

(2003) 03 CAL CK 0038
In the Calcutta High Court
Case No : Writ Petition No. 1701 of 2002

Kothari Filaments

APPELLANT

Vs

Commissioner of Customs (Port)

RESPONDENT

Date of Decision : 27-03-2003

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 111, 125

Citation : (2003) 155 ELT 26

Hon'ble Judges : Bhaskar Bhattacharya, J

Bench : Single Bench

Advocate : J.H. Srivastava, for the Appellant; Bandyopadhyay, Counsel, for the Respondent

Final Decision : Dismissed

Judgement

Bhaskar Bhattacharya, J.—By this writ application the petitioners have prayed for quashing the order dated April 19, 2002 passed by the Customs, Excise and Gold (Control) Tribunal, Kolkata ("CEGAT") by which the said tribunal has affirmed the order of the Commissioner imposing redemption fine and personal penalty upon the petitioners. The petitioners have further prayed for direction upon respondent No. 1 to refund a sum of rupees thirty lakh which has been paid by the petitioners by way of redemption fine on the imported goods and also for refund of rupees five lakh paid by the petitioner No. 1 as the personal penalty and a further sum of rupees one lakh paid by petitioner No. 2 as personal penalty on him.

2. The facts giving rise to filing of the instant writ application may be summarised thus:

The petitioners are importers of various items including lithophone. On the basis of the petitioners' order for import which was declared by the petitioners to be 21.5 MT of lithophone, the said amount of materials arrived at the port. Upon arrival of the goods, the petitioners filed a bill of entry dated June 3, 1999 for

home consumption making the selfsame declaration. However, the Customs Authorities had some doubt in their mind and after investigation it was detected that out of the said declared amount of 21.5 MT of lithophone, there were actually 10 MT of tetracycline, a prohibited item and 11.5 MT of lithophone. Ultimately, a notice was issued u/s 124 of the Customs Act, 1962 asking the petitioners to show cause why the said consignment valued at Rs. 63,32,018.60p. should not be confiscated u/s 111(d) and 111(m) of the Customs Act and why the importers and their agent should not be penalised u/s 112(a) and 112(b) of the said Act. The petitioners were further asked to show cause why the attempted evasion of duty amounting to Rs. 38,16,729.40p. resulting from wilful mis-declaration of the imported goods should not be paid by them along with interest and why the imported prohibited goods viz. tetracycline should not be confiscated u/s 14 of the Drugs and Cosmetics Act, 1940 and the persons concerned should not be liable for punishment u/s 13 of the said Act.

3. The petitioners gave reply to show cause notice and the defences taken by the petitioners were as follows:

(a) The petitioner No. 2 had placed an order for supply of 21.5MT of lithophone with Texpo International, Hong Kong. Upon arrival of the goods a bill of entry was filed and duty of 21.5 MT of lithophone was assessed and paid. On or about June 8, 1999 the goods were physically examined and it was found that the goods were really 11.5 MT of lithophone and 10 MT of tetracycline HCL BP 93. The bags containing lithophone and tetracycline were of different shapes and sizes and they could be distinguished easily. The lithophone has thus not been used for concealment of tetracycline. 11.5 MT of lithophone are, however, not offending goods and even no allegation has been made against the said quantity of lithophone for confiscation u/s 119 of the Customs Act, 1962. The 11.5 MT of lithophone, therefore, could be released straight away and the excess amount of duty paid by the noticee should be refunded.

(b) Since the petitioners came to know that the goods found upon physical verification were not the goods which were ordered, they immediately contacted the foreign supplier in Hong Kong and the said supplier after making enquiries reported back to the noticee that due to some mistake in his godown, 11.5 MT of lithophone and 10 MT of tetracycline were sent instead of 21.5 MT of lithophone and he requested that 10 MT of tetracycline which were missent goods might be shipped back to him and he would pay the expenses for that.

