 1981 per 5.S. Vishva Vakti and had been stored at the bonded warehouse. All these goods according to the petitioner had been imported under the same contract dated 18th July, 1980.

6. The petitioners contended that the said goods should be given the meaning and construction in the light of the commercial and trade practices and the same meaning should be given as is understood in the trade and amongst the commercial people. It was the case of the petitioner that the respondent authorities have acted beyond their jurisdiction and in abuse of their powers in purporting to ignore the meaning accepted in the commercial market. Hence, the action on the part of the customs authorities was arbitrary and without any basis, hence bad in law.

7. Mr. Nirmal Ch. Roychoudhury, on behalf of the petitioners submitted that while interpreting those items in taxing statute report should not be made to the scientific and technical meaning but the meaning attached to them by those dealing with them in their commercial sense. The customs authorities should have accepted the use of the expression, by the trade and its popular meaning.

8. Duty on importation of goods is charged u/s 12 of the Customs Act, 1962, The rate of duty is determined with reference to the first schedule of Customs Tariff Act, 1975. Rule 1 of the rules for interpretation of the schedule provides for interpretation of the first schedule. Hypalon has been tested in Customs House Laboratory from time to time and as a result of such testing, it had been found that Hypalon is essentially composed of saturated organic polymer which does not confirm to rubber and/or synthetic rubber. Chapter 40 of the Customs Tariff Act covers rubber and synthetic rubber etc. Note 4 of Chapter 40 provides the scope of synthetic rubber. The test of samples of hypalon did not confirm hypalon as synthetic rubber falling within Chapter 40. The same could not be assessed under the same chapter. Hypalon being the organic polymer was properly

classified under the heading 39.01/06 of Chapter 39 of the Customs Tariff Act, 1975. Such assessment and/or classification under Customs Tariff Act is independent of the classification made under the import trade control regulation. Such import trade control policy based on Brussels Trade Nomenclature, does not restrict the scope and statutory provisions of the Customs Tariff Act. There is no dispute that the import of Hypalon was permissible under open general licence in the import policy of 1981-82 and as such goods could be imported by the petitioner by virtue of the licence granted by the concerned authorities. The customs duty charged on synthetic rubber is assessable under the Customs Tariff Act provided the goods satisfied the conditions as laid down under Chapter 40 of the Customs Tariff Act 1975. Hypalon does not answer or comply with note 4 of Chapter 40. The petitioner's contention that Hypalon is most akin to synthetic rubber has been denied and disputed by the customs authorities. On the contrary they contended that it is a saturated synthetic substance more akin to resin group.

9. In the case reported in 1983 E.L.T. 258 Super Traders and Anr. v. Union of India and ors. a division Bench of the Delhi High Court held :-

"It is equally well to remember that it is primarily for the Import Control Authorities to determine the head or entry in tariff schedule under which any particular commodity fell, but if in doing so, these authorities adopted a construction which no reasonable person could adopt, i.e. if the construction is preserve, then it is a case in which the Court is competent to interfere. In other words, if there were two constructions which in entry could reasonably bear and one of them which was in favour of Revenue was adopted, the Court has no jurisdiction to interfere ready as the better one to adopt The Collector of Customs, Madras Vs. K. Ganga Setty, . In that case the dispute was whether feed oats fell within item 42 i.e. fodder, grain, or under item 32 I.e. grain. The customs authorities held that the goods imported fell within item 32 and the importers had undoubtedly no licence to import under that heading. The learned judges of the High Court however, held that entry 32 reading grain had to be read as excluding all grain which would be fodder and as the petitioner had imported oats for horses feed, the proper item within which the goods imported fell were item 42 fodder etc. The Supreme Court set aside the judgment of the High Court because it held that it cannot be said that the view taken by the Customs Authorities was such which no reasonable person can adopt. It is also well to remember that the Court dealing with the petition under Article 226 is not sitting in appeal over the decision of the Customs Authorities vide Girdharilal Bansidhar Vs. Union of India (UOI), .

10. As a matter of fact in V.V. Iyer of Bombay Vs. Jasjit Singh, Collector of Customs and Another, the Court has sanctioned the High Court against interfering under Article 226 of the Constitution with the decision given by the customs authorities in very strong language wherein it observed :

"Even if it be assumed that because of the language used in the two items viz.

items 74(vi) and 74(x) of the I.T.C. Schedule, there is some room for confusion, it would not be competent for the High Court to interfere in a writ petition with the conclusion or finding of the Collector of Customs regarding the scope and ambit of those items.

