

(2003) 09 BOM CK 0034

In the Bombay High Court

Case No : Writ Petition No. 1916 of 1992

Kanubhai Engineers Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 01-09-2003

Acts Referred:

Constitution of India, 1950 — Article 142, 226
Customs Act, 1962 — Section 2(30), 76

Citation : (2004) 4 BomCR 448 : (2003) 111 ECR 1042 : (2003) 158 ELT 571

Hon'ble Judges : V.C. Daga, J; J.P. Devadhar, J

Bench : Division Bench

Advocate : Manoj Sanklecha and B.N. Vaishnava, instructed by N.N. Vaishnava, for the Appellant; R.V. Desai and A.S. Rao, instructed by T.C. Kaushik, for the Respondent

Final Decision : Dismissed

Judgement

J.P. Devadhar, J.—In this unusual case, the machinery imported by the Petitioner on being found to be defective was re-exported within the warranty period and the foreign supplier replaced the defective machinery by a new one, but the Petitioner was required to pay customs duty twice, one at the time of first clearance and another at the time of clearance of the replaced machinery. As the Customs authorities declined to entertain the refund application filed u/s 27 of the Customs Act and have also rejected duty drawback claimed u/s 74 of the Customs Act, the Petitioners have approached this Court by filing this Writ Petition.

2. The facts relevant for the present petition are that on 10th February, 1987 the Petitioner imported a Crankshaft machine from Germany and cleared the same on payment of duty of Rs. 2,27,871/-. Thereafter, the said Crankshaft, was found to be defective and the foreign supplier agreed to take back the machine and substitute it by a new one. The Petitioners on obtaining necessary permission from R.B.I., re-exported the said machine on 18th July, 1987. The new machine

supplied in lieu of the defective machine arrived at Bombay sometime in January, 1988. On 25th January, 1988 the Petitioners filed a bill of entry and cleared the said replaced Crankshaft machine on payment of duty of Rs. 2,37,637/-.

3. On 10th June, 1988, the Petitioners made an application u/s 27 of the Customs Act seeking refund of duty of Rs. 2,27,871/- paid at the time of first clearance. By a letter dated 15th November, 1988, the Assistant Collector of Customs (Refund Department) informed the Petitioners that the claim for refund of duty u/s 27 was not admissible and advised the Petitioners to approach the Drawback Department for refund. Accordingly, the Petitioners filed their claim on 5th July, 1989 seeking duty drawback u/s 74 of the Customs Act. The Petitioners furnished all the relevant documents called for by the adjudicating authority. Thereafter, by an order-in-original dated 17th October, 1989, the Assistant Collector of Customs rejected the drawback claim inter alia on the ground that the machinery re-exported was under a free shipping bill, and not under the duty drawback shipping bill, that the identity of the machinery re-exported was not established and that the examination of the re-exported machinery was not carried out under the supervision of the Assistant Collector of Customs and the prevailing market value (PMV) of the machinery was not certified to be fair as required u/s 76 of the Customs Act.

4. Being aggrieved by the aforesaid order, the Petitioners filed an appeal before the Collector of Customs (Appeals) who by his order dated 12th April, 1990 allowed the claim of the Petitioners, inter alia, on the ground that the petitioners had mentioned the S. No. of the crankshaft both in the Bill of Entry and the Shipping Bill, and therefore, the Customs authorities at the time of re-export must have satisfied that the goods exported were the same goods which were imported earlier. The Collector (A) held that the description of the goods and determination of the prevailing market value was not relevant in the present case, as the petitioners had obtained permission of the Reserve Bank of India for re-export with a condition to obtain free replacement within six months and that the said condition has been complied with by the petitioners. The order of Commissioner of Customs (A) was reviewed by the Government of India and by the impugned order dated 13th December, 1991. The Joint Secretary to the Government of India set aside the order of Collector of Customs (Appeals). In the said order, it was held that although the goods exported were the same as imported originally, the duty drawback could not be granted to the petitioners because the export was not on the drawback, shipping bill consequently the prevailing market value (PMV) of the exported machinery could not be ascertained which is essential for grant of duty drawback. It was further held that even if the value of the defective crankshaft shown in the free shipping bill at Rs. 1,10,000/- is taken as PMV, it being less than the duty drawback claimed (98% of Rs. 2,27,871/-) no drawback could be granted as per Section 76 of the Customs Act. Challenging the said order, the present petition is filed.

