
(1978) 03 BOM CK 0005

In the Bombay High Court

Case No : Appeal No. 204 of 1974 in Miscellaneous Petition No. 406 of 1969

M.A. Rangaswami and Others

APPELLANT

Vs

Amin Chand Payarelal Firm, Bombay

RESPONDENT

Date of Decision : 09-03-1978

Acts Referred:

Customs Act, 1962 — Section 11, 11(1), 111, 112, 125

Imports and Exports (Control) Act, 1947 — Section 3, 3(1), 3(2), 3(3), 4A

Sea Customs Act, 1878 — Section 167, 167(8), 19

Citation : AIR 1979 Bom 130 : (1978) 80 BOMLR 250

Hon'ble Judges : Kantawala, C.J.;Desai, J

Bench : Division Bench

Advocate : R.J. Joshi and F.H.S. Taleyarkhan and S.G. Shah, instructed by R.L. Mukherjee, for the Appellant; A.J. Rana and S.N. Parikh, instructed by Jamshedji Rustomji and Devidas and Jani and Merchant, for the Respondent

Final Decision : Allowed

Judgement

Desai, J.—This appeal is from the decision of Lentin J. in Misc. Petition No. 406 of 1969. By the impugned decision the learned trial Judge allowed the petition and made the Rule absolute, but directed each party to bear its own costs of the petition. Being aggrieved by the said decision the respondents to the Misc. Petition have preferred this appeal, the original petitioners being the respondents to this appeal.

2. It is found from the impugned decision that the learned trial Judge summarized the grounds of challenge by the petitioners before him on three broad heads. He further found that it was sufficient to dispose of the petition and give relief to the petitioners on the first of these heads and accordingly the two other heads of submissions urged by the petitioners were not dealt with by the learned trial Judge. As indicated hereinafter, we find that the approach of the learned trial Judge on the first head of submissions is not in accordance with the legal position as we see it. Accordingly it becomes necessary to have the two

other broad heads of submissions disposed of. Ordinarily it could have been done before us. But we found that In order to do so, it was necessary to go into the permits issued and other circumstances, on which the necessary materials had not been brought on record before the trial Court. In this state of affairs, in the view that we have taken of the grounds which appealed to the trial Court, as we shall indicate hereinafter, we propose to remand the Misc. Petition back for further trial on the grounds not dealt with by the trial Court. Accordingly we propose to restrict our discussion in this order only to the limited ground on which the petition was allowed, without going into the other heads which are still to be disposed of and will have to be disposed of by a single Judge pursuant to our order of remand.

3. It is in this context that we make the observation that we propose to give no finding as to any of the actual facts which transpired and we do not go into the correctness or otherwise of the factual contention of the petitioners or of the conclusion on facts reached by either the Collector of Customs or the Member of the Central Board of Excise and Customs. Whether these conclusions were justified or unjustified, proper or improper, perverse or possible, are matters left at large to be disposed of on remand.

4. In order to understand the legal ground on which the petition was decided in favour of the petitioners, a few facts may be stated:

5. The petition was for setting aside the order dated 30th October 1965 passed by the 1st appellant (hereinafter referred to as "the Collector of Customs") and the order dated 11th October 1968 passed by the 2nd appellant (hereinafter referred to as "the Member, Central Board of Excise and Customs"). The petitioners also sought for the refund of Rs. 2,00,000/- recovered from the petitioners as fine in lieu of confiscation and personal penalty. The 3rd appellants before us, who were the 3rd respondents to the Misc. Petition, are the Union of India.

6. The petitioners are a partnership firm registered under the Indian Partnership Act. On 8th August 1961 the petitioners were granted a licence valid till 28th February 1962 for the import of galvanised plain sheets. The petitioner's case is that on 16th November 1961 they placed an order with M/s. Metal Impex Budapest, Hungary, for supply of 555 tons of galvanised plain sheets with a stipulation that the goods should cross the Hungarian border on or before 28th February 1962. The shipment was to be effected from any European port. On 3rd December 1961 Messrs. Metal Impex wrote to the petitioners accepting this order and confirming that delivery would be in January/February 1962. According to the petitioners, on 27th February 1962 a Cross Border Certificate was issued by the Hungarian authority authorised to issue certificate, which certificate was to the effect that the goods had crossed the Hungarian border on 25th February 1962 for Stettin, a port in Poland, for shipment to Bombay. On 26th March 1982 the petitioners inquired from M/s. Metal Impex the name of the ship on which the goods were consigned and asked for various relevant documents such as the Bill