(c) It was a bona fide mistake on the part of the foreign supplier and the petitioners should not be blamed in any manner for what had happened by mistake. In paragraph 27 of the show cause notice, the Customs Authority had stated that evidence would not be disclosed since the enquiry was yet to be completed and if no evidence was disclosed to the petitioners, there was no reason for giving such show cause notice. In paragraph 28 of the show cause notice it was mentioned that some documents were in existence and those would not be provided to the petitioners. Thus, there was nothing on record to say that

the explanation given by the petitioners were not true.

(d) The burden to prove that the defence of the petitioners is baseless or wrong is on the department and the department not having discharged such burden, no action should be taken against the petitioners.

(e) Tetracycline could not be confiscated u/s 14 of the Drugs and Cosmetics Act, 1940 and personal penalty could not be imposed u/s 13 of the said Act by the Commissioner of Customs inasmuch as power of confiscation and personal penalty vested only in the Court u/s 15 of the said Act.

4. Ultimately the Commissioner of Customs (Port) by order dated December 29, 2000 passed an order of confiscation of the entire materials weighing 21.5 MT containing 10 MT of tetracycline and 11.5 MT of litho-phone u/s 111(d) and 111(m) of the Customs Act, 1962 read with Section 119 thereof and Section 3 of Foreign Trade Development and Regulation Act. By the said order the said respondent, however, gave the petitioners an option to redeem the confiscated goods on payment of a fine of rupees thirty lakh in lieu of confiscation. It was further ordered that the option must be exercised within three months of the receipt of the order or such extended period as might be allowed by the Commissioner of Customs (Port). After redemption, the order provided, the importers might re-export the goods within a fortnight from the date of such redemption without any payment of duty leviable thereon or the importers might take out the goods for home consumption on payment of duty on the date of such redemption.

5. The Commissioner of Customs (Port) further imposed a penalty of rupees five lakh on petitioner No. 1 u/s 112(a) of the Customs Acts, 1962 and a personal penalty of rupees one lakh on Mr. Rajesh Kothari, Proprietor of the importing firm M/s. Kothari Filaments u/s 112(b) of the said Act. However, the clearing agent was absolved all the allegations against him as the same was not conclusively proved.

6. Being dissatisfied, the petitioners filed an appeal before the Tribunal. The matter was heard by a Division Bench of the Tribunal. The learned Member (Judicial) allowed the petitioners' appeal following the decision of the Supreme Court in the case of Siemens Ltd. Vs. Collector of Customs and Others, . Learned Member (Technical) however dismissed the appeal. Since there was difference of opinions, the matter was referred to the President of the Tribunal u/s 129(c)(5) of the Customs Act and the learned President agreed with the order of the learned Member (Technical) and by majority, the impugned order dated April 19, 2002 was passed against the petitioners.

7. Being dissatisfied the petitioners have come up with the instant application under article 226 of the Constitution of India.

8. Mr. Bandyopadhyay, the learned Counsel appearing on behalf of the respondent/Customs Authority has taken a preliminary objection to the

maintainability of the instant writ application on the ground of existence of an efficacious alternative remedy of the petitioners provided in Section 130A of the Customs Act by way of reference. Mr. Bandyopadhyay contends that under such circumstances this Court instead of entertaining the writ application should ask the petitioners to avail of the said remedy.

9. The aforesaid preliminary objection raised by Mr. Bandyopadhyay has been seriously disputed by Mr. J.H. Srivastava, the learned Counsel appearing on behalf of the petitioners. According to Mr. Srivastava, the remedy provided in Section 130A of the Customs Act is not an efficacious alternative remedy of the petitioners. Mr. Srivastava contends that law on the points involved in this writ application having already been settled by the Supreme Court in the case *Simens Limited* (supra), the remedy of Section 130A cannot benefit the petitioners in any way. Mr. Srivastava further contends that even if it is assumed for the sake of argument that the petitioners have such alternative remedy, existence of such a remedy cannot be an absolute bar in entertaining a writ application if the petitioners can convince this Court that the decision of the Tribunal is contrary to the clear decision of the Supreme Court given on that point. Mr. Srivastava thus prays for overruling the aforesaid preliminary objection.