5. Mr. Sanklecha, learned Counsel appearing on behalf of the petitioners

submitted that once the imported machine on being found to be defective was re-exported with the approval of R.B.I. The duty paid on the said machines ought to have been refunded by the Customs authorities and the Respondents were not justified in holding that the refund claim filed u/s 27 of the Customs Act was not admissible.

6. Mr. Sanklecha submitted that in any event the claim for drawback of duty could not be rejected on the ground that the PMV of the re-exported machinery has not been determined. He submitted that on the shipping bill, at the time of re-export, the petitioners had declared the market value at Rs. 1,10,000/- and if the duty of Rs. 2,27,871/- paid on the said Crankshaft at the time of import is taken into account, the market value of re-exported crankshaft would be much more than the drawback claimed and in that view of the matter, the duty drawback ought to have been granted to the petitioners. It was submitted that the drawback claimed by a party is to be on the basis of replacement value and not on this basis of export value. Mr. Sanklecha, submitted that the Government of India was in error in denying the benefit of drawback on the technical ground that the shipping bill filed by the petitioners was not a drawback shipping bill. He submitted that when the petitioners have paid duty in respect of Crankshaft twice while importing for home consumption only once, the petitioners are entitled to get refund either u/s 27 or u/s 74 of the Customs Act, 1962. Mr. Sanklecha further submitted that Section 76 of the Customs Act, is ultra vires. The Constitution as it purports to disallow/prohibit/grant of drawback on export of goods whose market value is less than the amount of drawback claimed, without laying down any guidelines to determine the market value. He submitted that the value declared by the petitioners before the Reserve Bank of India should have been accepted as market value u/s 76 of the Customs Act.

7. Mr. Desai, learned Counsel appearing on behalf of the Respondents, on the other hand submitted that admittedly at the time of re-export of Crankshaft, the petitioners have not furnished the drawback shipping bill as a result the prevailing market value of the machinery as required u/s 76 of the Customs Act has not been determined. He submitted that since the requisite conditions set out u/s 76 has not complied with, the claim for drawback has been rightly rejected.

8. We have considered the submissions made by Counsel on both sides and we have perused the record placed before us. In the present case, the refund claim made u/s 27 of the Customs Act was held by the Customs authorities as not admissible. The petitioners have not challenged the rejection of the refund claim made u/s 27 of the Customs Act. The reliefs sought in this petition pertain to the validity of Section 76 of the Customs Act and the denial of duty drawback u/s 74 of the Customs Act. Therefore, granting refund of duty u/s 27 of the Customs Act does not arise in this petition.

9. As regards the duty drawback is concerned under the Customs Act, to avail duty drawback, it is necessary to export the goods on a drawback shipping bill as

per the procedure prescribed. In the present case, admittedly the machinery was not re-exported under the drawback shipping bills but the same was re-exported under a free shipping bill. If the machinery was exported under the drawback shipping bill, then the petitioners were bound to fill up the prescribed column which require the exporter to set out the prevailing market of the goods to be exported and the customs authorities were bound to verify the declaration of market value made on the drawback shipping bill. In the free shipping there being no such column there was no determination of prevailing market value. Section 76 of the Customs Act provides that the duty drawback shall not be allowed if the market value of the export goods is less than the amount of the drawback due thereon. In the present case, admittedly, the market value of the defective machinery exported was not determined. Therefore, in the absence of determination of PMV as set out in Section 76 of the Customs Act, duty drawback could not be granted to the Petitioners.