of Lading, Invoice, etc. After a further reminder, on 28th April 1962 M/s. Metal Impex addressed a letter to the petitioners stating that their (M/s. Metal Impex's) forwarding agents at Stetting had promised that the goods would be shipped immediately they arrived at the port. After one further reminder, information was received by the petitioners from M/s. Metal Impex to the effect that the goods had not yet reached Stetting and that a search was in progress in respect of the same. Thereafter, pursuant to further inquiry on 2nd July 1962 M/s. Metal Impex wrote to the petitioners that the goods had erroneously been delivered at port Goausk instead of being delivered at Stetting and that steps were being taken for the goods being sent to Stetting. On 28th September 1962 the petitioners were informed by M/s. Metal Impex that the goods had arrived at Stetting port and would be shipped by the next steamer. On 22nd October 1962 the petitioners instructed M/s. Metal Impex to ship the goods without further delay. In reply M/s. Metal Impex by their letter dated 30th October 1962 informed the petitioners that they were unable to secure the necessary shipping space. However, on 28th November 1962 intimation was received from M/s Metal Impex to the effect that the shipping space had been secured and that the goods would leave for India in due course. It appears, however, that on 10th January 1963 M/s Metal Impex addressed a letter to the petitioners stating that Port Stetting was frozen, and the petitioners were by the said letter requested to be patient until navigation was possible. On 14th February 1963 and Hungarian party addressed another letter informing the petitioners that by reason of frosty weather, large quantities of goods were stored at that port (Stetting) and a hope was expressed that the goods could be shipped to India by 1st March 1963. On 15th March 1963 M/s. Metal Impex informed the petitioners that the goods had been shipped on 13th March 1963, and in fact the goods arrived at Bombay on 20th April 1963 by S.S. Zamenhoff. Thereafter, pursuant to the petitioners' application dated 16th May 1963, the goods were removed to the Bonded Warehouse pending receipt of the necessary Customs Clearance Permit (hereinafter referred to as "the C. C. P."). On 18th November 1963 the petitioners obtained from the Deputy Assistant Iron and Steel Controller the C.C.P. This C.C.P. contained the following superscription: "Valid If Crossed Hungarian Border on or before 28-2- 1962 but after 8-8-1961" (to be found at page 42 of the Appeal paperbook). On 19th/21st December 1964 a show cause notice was issued by the Principal Appraiser, Special Investigation Branch, calling upon the petitioners to explain why these goods should not be confiscated u/s 111 of the Customs Act, 1962, read with section 3 (2) of the Imports and Exports (Control) Act, 1947, (as amended), and why action should also not be taken u/s 112 of the Customs Act, 1962. The proposed action was on the ground that the Cross Border Certificate was manipulated with the intention of getting the goods cleared clandestinely against the C. C. P. which was valid only if the goods had crossed the Hungarian border before 28th February 1962. On 29th January 1965 the petitioners filed their reply to the show-cause notice. Thereafter personal hearings were given to the petitioners on 14th June 1965 and on 18th September 1965. Pursuant to these hearings the Collector of

Customs passed his order dated 30th October 1965, ordering confiscation of the goods u/s 111 of the Customs Act, 1962, read with section 3 of the Imports and Exports (Control) Act, 1947, but giving option to the petitioners to pay in lieu of confiscation of a fine of Rs. 1,00,000/-; this was under provisions contained in section 125 of the Customs Act, 1962. By his order the Collector of Customs also levied penalty of Rs. 1,00,000/- on the petitioners u/s 112 of the Customs Act, 1962. On 3rd December 1965 the petitioners paid the fine and the penalty under protest and cleared the goods. On 21st January 1966 the petitioners preferred an appeal to the Central Board of Excise and Customs. The grounds of appeal are contained in the detailed letter which the petitioners had addressed to the said Central Board. A personal hearing was given to the petitioners by the Member of the Central Board on 13th September 1967. The said Member of the Central Board of Excise and Customs by his order D/- 11th Oct. 1968 rejected the appeal and confirmed the order of the Collector of Customs. These are the two orders which are impugned by the petitioners in their petition.

7. The above recital of facts is substantially as per the factual averments in the petition and it may only be stated that the stand of the respondents to the petition (the appellants before us) was that the goods which arrived in India in April 1963 had not crossed the Hungarian border on or before 28th February 1962 as was required by the C.C.P. According to the respondents to the petition, the Cross Border Certificate was a fabricated document. It was in these circumstances that impugned orders for confiscation with an option to pay the fine of Rs. 1,00,000/- in lieu of confiscation and the further order for the levy of penalty were sought to be justified.