10. So far the merit of this writ application is concerned, Mr. Srivastava contends that the point involved in this writ application has already been concluded by a decision of the Supreme Court in the aforesaid case of *Simens Limited*, wherein the Supreme Court held that when the goods have been ordered to be re-exported, neither any redemption fine can be imposed nor is any duty required to be paid. Thus, Mr. Srivastava continues, the majority of the members of the Tribunal acted illegally in affirming the decision of the Commissioner of Customs by taking a contrary view. Mr. Srivastava has further placed strong reliance upon the following decisions of various Customs, Excise and Gold (Control) Appellate Tribunals of different States:

(1) 2003 (106) ECR 1 32 .

(2) 1997 (92) ELT 367 .

(3) 1993 (46) ECR 674 .

(4) 2002 (102) ECR 297

(5) 2000 (121) ELT 426

(6) 1991 (33) ECR 398

(7) *Datalab (India) Limited v. Collector of Customs, Bombay* reported in 1999 (109) E.L.T 352 (Tribunal) = 1997 (19) R.L.T. 390 (CEGAT-SB)

(8) 2000 (118) ELT 517 (CEGAT)

(9) *Alukkas Exporters v. Commissioner of Customs, Coimbatore* reported in 2002 (145) E.L.T. 227 (Tribunal) = 2002 (48) R.L.T. 311 (CEGAT-Che.)

(10) Siemens Public Communication Networks Ltd. v. CC (Airport), Calcutta reported in 2001 (137) E.L.T. 623 (Tribunal) = 2001 (43) R.L.T. (CEGAT-Kol.)

11. Mr. Srivastava next contends that lithophone being not placed in the list of prohibited goods, no order of confiscation could be passed in respect of 11.5 MT of lithophone. Therefore, the respondents authorities acted illegally in confiscating 11.5 MT of lithophone notwithstanding the fact that lithophone is not prohibited goods. Mr. Srivastava submits that at the most, the Customs Authority could confiscate 10 MT of tetracycline if they reject the contention of the petitioners that for the mistake on the part of the foreign manufacturer those were brought to this country.

12. Mr. Srivastava further contends that in the facts of the present case, the Customs Authority acted illegally in rejecting the contention of the petitioners that through mistake tetracycline's were sent by the foreign manufacturer inasmuch as the petitioners have not been given any opportunity to contradict the undisclosed documents relied upon by the Customs Authority in arriving at the conclusion that there was collusion between petitioners and the foreign manufacturer.

13. According to Mr. Srivastava before coming to such decision, all the documents relied upon by the respondent should be brought to the notice of the petitioners and his clients should be given opportunity of contradicting those documents by giving further evidence. In the absence of disclosure of such documents, Mr. Srivastava contends, those documents should be deemed to be non est and as such, decision of the authority based on those documents should be set aside.

14. Mr. Srivastava thus prays for a direction upon the respondent to refund the redemption fine as well as personal penalty imposed by the respondent authority.

15. The aforesaid contentions of Mr. Srivastava have been seriously disputed by Mr. Bandyopadhyay appearing on behalf of the respondents. Mr. Bandyopadhyay contends that the decision of the Supreme Court in the case of Siemens Ltd. Vs. Collector of Customs and Others, does not apply to the facts of the present case. Mr. Bandyopadhyay points out that in the case before Supreme Court the Customs Authority not only gave option to the petitioners therein for redemption of the imported item on payment of fine and appropriate duty, if they wanted to keep the goods in India but at the same time, also gave the petitioners option to re-export the said goods within three months and it was specifically ordered that in case of re-export, no duty would be chargeable. In the present case, on the other hand, the Customs Authority did not give such liberty as given in the case of Siemens Limited (supra). Thus, Mr. Bandyopadhyay contends that the decision given by the Supreme Court in the facts of such case cannot apply as a precedent to the present case where the facts are totally different. Mr. Bandyopadhyay contends that Supreme Court, as a proposition of law, has never laid down in the said decision that whenever there is an option for reexport,

there cannot be any order of payment of redemption fine or personal penalty. He, therefore, submits that in all the decisions referred to by Mr. Srivastava, the Tribunals have misinterpreted the decision of the Supreme Court and have laid down a wrong proposition of law.

