
(1991) 02 CAL CK 0013
In the Calcutta High Court
Case No : Matter No. 160 of 1991

J.B. Shah

APPELLANT

Vs

Collector of Customs

RESPONDENT

Date of Decision : 08-02-1991

Acts Referred:

Customs Act, 1962 — Section 112, 147

Citation : (1993) 49 ECR 221 : (1991) 55 ELT 333

Hon'ble Judges : Ruma Pal, J

Bench : Single Bench

Judgement

Ruma Pal, J.—The Court: The petitioner carries on the business of importing ball bearings under the name & style of M/s. Continental Corporation.

2. The petitioner imported two consignments of ball bearings. One consignment arrived in Calcutta aboard the vessel "TIGER CREEK". Another consignment arrived in Calcutta aboard the "MURRAY EVERETT". The first consignment with which we are concerned in this writ petition (hereinafter referred to as the consignment) arrived on 1-11-1990. A bill of entry was filed by the petitioner's clearing agent on the same date. According to the petitioner, the "ball bearings imported were covered by their import licence dated 31-3-1989. It appears that the Customs Authorities were not willing to clear the ball bearings described as 1209K on the ground that it was a restricted item under Appendix - 2B of the Import Export Policy 1990-91. The petitioner dispute the contention and states that the import of 1209K ball bearings was permissible being under item 540, Appendix-3 Part "A" of the said Import Policy.

3. According to the petitioner, the Customs Authorities had released several consignments of 1209K ball bearings as permissible items under item 540. However, it is admitted by the petitioner that the Customs authorities had in one case imposed penalty amounting to 100% of the CIF value in respect of the import of 1209K ball bearings.

4. On 5th November 1989 an endorsement was made on the bill of entry by the clearing agent of the petitioner as under:

"We do not have import licence for bearing No. 1209K. We request you to kindly adjudicate the case. We do not want any show cause notice or personal hearing in this regard."

Another endorsement made by the Clearing Agent dated 5th November 1990 reads as follows:

"Sir, we have not received P.D. Bond yet. Since the importer is Bombay based, we request to kindly assess/release the B/E. P.D. Bond will be submitted before duty."

The next endorsement on the bill of entry made by the Customs Authorities on 5th November 1990 reads as under:

"The goods under importation covers bearing No. 1209 of Appendix-2B.

The C/A has expressed their inability to submit licence and requested to adjudicate the goods vide endorsement at the opt side. Under the circumstances goods are required to be examined on original B/E. If approved, goods may be examined on original B/E."

The next endorsement dated 5th November 1990 is by the Customs Authorities and reads as follows :

"ACG/SA order alongside. PL open all the cases for appraisement, check declaration, contents...".

The next endorsement dated 23-11-1990 reads as follows :

"Opened all cartons of pallets for appraisement. Checked declaration and found in order..."

The next endorsement is dated 28-11-1990. The said endorsement which has been cancelled was as follows :

"B/E assessed, pending submission of P.D. Bond for 100% CIF value as per request of the C/A on the back of the original B/E".

The final endorsement is also dated 28-12-1990. The said endorsement is on a stamp. The relevant portion of which reads "fine for H.O. Rs. 1,00,000/- (Rupees one lakh only).

5. According to the writ petitioner the fine of Rs. 1 lakh is 5 times the value of the 1209K ball bearings in the said consignment. The writ petitioner has challenged this imposition of penalty on 4 grounds :

(1) That other importers of 1209K ball bearings had been permitted to import without payment of any penalty. Only in one case one importer had been imposed a penalty of 100% of the CIF value. There was nothing to justify the

respondents imposing 500% of the CIF value as penalty in the petitioner's case, although the petitioner was similarly circumstanced as the other importers.

(2) All the goods apart from 1209K ball bearings had been wrongfully detained by the Customs Authorities, although there was no dispute pertaining to them.

(3) The Customs Authorities had agreed to release the goods on the execution of a P.D. Bond for 100% of the CIF value and had passed an order as would appear from the cancelled endorsement. The cancellation of the order and subsequent imposition of penalty was not based on any reason and done without giving any opportunity to the petitioner of being heard.

(4) The goods were clearly covered under Item 540 of Appendix 3A of the Import Policy. The Customs Authorities' contention that the goods were a derivative and therefore, a restricted item under Item 146 Appendix 2B of the Import Policy was wholly wrong. 1209K was a distinct and different kind of ball bearing to 1209 ball bearings and could not in any way be called a derivative of the same.

The Customs Authorities have contended :

(a) There has been a final adjudication relating to imposition of penalty u/s 112 of the Customs Act, 1962 (hereinafter referred to as the Act). Therefore, the petitioners, if they were aggrieved, should protest by way of appeal under the Act.

(b) The clearing agent of the petitioner had categorically admitted that they had no licence covering 1209K ball bearings. The statement of the clearing Agent was binding on the petitioner u/s 147 of the Act.

(c) The other consignments referred to by the petitioner of 1209K ball bearings had been released without imposition of penalty by mistake. The Customs authorities were not bound to perpetuate such mistake.