8. As stated earlier, the learned trial Judge made the Rule absolute and granted relief to the petitioners by quashing the two impugned orders proceeding mainly upon the submissions to be found in the later part of paragraph 17 (a) of the petition. This was on the assumption -- without any admission thereof --that even if what the respondents contend was correct viz. that the goods had crossed the Hungarian border later than 28th February 1962, this was a mere breach of a condition of the C.C.P. and such breach of a condition would not entitle the Customs authorities to confiscate the goods or levy a personal penalty under the provisions to be found contained in sections 111 and 112 of the Customs Act, 1962. For the purpose of this submission reliance was placed by the petitioners on a decision of the Supreme Court in *Additional Collector of Customs, Calcutta and Another Vs. Best and Company*, , as also on the unreported judgment of this High Court in which the aforesaid Supreme Court decision was followed and applied. These unreported decisions are of *Kantawala J.* (as he then was) in *Misc. Petn. No. 356 of 1966* (decided on 16-3-1971) (Bom), which was subsequently confirmed by a Division Bench of this High Court consisting of *Tulzapurkar and Kama JJ.* in *Appeal No. 50 of 1971*. (decided on 22-4-1974) (Bom). It may be stated that the decision of the Supreme Court in *Best & Co.*'s case as well as the aforesaid two unreported decisions of the Bombay High Court were not based on any provisions of the Customs Act, 1962,

but on section 167 (8) of the Sea Customs Act, 1878, read with the relevant provisions of the Imports and Exports (Control) Act, 1947, read with the provisions of the Imports (Control) Order, 1955. The argument of the petitioners was that the provisions of the Customs Act, 1962, under which the impugned orders were passed were In pari materia with the provisions of the Sea Customs Act, 1878 considered in the Supreme Court judgment and the two other unreported Bombay High Court Judgments and the same result must follow in the present case as in Misc. Petn. No. 356 of 1966 viz. that the order of confiscation and the order of penalty could not be upheld and would require to be quashed. It is this submission that found favour with the learned trial Judge and it is the correctness of the approach and the conclusions of learned trial Judge which have been assailed by Mr. Joshi on behalf of the appellants before us.

9. Before advertng to the aforesaid decisions on which reliance was placed at the Bar by Mr. Rana appearing for the original petitioners, we may briefly indicate the statutory provisions under which action of confiscation and imposition of penalty was taken.

10. Chapter XIV of the Customs Act. 1962, deals with confiscation of goods and conveyances and imposition of penalties, We are concerned with Sub-section (d) of Section 111, and the same reads as follows:--

"111. The following goods brought from a place outside India shall be liable to confiscation;--

XXX XXX XXX

(d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;

XXX XXX XXX" (underlining supplied).

11. Section 112 provides for penalty for improper importation of goods, etc. in following words:

"112 Any person-

(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation u/s 111, or abets the doing or omission of such an act, or

(b) xxx xxx xx".

12. The quantum of penalty is provided also in Section 112, but we are really not concerned with this aspect of the matter, and it is not the petitioners grievance that the penalty imposed u/s 112 is beyond the prescribed limit. It is, however, their case that no penalty at all can be imposed against them.

13. Before parting with the Customs Act, 1962, reference may be made to the

definition section viz. Section 2 of the said Act, and, in particular, to the definitions of "imported goods" to be found in Section 2(25) and "prohibited goods" in Section 2(33). Now, Section 2(33) reads as under :-

Section 2(33). "prohibited goods means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with." (underlining supplied),

14. In the judgment of the learned trial Judge the relevant provision of the Sea Customs Act, 1878, viz. section 167 (8) has been extracted. This provision occurs in Chapter XVI of the said Act which deals with offences and penalties and reads as follows:-

"167. Punishments for offences:

The offences mentioned in the first column of the following schedule shall be punishable to the extent mentioned in the third column of the same with reference to such offences respectively:

Offences Section of this Act to which offence has reference Penalties

... ..

... ..

8. If any goods the Importation Or exportation of which is for the time being prohibited or restricted by or under Chapter IV of this Act, be imported into or exported from India contrary to such prohibition Of restriction; or

18 & 19.

Such goods shall be liable to confiscation ; and any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods, or not exceeding one thousand rupees.

If any attempt be made so to Import or export any such goods; or

... ..

... ..