In this case stress was laid on an earlier decision of the Supreme Court to urge that if there is doubt in the construction of the Licence the appellant against whom the penal provisions of the Sea Customs Act, 1878 are sought to be enforced is entitled to a benefit of doubt. The Court however referred to *The Collector of Customs, Madras Vs. K. Ganga Setty, and Thansingh Nathmal and Others Vs. A. Mazid, Superintendent of Taxes*, wherein the decisions of the larger benches has taken the view that even if the Collector of Customs had taken a wrong view in construing the entry the High Court cannot interfere with the decision unless it is found to be perverse or of such nature which no reasonable person could arrive at. It is therefore not correct for Mr. Sen to urge that simply because an interpretation about an entry has to be given this makes the whole thing doubtful that it can only be resolved by decisions against the Revenue. In this connection we would like to note that sometimes the broad maxim that a penal provision should be strictly construed against the department and if any concession is to be made it must be made in favour of the citizen is put forth as it is an inevitable mandate that an effort be made at finding any technical flaw to help a person from avoiding this Court had occasion to express disapproval of such an approach in (C.W. 629/1980 decided on 27.11.1980) *Hindusthan Aluminium Corporation Ltd. v. The Superintendent, Central Excise and Ors.* 1981 E.L.T. 642 where one of us (Sachar, J.) speaking for the Bench observed :-

"We cannot accept as sound law that a fiscal provision has to be construed against the department and in favour of citizens on any supposed reason of technicality and strict construction. It must be remembered that is only when there is some equivocation or ambiguity about a word or provision that the rule of strict construction or narrow construction in favour of the subject is to be applied but if there is no ambiguity and the act or omission falls clearly within the mischief of statute than the construction of penal statute will not differ from that of any other, See *Maharaja Book Depot Vs. State of Gujarat*, ".

10A. In the case reported in *Andhra Industrial Works Vs. Chief Controller of Imports and Others*, . it was held that the import control policy statement is not a statutory document and a person on the basis of such import trade policy has no absolute right much less a fundamental right. Hence, the petitioner on the basis of such import trade policy has acquired no absolute right much less a fundamental right which could be enforced under Article 226.

11. In the case reported in AIR 1977 SC 597 *Dunlop India Ltd. v. Union of India and Ors.* it was held :-

"Meanings given to articles in a fiscal statute must be as people in trade and commerce, conversant with the subject, generally treat and understand them in

usual course. But once an article is classified and put under a distinct entry, the basis of classification is not open to question. Technical and scientific tests offer guidance only within limits. Once the articles are in circulation and come to be described and known in common parlance then there is no difficulty for statutory classification under a particular entry. It is not for the Supreme Court to determine for itself under Article 136 of the Constitution under which item a particular article falls. It is best left to the authorities entrusted within the subject. But where the very basis of the reason for including the article under a residuary head in order to charge higher duty is foreign to a proper determination of this kind, the Court will be loath to say that it will not interfere."

There were no materials before this Court to come to the finding that no reasonable person could have come to that conclusion.

12. Mr. Jatin Ghosh, the learned lawyer appearing on behalf of the respondents authorities also craved reference to the case reported in 1985 E.L.T. 537.

13. In the case reported in AIR 1983 S.C. 630 Titaghur Paper Mills Co. Ltd. and Anr. v. State of Orissa, it was held :-

"In the instant case against the order of assessment made by Sales Tax Officer under the Orissa Sales-tax Act the petitioners assesseees, can get adequate redress against the wrongful acts complained of. The petitioners have the right to prefer an appeal before the prescribed authority under Sub-section (1) of Section 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal they can prefer a further appeal to the Tribunal under Sub-section (3) of Section 23, and then ask for a case to be stated upon a question of law for the opinion of the High Court u/s 24. The Act provides for a complete machinery to challenge an order of assessment, and the impugned order of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the constitution. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of."

14. The petitioner cannot be permitted to continue two parallel proceedings for the same cause. In view of the existence of efficacious alternative remedy in the absence of gross abuse of power or perverse finding, this Court should not interfere in its writ jurisdiction with such remedy.

15. Hypalon has been tested in the Customs House Laboratory from time to time and the result found is essentially composed of saturated organic polymer. As hypalon did not fall under the heading synthetic rubber the same was not assessed as synthetic rubber. Hence, hypalon was appropriately classified under heading 39.01-06 of Chapter 13 of the Customs Tariff Act, 1975. Synthetic rubber is an item assessable under the Customs Tariff Act, 1975 provided such synthetic rubber satisfied the conditions as laid down in Note 4 of Chapter 40 of the Customs Tariff Act. Hence, the petitioner was not wrongfully assessed, nor were they entitled to any refund. The order passed on the 6th of November, 1986

by the Collector of Customs had been set aside by an appellate authority.

16. The statutory definition of synthetic rubber given in Chapter 40 shall be given effect to what is known in common parlance is of no consequence. Hypalon falls within the definition of synthetic resin and not under the definition of synthetic rubber. Hypalon has been specially classified under Chapter 39 and not under 40. Mr. Ghosh craved reference to various notifications dated 1st March, 1981, 28th February, 1982, 1st March, 1983, 18th August, 1983 and 17th November, 1984 whereunder Hypalon has been classified under Chapter 39.

17. In any event the petitioner has availed itself of the alternative remedy under the Customs Act by filing an application before the Board of Revenue which is pending for its decision as well as Review Petition filed by the Central Government u/s 131(3) is also pending. Under those circumstances and also because there are no cogent grounds as to why this Court should invoke its writ jurisdiction and interfere with the finding of the respondent authorities! Apart from that the respondents had also taken the points that no demand for justice had been made by the writ petitioner, in gross violation of the rules framed by this Court. Under the circumstances, no writ of mandamus could be issued by this Court. The issues raised in this petition involved determination of disputed questions of fact which required of giving evidence by experts on technical analysis and test. Under the circumstances, this Court is Of the view that no order be passed on this application as a result of this application is dismissed. There will be no order as to costs.