(d) The penalty had been imposed taking into consideration the market price in respect of 1209K ball bearings. From the price lists available, it appeared that the market price of 1209K ball bearings was much higher than the price declared on the invoice of the petitioner.

6. On a reading of the publication of the normal entitled NSK Ball and Roller Bearings of Nippon or Seiko, it appears prima facie that there is substance in the contention that 1209K ball bearings are different from 1209 ball bearings and cannot be termed as its derivative. The word derivative has been defined in the shorter Oxford Dictionary as "of derived character or nature." The word "derive" has been defined as "to obtain a compound from another as by partial replacement." It does not appear from the Manufacturers Manual referred to above, that 1209K is derived from 1209. Furthermore the indication in Item 146 of Appendix II part of the word derivative is "having metallic shields grooves." In other words ball bearings should be 1209 with additional for the purpose of being a derivative. Finally in Appendix 14(1) of the Import Trade Control Policy 1209

and 1209 K have been listed as distinct types of ball bearings. Note 1 to the said appendix reads "All the above bearings with special features such as :

- (a) A groove in the outer ring with or without loose ring in the groove;
- (b) A dust shield or plate on one or both sides of the bearings;
- (c) Any combination of items (a) and (b) above;

will be considered as banned for import." This would also clearly indicate that 1209K is not derivatives of 1209 ball bearings.

7. It is clear from the endorsement on the bill of entry that the clearing agent had agreed to adjudication without a show cause and had requested the Customs Authorities to "release the Bill of Entry upon furnishing of a P.D. Bond of 100% of the CIF value."

8. This request was acceded to. In fact the cancelled endorsement would also bear this out. All the facts including the price lists relating to 1209K were already available for consideration by the respondent authority. When the cancelled endorsement was made, it is not the case of the respondents that there was any new factor which came into existence between the time of making the cancelled endorsement and the final endorsement. There was, therefore no justification for passing a different order on the same facts. The Customs Authority ought not, after having signed the order of release to have deleted the same without reference to the petitioner. In the case of *Radha Kissen v. E. Rajaram Rao* reported in AIR 1955 Cal. 241 a Division Bench of this Court held "when an order made against certain parties is in any way altered it is but just and fair that it should be altered in their presence although they may have no conceivable case to make out against the alteration." It must be stated however, that in that case the Court refused to interfere because the alteration was not substantial and the petitioners had already availed of the alternative remedy.

9. In this case, however the alteration is substantial;

10. Furthermore the power to levy penalty must be exercised with judicial discretion and not arbitrarily [See *Gyanoba Yaswant Jadav Vs. The Collector of Central Excise, Hyderabad and Others*, The market price of the commodity imported cannot be a relevant consideration for determination of the penalty. The purpose of the penalty is deterrence and not retribution. There is no other reason disclosed by the authorities as to why the maximum penalty was imposed. The penalty must have some relation to the offence committed. The punishment, so to speak, must fit the crime. In this case there was clearly a bona fide doubt regarding the categorisation of 1209K ball bearings. The Customs Authorities themselves admit that they had mistakenly allowed other consignments to be released without imposing any penalty. It is not their case that the petitioner is a habitual offender.

11. The order imposing penalty was, therefore, arbitrary and is quashed.

12. I do not accept the contention that the Court is bound in cases such as this, to drive the petitioner to the alternative remedy provided under the Act. Reference may be made in this regard to the case of G.Y. Yadav (supra) where in similar circumstances a Division Bench of the Andhra Pradesh High Court held :-

"It is well recognised that judicial review is not confined to the question whether the competent authority has kept within the four corners of the Act and whether it has acted in good faith. The courts will pursue the enquiry further and will use the judicial review for determining whether the repository of a discretion although acting in good faith has not abused its power by an excessive or oppressive use thereof on irrelevant grounds or without regard to relevant consideration or with gross unreasonableness. The discretion committed to the authority u/s 112 of the Act is a judicial or qualified discretion and is amenable to correction in the event, among other things, of the unreasonable or patently unjustifiable exercise of the power."

13. In the circumstances of the case and also taking into consideration the fact that other consignments of 1209K ball bearings have been released either without payment of any penalty or upon payment of penalty assessed at 100% of the CIF value, I direct the Customs Authorities to release the consignment in question upon the petitioner furnishing a P.D. Bond for 100% of the CIF value of the 1209K ball bearings. It may be noted that there is, in any event, no justification for the Customs Authorities to detain the other goods forming part of the consignment in respect of which there was no dispute. The same will be released unconditionally and forthwith.

14. The concerned respondent will be at liberty to reconsider the matter upon notice to the petitioner in the light of the observations made herein. The petitioner will be at liberty to raise all points taken in this petition before the authorities. As no affidavit-in-opposition has been used, it is recorded that the allegations contained in the petition are not admitted.

15. This application is disposed of accordingly.

16. There will be no order as to costs.

17. All parties to act on a signed copy of the operative part of this judgment on the usual undertaking.