It is pertinent to note that both confiscation and penalty are provided in the very same provision. What is more important is the difference in phraseology between section 167 (8) of the Sea Customs Act, 1878, and section 111(d) of the Customs Act, 1962; the former talks of importation of goods which are for the time being prohibited or restricted by or under Chapter IV of the Sea Customs Act, 1878 whereas the Customs Act 1962, with which we are concerned, talks of prohibition imposed by or under the Customs Act or any other law for the time being in force.

15. Before dealing with the authorities cited at the Bar we may also refer to the Imports and Exports (Control) Act, 1947, and the Imports (Control) Order, 1955, both being very relevant provisions for our purposes, inasmuch as it was contended on behalf of the appellants that on the assumption that the goods had not crossed the Hungarian border by 28th February 1962, the import must be deemed to be a prohibited import by reason of the provisions contained in the said Act of 1947 read together with the provisions of the Imports (Control) Order, 1955. Section 3 of the Imports and Exports (Control) Act, 1947, confers power on the Central Government to prohibit or restrict imports and exports; this may be done by an order published in the Official Gazette and Sub-section (2) of section 3 as in force at the relevant time provided as under :-

"3 (2) All goods to which any order under Sub-section (1) applies shall be deemed to be goods of which the import or export has been prohibited u/s 11 of the Customs Act, 1962, and all the provisions of that Act shall have effect accordingly",

16. It may be noted that Sub-section (3) of section 3 also empowers the Central Government by order published in the Official Gazette, to prohibit, restrict or impose conditions on the clearance, whether for home consumption or for shipment abroad, of any goods or class of goods imported into India. The Imports (Control) Order, 1955, is expressly made in exercise of powers conferred by section 3 and section 4A of the Imports and Exports (Control) Act, 1947, as in force; and we are concerned with Clause 3 (1) of the said Order, which reads as follows:

"3. Restriction of import of certain goods. -- (1) Save as otherwise provided in this Order, no person shall import any goods of the description specified in Schedule I, except under, and in accordance with, a licence or a Customs clearance permit, granted by the Central Government or by any Officer specified in Schedule II".

(Underlining supplied).

It may be mentioned that the Deputy Assistant Iron and Steel Controller is one of the officers mentioned in Schedule II.

17. A very brief argument advanced at the Bar by learned counsel for the appellants (the Collector of Customs and the Member, Central Board of Excise and Customs) was that proceeding on the assumption that the goods had not crossed the Hungarian border by 28th February 1962, as was the case of his clients, those goods had not been imported in accordance with the C.C.P. issued by the Deputy Assistant Iron and steel Controller. It was accordingly submitted that the import of the goods, which was attempted to be made by the petitioners, was in contravention of the provision contained in Clause 3 (1) of the Imports (Control) Order, 1955, and such attempt to import was within the provision to be found in Section 111(d) of the Customs Act, 1962, as being contrary to any prohibition imposed by or under any other law for the time being

in force. It was not disputed by Mr. Rana that the Imports (Control) Order, 1955, made in pursuance of the powers conferred on the Central Government by Sections 3 and 4A of the Imports and Exports (Control) Act, 1947, would be covered by the later portion of section 111(d) (as underlined earlier by us while extracting the statutory provisions).

18. As stated earlier, the submission of the learned counsel for the petitioners was that the requirement that the goods must have crossed the Hungarian border by 28th February 1962 was only a condition of the C.C.P., and that assuming there was a breach of this condition, such breach could not empower the Collector of Customs or the Member of the Central Board of Excise and Customs to pass any order purporting to confiscate the goods or levy a personal penalty on the appellants. According to learned counsel, the point was concluded in his favour by the decision of the Supreme Court in the Additional Collector of Customs, Calcutta and Another Vs. Best and Company, as also by the unreported decisions of this High Court in Misc. Petn. No. 356 of 1966 and Appeal No. 50 of 1971 which was an appeal from the decision of the learned single Judge in Misc. Petn. No. 356 of 1966. It becomes necessary, therefore, to consider whether the point is so concluded as contended by learned counsel.