10. The contention of Mr. Sanklecha that in the free shipping bill the petitioners had mentioned the price of the machinery at Rs. 1,10,000/ and if the duty paid on that machinery at the time of import is taken into account, the market value would be much more than the drawback claimed and therefore the Petitioners were entitled for drawback cannot be accepted because, in the present case, admittedly the machinery exported was defective and the defect was of such nature that the entire machinery had to be replaced. If the defects in the imported machinery is beyond repairs, then its market value would be that of a scrap. Scrap value of any goods ordinarily can never be higher than the C.I.F. value. In the present case, the duty paid on the imported goods was two times more than the C.I.F. value. Therefore, it is inconceivable that the market value of a totally defective machine could be higher than the drawback of duty which is more than the C.I.F. value. In any event, as the market value of the exported machine was not declared/determined in the present case, the drawback of duty could not be granted. If the price of Rs. 1,10,000/- declared on the free shipping bill is to be accepted as market price of a defective machine, then it being less than the duty drawback allowable, u/s 76 of the Customs Act, drawback could not be granted. The contention of the petitioners that the duty paid at the time of original import should be added to the price declared on the free shipping bill cannot be accepted, because scrap value of any defective machine can never be more than the duty paid which is twice the C.I.F. value. In the present case, actual market value of defective machine has not been ascertained at all. Therefore, in any view of the matter, drawback of duty is not admissible.

11. The contention of the Petitioners that the drawback claimed by a party is to be determined on the basis of replacement value and not on the basis of export value of the defective machine is also without any merit. The Apex Court, in the case of Om Prakash Bhatia Vs. Commissioner of Customs, Delhi, has held that u/s 76 of the Customs Act, the relevant consideration is the market price of the goods prevailing in the country and not the price of the goods which the exporter expects to receive from the overseas purchaser. Therefore, for grant of duty

drawback, what is relevant is the market value of a totally defective machine in India and not the replacement value of a defect free machine.

12. Decision of the Calcutta High Court (Single Judge) in the case of Hindusthan Malleables and Forgings Ltd. Vs. Asstt. Collr. of Cus., which has been heavily relied upon by the petitioners, is distinguishable on facts. In that case, X-ray machine was imported and certain components of that X-ray machine were found to be defective which needed replacement and the entire X-ray machine was not defective. Moreover, in that case, the Customs authorities on re-export of certain components of X-ray machine had granted drawback but at a lesser rate. In that context it was held by the learned Single Judge of the Calcutta High Court that the petitioners therein are entitled to higher amount of duty drawback. Thus the above decision of the Calcutta is distinguishable on facts of the present case. Apart from that, in the light of the decision of the Apex Court in the case of Om Prakash Bhatia (supra), the findings given in the decision of the Calcutta High Court that the value of replacement parts for charge of import duty should be treated as value for calculating export drawback cannot be accepted. The market price referred to in Section 76 of the Customs Act is with reference to the market price in India and not the replacement value.

13. The contention of the Petitioners that Section 76 of the Customs Act is arbitrary and unreasonable on the ground that it does not lay down any guidelines to determine the market value of the goods is also without any merit. Section 2(30) of the Customs Act defines "market price" in relation to any goods, to mean the wholesale price of the goods in the ordinary course of Trade in India. Thus, the market price for the purpose of Section 76 of the Customs Act is to be determined on the same footing as the wholesale price of similar goods is determined in India. Under the circumstances, it cannot be said that no guidelines has been laid down to determine the market value. Therefore, there is no merit in the contention that Section 76 of the Customs Act is arbitrary or unreasonable.

14. It is true that in the present case, the identity of the goods, namely, the goods imported and the re-exported goods were the same has been established. It is also true that the Petitioners have paid the duty twice, firstly, at the time of original clearance and secondly at the time of clearance of replaced machine. Under the Customs Act, unfortunately for the petitioners, if the market price of the defective machine which is exported is less than the duty drawback then drawback of duty, cannot be granted. Although, in the present case, the denial of drawback appears to be harsh, if the statute does not permit grant of drawback, we cannot direct grant of drawback contrary to law. We are bound by the rule of law. The submission made by Mr. Sanklecha that while exercising powers under Article 226 of the Constitution, with a view to do complete or substantial justice, we should exercise powers similar to the powers under Article 142 of the Constitution is misplaced, as it is the prerogative of only the Apex Court. Hence, contention urged in this behalf is misplaced.

15. In this view of the matter, the petition fails. The same is dismissed, with no order as to costs.