16. As regards the second contention of Mr. Srivastava, Mr. Bandyopadhyay contends that although lithophone is not a prohibited goods, once a case of mis-description of the goods has been established, the onus is entirely upon the importer to show that it was a mistake on the part of the foreign supplier. Under such circumstances, unless the initial burden is discharged, there is no necessity on the part of the Customs Authority to rely upon any document. Mr. Bandyopadhyay thus prays for dismissal of this writ application even on merit.

17. The first question that arises for determination is whether this Court should entertain this writ application in view of the alternative remedy available to the petitioners as provided in Section 130A of the Customs Act.

18. It is now settled position of law that mere existence of an alternative remedy available to the petitioners is not an absolute bar in entertaining a writ application under Article 226 of the Constitution of India. In a case where the petitioner alleges that the order impugned is passed in ignorance of a law declared by Supreme Court, a writ Court can entertain a writ application for verifying whether the contention of the petitioner is correct or not. Similarly, if it is alleged that the order impugned is passed by not following the principles of natural justice, a writ Court can go into that question notwithstanding existence of alternative remedy. In the present case, Mr. Srivastava having vehemently contended that the order of the Tribunal is contrary to a settled law laid down by Supreme Court and that in holding that this case was not one of bona fide mistake of the foreign manufacturer, the Customs Authority acted against the principle of natural justice by relying upon undisclosed materials, such pleas can be investigated in a writ application even if the petitioners have other alternative remedy. Under the aforesaid circumstances, I turn down the preliminary objection raised by Mr. Bandyopadhyay and propose to enter into the merit of arguments advanced by Mr. Srivastava.

19. Therefore, I proceed to consider the principal point raised by Mr. Srivastava that having regard to the decision of the Supreme Court in the case of Siemens Limited (supra), the majority of the members of the Tribunal acted illegally in arriving at a contrary conclusion.

20. In the case of Siemens Ltd. Vs. Collector of Customs and Others, the Supreme Court was considering a case where the Commissioner of Customs passed, inter alia, the following orders as quoted in paragraph 2 of the said judgment:

"I order for confiscation of one unit Laser Imager valued Rs. 20 lakhs u/s 111(d) of Customs Act, 1962.

However, I give the option to M/s. Siemens Ltd. Delhi for redeeming the Laser Imager on payment of fine of Rs. 6,00,000/- only and appropriate duty of Customs leviable thereon, if they desire to avail to keep it in India.

I also give M/s. Siemens the option to re-export the Laser Imager to Germany within 3 months from the date of receipt of this order and in such case no duty will be chargeable."

21. Therefore, in the said case the Customs Authority after passing an order of confiscation u/s 111(d) of the Customs Act, gave option to the petitioners for redeeming the said item on payment of rupees six lakh and appropriate duty of customs leviable thereon if they desired to keep it in India. On the other hand, if the petitioners desired to re-export item to Germany within three months, in such a case, the authority specifically exempted the petitioner from paying any duty.

22. The Tribunal, however, interpreted the said order by saying that if the petitioner wanted to keep the goods in India, then he should pay the redemption fine and duty and after payment of duty, if he still wanted to export them, he was entitled to duty drawback in terms of Section 74 of the Customs Act. The Tribunal totally overlooked the fact that the adjudicating authority had also given the appellant the concession that in case it was re-exporting the goods within three months, it need not pay the duty. The appellant in the said case paid the redemption fine of rupees six lakh. It was unable to re-export the goods within three months because of certain actions on the part of the Customs authorities. Under such circumstances, the appellant moved the Supreme Court by an interim application in the appeal and an order was passed on 22nd February, 1999. By the said order the Supreme Court having regard to the facts that were brought to its notice, extended the period of three months fixed by the adjudicating authority for re-export of the goods in which event neither the redemption fine nor the duty was liable to be paid. In such circumstances, the Supreme Court held that the appeal should be allowed and the respondent should be directed to refund to the appellant an amount of rupees six lakh paid by way of redemption fine.