19. In Additional Collector of Customs, Calcutta and Another Vs. Best and Company, the reported decision indicates that the question which was posed for consideration by the Supreme Court (as is to be found in paragraph 4 of the report) was: Whether for breach of a condition of the licence penalty may be imposed u/s 5 of the Imports and Exports (Control) Act, 1947, read with the Sea Customs Act, 1878? This was answered by the Supreme Court in the following words (at page 172):

"In the present case the Customs authorities did not direct prosecution for contravention of any condition of a licence; they directed confiscation of the machinery and imposed penalty in lieu thereof. But on the terms of Section 5, as amended, the right to impose penalty for contravention of any condition of a licence may be exercised under the Sea Customs Act, 1878, and not under the Imports and Exports (Control) Act, 1947. For breach of any condition of a licence it is open to the authorities to direct prosecution, but no order confiscating goods and imposing penalty in lieu thereof could be made. The order of confiscation could only be made u/s 167, clause (8) of the Sea Customs Act, 1878; in terms clause (8) of Section 167 provides for confiscation of the goods importation or exportation of which is for the time being prohibited or restricted by or under Chapter IV of the Sea Customs Act, 1878. The notification of which the contravention is said to have been made, is not issued u/s 19 of the Sea Customs Act, but under the Imports and Exports (Control) Act, 1947. It has not been urged before us, and rightly, that penalty of confiscation is incurred under the provisions of the Sea Customs Act, 1878, for breach of the conditions of the licence".

(Para 10 of the report)

20. It will be pertinent to note that in the aforesaid decision the Supreme Court did not have occasion to consider whether or not import or the attempt to import could be said to be in accordance with the licence or the C.C.P., which is the phraseology employed by clause 3 (1) of the Imports (Control) Order, 1955. It may be mentioned at this juncture that section 111(d) of the Customs Act, 1962 came to be considered by the Supreme Court in *Sheikh Mohd. Omer Vs. Collector of Customs, Calcutta and Others*, , where the Supreme Court also had occasion to deal with the precise implication of the definition of the expression "prohibited goods" to be found in section 2(33) of the Customs Act, 1962. The relevant statutory provisions of the Customs Act, 1962, the Exports and Imports (Control) Act, 1947, and of the Imports (Control) Order, 1955, are set out by the Supreme Court in paragraphs 4 to 9 of the report of the aforesaid decision, and it is observed in the first place (paragraph 6) that "prohibited goods" under the Act would include such goods as may be imported without complying with the prescribed conditions. In the case before the Supreme Court, Omer had sought to import a breeding mare under one of the exemptions available for clearance of one dog, a pet animal and birds, and it was urged that the expression "prohibition" occurring in Section 111(d) of the Customs Act, 1962, must be considered as a total prohibition and such expression would not bring within its fold the restriction imposed by clause 3 of the Imports (Control) Order 1955. After setting down the argument in full, which was inter alia based upon also the user of the words found to be contained in section 3 of the Imports and Exports (Control) Act, 1947, the Supreme Court was not impressed with the same. It observed (at p. 295):

".....We are not impressed with this argument. What clause (d) of section 111 says is that any goods which are imported or attempted to be imported contrary to "any prohibition imposed by any law for the time being in force in this country" is liable to be confiscated. "Any prohibition" referred to in that section applies to every type of "prohibition". That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression "any prohibition" in Section 111(d) of the Customs Act, 1962, include restrictions. Merely because section 3 of the Imports and Exports (Control) Act, 1947, uses three different expressions "prohibiting", "restricting" or "otherwise controlling", we cannot cut down the amplitude of the words "any prohibition" in Section 111(d) of the Act. "Any prohibition" means every prohibition. In other words all types of prohibition. Restriction is one type of prohibition. From item (I) of Schedule I, Part IV to Imports Control Order, 1955, it is clear that import of living animals of all sorts is prohibited. But certain exceptions are provided for. But nonetheless the prohibition continues."

(Para 14 of the report).

21. It may be observed that learned counsel for the appellants referred us to *The Collector of Customs, Madras Vs. Nathella Sampathu Chetty and Another*, , in order to show to us the effect of the provisions similar to those contained in Sub-

section (2) of section 3 of the Imports and Exports (Control) Act, 1947. As will be clear, it will be unnecessary to rely upon these provisions because of the express change in phraseology adopted by the new statutory provisions viz. Section 111(d) of the Customs Act, 1962, as contrasted with the earlier statutory provisions viz. Section 167 (8) of the Sea Customs Act, 1878. There is, however, in the very volume AIR 1962 SC a decision of the Supreme Court viz. *East India Commercial Co. Ltd., Calcutta and Another Vs. The Collector of Customs, Calcutta*, a decision which deals with the breach of a condition of a licence. In the case before the Supreme Court it was alleged that the party had obtained a licence by misrepresentation and had also subsequently infringed the condition in the licence not to sell the goods imported to third parties. The Supreme Court was considering the provisions contained in Section 167 (8) of the Sea Customs Act, 1878, and the majority of the Court held that Section 167 (8) of the Sea Customs Act could be attracted only if there was a contravention of the order issued u/s 3 of the Imports and Exports (Control) Act, 1947, and further that the infringement of a condition in the licence not to sell the goods imported to third parties was not infringement of the order. Accordingly in the opinion of the Supreme Court (by a majority), such an infringement did not attract Section 167 (8) of the Sea Customs Act. Similarly it was observed by the majority that a licence obtained by misrepresentation does not make the licence non est.

22. *N. Sampathu Chetty's* case came to be considered by the Supreme Court once again in *Ram Kirpal Bhagat and Others Vs. The State of Bihar*, which was after the enactment of the Customs Act, 1962. As stated earlier, in our opinion, we have not to rely upon section 3 (2) of the Imports and Exports (Control) Act, 1947, for upholding the action of confiscation and the levy of penalty, and, therefore, it does not appear to us to be necessary to lavish any time on the aforesaid decision. It is sufficient to state that it was observed by the Supreme Court that by reason of the amended language of Section 3 (2) the same effect continued as far as the Customs Act, 1962, was concerned, as was observed by the Supreme Court in the earlier decision at which time Section 167 (8) of the Sea Customs Act, 1878, was the law in force.

23. The provisions of the Imports and Exports (Control) Act, 1947, and of the Imports (Control) Order, 1955, came up for consideration before the Supreme Court in *Boothalinga Agencies Vs. V.T.C. Poriaswami Nadar*, and our attention was also drawn at the Bar to the observations to be found in para. 8 of the aforesaid report. As will be clear hereinafter, and in the view that we have taken viz. that this would be a prohibition under any other law for the time being in force, we are of opinion that it is unnecessary to go into the question whether this would be also a prohibition imposed by or under the provisions of the Customs Act, 1962, by reason of what is provided in Section 3 (2) of the Imports and Exports (Control) Act, 1947 (read with section 111 of the Customs Act, 1962),

24. It becomes necessary now to refer to the unreported decision given by this Court in Misc. Petal. No. 356 of 1966, which was affirmed in Appeal No. 50 of

1971. The point involved in the Misc. Petn. (No. 356 of 1966) was very similar to the one involved before us in this appeal though the said petition was required to be dealt with under the provisions of the law as it then stood viz. Section 167 (8) of the Sea Customs Act, 1878. In the said petition it was alleged on behalf of the Customs Department that the requirement of the C. C. P. (under consideration in that petition) to the effect that the materials should cross the Hungarian border by a particular date, had not been complied with and, therefore, the C.C.P. could not be accepted as valid to cover the importation in question. Accordingly it was submitted that the goods were imported in contravention of the provisions of the Imports (Control) Order. It was submitted by the petitioners before the learned single Judge that the breach of a condition of the import licence or the provisions of the C. C. P. would not entitle the Customs Authorities to confiscate the goods u/s 167 (8) of the Sea Customs Act, 1878, read with Section 3 (2) of the Imports and Exports (Control) Act, 1947, and to pass an order of personal penalty; and this contention was sought to be upheld by reference to the Supreme Court decision in the Additional Collector of Customs, Calcutta and Another Vs. Best and Company, . The learned single Judge considered that decision. It was sought to be argued by counsel on behalf of the Customs authorities that the decision of the Supreme Court was per incurium as certain provisions of the Imports (Control) Order were overlooked. It was observed after referring to the observations of the Supreme Court in Smt. Somavanti and Others Vs. The State of Punjab and Others, , that even if such contention may be assumed to be correct, the binding effect of a decision of the Supreme Court would not depend upon whether a particular argument is considered therein or not. Accordingly after discussing two earlier decisions of the Supreme Court in the East India Commercial Co. Ltd., Calcutta and Another Vs. The Collector of Customs, Calcutta, and in Boothalinga Agencies Vs. V.T.C. Poriaswami Nadar, (earlier referred to in this judgment), it was observed that the point was concluded in favour of the petitioners by reason of the decision of the Supreme Court in Best & Co."s case.

25. In our opinion, the decision of the learned single Judge in Misc. Petn. No. 356 of 1966 does not take the case of the petitioners any further than the decision of the Supreme Court in the Additional Collector of Customs, Calcutta and Another Vs. Best and Company, It was the Supreme Court decision which was applied and which, according to the learned single Judge, concluded the matter in the petitioners" favour.