23. In my view, the said decision cannot be read as an authority for a proposition of law that whenever an order has been passed for re-export, no redemption fine can be at all chargeable. In this case, as pointed out earlier, the adjudicating authority has given the petitioners an option to redeem the confiscated goods on payment of fine of rupees thirty lakh and it was specifically made clear that option should be exercised within three months or such extended period as may be allowed by the Commissioner. It was further provided that after redemption, the importer might re-export the goods within a fortnight from the date of redemption without any payment of duty leviable thereon or the importers may take out goods for home consumption on payment of duty at the date of such redemption. Therefore, in this case, after specific finding that there was violation of law on the part of the petitioners, the goods were confiscated and redemption

fine was imposed and only after redemption, the petitioners were permitted to re-export the goods without any payment of duty leviable thereon. This is not a case where the petitioner was given liberty either to pay redemption fine or to re-export within a specified period.

24. I, therefore, find substance in the contention of Mr. Bandyopadhyay that the decision of the Supreme Court in *Siemens Limited* (supra) cannot have any application to a case where the adjudicating authority permitted the petitioners to re-export the imported goods on the sole condition that the petitioners should first pay redemption fine. In my view, the various decisions cited by Mr. Srivastava of different tribunals in India have been passed in total misinterpretation of the Supreme Court decision. The decision of the Supreme Court in the case of *Siemens Limited* (supra) could be applicable only to a case where adjudicating authority gives option to the petitioner either to pay redemption fine and appropriate duty or to re-export without payment of any duty, but not to a case where re-export has been permitted only after payment of redemption fine. I thus find that the majority of the members of the tribunal rightly refused to apply the decision of the Supreme Court in the case of *Siemens Limited* (supra) to the facts of the present case.

25. As regards the second contention, there is no dispute with the proposition of law that even if a particular item is not prohibited for the purpose of import, once there is mis-description, the Customs Authority in terms of Section 111(m) of the Act, can confiscate the entire goods. It is not necessary that confiscated goods must be prohibited goods. Therefore, there being definite mis-description of the imported goods in the bills of entry, the entire goods were liable to confiscation and not that part of the goods which is prohibited. I thus find no substance in the second contention of Mr. Srivastava.

26. Lastly, as regards the findings of the Commissioner of Customs that there was mala fide intention on the part of the petitioners in giving mis-description of the goods, such findings having been passed on appreciation of the entire facts involved herein, there is no scope of interference with such findings of fact. It appears from the order of the Customs authority that in paragraphs 27 and 28 of the show cause notice, sufficient indications have been given as regards the outcome of the overseas enquiry through departmental source. Although documents were not given to the petitioners as regards the investigation done by such Authority, the initial burden was upon the petitioners to show bona fide mistake on the part of their exporter. Therefore, unless sufficient materials are placed by the petitioners showing that it was a mistake on the part of the foreign exporter to send wrong item and that the conclusion of the overseas enquiry was wrong, the Customs Authority had no liability to disclose their materials. The position would have been different if the initial onus was upon the Customs Authority to prove mala fide intention of the petitioners and in such a case, it could be legitimately argued by the petitioners that in the absence of disclosure of documents they were unable to controvert the veracity of such document.

Thus I do not find any reason to go into the aforesaid findings of mala fide recorded by the customs authority against the petitioners in this writ jurisdiction. Such findings are quite reasonable and cannot at any rate be called perverse.

27. All the points taken by Mr. Srivastava having failed I find no merit in the instant writ application and the same is liable to be dismissed.

28. In the facts and circumstances there will be, however, no order as to costs.