26. Mr. Rana on behalf of the original petitioners contended that the decision in Appeal No. 50 of 1971 did not merely rest upon the Supreme Court decision in the Additional Collector of Customs, Calcutta and Another Vs. Best and Company, and he relied upon certain observations to be found in the said Division Bench decision in which the argument advanced on behalf of the Customs authorities was expressly repelled. Before the appellate Court the learned counsel on behalf of the Customs authorities made submissions falling in two broad categories, one of which was that the period of validity of the licence could not be considered to

be a condition of the licence at all, and, according to him, any importation beyond this period was in law an importation without any licence at all. This argument was dealt with by the Division Bench in the following words:

"The other arguments advanced by Mr. Shah were to the effect that the validity of the period of licence cannot be regarded as a condition of the licence at all. It was urged by him that on the expiry of the period of the import licence there is not further valid licence in existence and the import, if made, is not on a valid licence in existence and must be held to be illegal. It was further submitted by Mr. Shah that the import of goods under an invalid licence must be deemed to be in contravention of the Imports (Control) Order, 1955, and on this ground the case fell within the provisions of Section 167 (8) of the Sea Customs Act, 1878....."

27. It was observed, in the first place, by the Division Bench and categorically that it was not open to the appellants to advance such contention for the first time in appeal, since it was clear from the judgment of the learned single Judge in appeal that such contention was not advanced before him. It was, therefore, clearly observed that it was not open for the appellants to raise such a contention. However, to leave no cause for complaint the Division Bench proposed to consider the arguments of Mr. Shah (counsel for the appellants) on merits. It is these observations of the Division Bench that are relied upon by Mr. Rana before us. These observations read as follows:

"Even as far as these contentions of Mr. Shah are concerned, we are of the view that the same must also be negated in view of the decision in *Additional Collector of Customs, Calcutta and Another Vs. Best and Company*, . We may point out that even in that case Condition No. 1 of the licence which we have set out clearly provided that the licence granted was having quantity and value as the limiting factors and was not valid for clearance if the actual value of any item exceeded the C. I. F. value indicated in the licence by more than 5%. The ground on which the order of confiscation was sought to be supported was that the correct C. I. F. value exceeded the sum of Rs. 45,000/- by more than 5%. Yet this was regarded as a breach of a condition of the licence. If the provision in the licence setting out the scope of the licence from the point of view of the value of the goods permitted to be imported is regarded as a condition of the licence, we fail to see why a provision to the effect that the licence would be effective for a particular period should not be regarded in the same manner. The licence may be limited as regards the period of utilisation or as regards the nature of the goods permitted to be imported thereunder or as far as the monetary value of the goods is concerned. In view of the decision in the case of *Best & Co.*, it would be difficult to contend that any of these terms could be regarded as other than conditions. It is true that in that case this particular provision was called Condition No. 1. That, however, is a mere nomenclature or description given to the term or provision and cannot make any difference to the result. If such a term was really not a condition, merely having called it a condition could make

no difference. In fact, the term there specifically provided that the licence could not be valid if the actual value exceeded the C. I. F. value indicated in the licence by more than 5%, and yet it was held that the breach of this provision amounted in law to a mere breach of a condition. These submissions of Mr. Shah on the footing that there was no import at all under a valid licence, must also be rejected."

28. It was submitted by learned counsel for the petitioners (respondents before us) that these observations constituted the ratio of the decision of the Division Bench and were binding on us. It is a moot point in the context of the earlier observations, to which reference has been made, that it was not open for the appellants to raise such contention (though later on dealt with by the Division Bench) whether the observations of the Division Bench on this aspect of the matter are really to be regarded as the ratio of its decision. If it is not part of the ratio decidendi of the decision but merely certain observations on merits of arguments advanced at the Bar (which the Court expressly opined were not open to be urged), then these observations would seem to us to be in the nature of obiter dicta and hence not binding on us. But it appears to be unnecessary to consider these observations merely on the footing of obiter dicta and therefore not binding on us inasmuch as the question, posed before us in the terms in which it has been posed is essentially different from the argument advanced before the Division Bench, which argument was not acceptable to the Division Bench. The argument of Mr. Shah in the said Appeal was that the licence became invalid by reason of the breach of the condition, which was not found acceptable by the Division Bench in Appeal No. 50 of 1971. The argument before us is not that the C.C.P. is or became invalid on any footing whatsoever but simply that the attempted import of the goods by the petitioners was not in accordance with the C.C.P. granted by the Deputy Assistant Iron and Steel Controller. Once the proper question is posed, it would be found that the decision of the Division Bench in Appeal No. 50 of 1971 does not deal with the same and, therefore, is of little assistance to the learned counsel for the original petitioners.

29. As stated earlier, once the proper question is posed, the answer is fairly simple and does not admit of any elaborate argument. The question is whether on the assumption that the goods had crossed the Hungarian border after 28th February 1962, was the attempted import in accordance with the C.C.P.?

30. It was sought to be faintly suggested by Mr. Rana that if the C.C.P. dated 13th November 1963 is perused, we find certain particulars indicated after the name of the party to whom the C.C.P. is issued and the requirement of the goods crossing the Hungarian border by a particular date is to be found super scribed at the top right hand side, A distinction was sought to be made between these particulars and the condition, which distinction we do not find to be of any real substance. The C.C.P. is to be considered in its entirety and the question is then fairly required to be answered viz. whether the attempted Import is in accordance with what is contained and provided for in the C.C.P. considered in its

totality. The requirement to be found at the top of the C.C.P. on the right hand side is as much a part of the C.C.P. as the other particulars indicated and prefixed by numerals. In connection with this aspect of the matter Mr. Joshi on behalf of the appellants drew our attention to the views expressed by a Division Bench of the Calcutta High Court in Collector of Customs and Central Excise, West Bengal and Others Vs. Hindustan Motors Ltd. and Another, In para 53 of the report the contention similar to the one raised before us appears to have been dealt with.

31. To turn once again to the question which we have posed, on a fair reading of the C.C.P. which was obtained by the original petitioners it cannot be said, again proceeding on the assumption that the goods had crossed the Hungarian border after 28th February 1962, that the attempted import was in accordance with the C.C.P. If the attempted import was not in accordance with the C.C.P., we are of opinion that such an import is prohibited directly by the restriction to be found in Clause 3 of the Imports (Control) Order, 1955. To turn once again to the Imports and Exports (Control) Act, 1947, if regard be had to the provisions of Section 5 of the said Act as then in force, it would appear that such restriction would attract the penalty provided for in the said provisions. In other words, the contravention of the requirements of the Imports (Control) Order 1955, is made punishable or penal by reason of the provisions contained in Section 5 of the parent Act viz. the Imports and Exports (Control) Act, 1947. Now, with this background we pose the further question: Whether the goods which were attempted to be imported were being sought to be imported contrary to any prohibition imposed by or under any other law for the time being in force (to employ the phraseology of Section 111 of the Customs Act, 1962)? And if that question is considered in the light of the definition of the expression "prohibited goods" to be found contained in Section 2(33) and in the light of the decision of the Supreme Court in Sheikh Mohd. Omer Vs. Collector of Customs, Calcutta and Others, (already referred to), the answer must be in the affirmative, which would mean that the goods are liable to confiscation. If that is so, penal action u/s 112 of the Customs Act, 1962, would also be in order.

32. Our attention was drawn by Mr. Rana to the Statement of Objects and Reasons at the time of the enactment of the Imports and Exports (Control) Amendment Act. 1976. These are to be found at page 214 of the Gazette of India Extraordinary, Part II, Section 2, 1976, which reads as follows:

"The provisions of the Imports and Exports (Control) Act, 1947, and the Orders made thereunder were enforced either by the prosecution of the offender or by debarment of the offender from receiving import and export facilities for a specified period. Experience has shown that these steps did not have the desired effect in curbing the abuses of import and export facilities. Further, debarment of the offender from receiving further import facilities has its own repercussions on the industry as it affects the continuity of production and employment. There is also no guarantee that the sentences of imprisonment or fine imposed by the

Courts or the debarment of import and export facilities would mop up the ill-gotten gains accruing to the persons misusing the import and export facilities. With a view to removing these lacunae from the law, the President has promulgated the Imports and Exports (Control) Amendment Ordinance, 1975, to provide for the entry, inspection and search of premises in which imported goods or materials are suspected to have been kept or concealed and to seize them. Provisions for the confiscation of such goods and imposition of penalties have also been made in the Ordinance.

The Bill seeks to replace the said Ordinance."

33. It was submitted that the amendment of the Imports and Exports (Control) Act became necessary by reason of the decision of the Supreme Court in the Additional Collector of Customs, Calcutta and Another Vs. Best and Company, and, therefore, there was a legislative recognition of the legal position as enunciated by the Supreme Court in the said case. In our view, such an amendment must be deemed to be *ex major cautella* and cannot be given effect to as sought for this submission of Mr. Rana.

34. On the assumption that the goods crossed the Hungarian border after 28th February 1962 we are of opinion that the attempted importation thereof was not in accordance with the C. C. P. and therefore, action u/s 111(d) and Section 112 of the Customs Act, 1962, was attracted. In this view of the matter, the decision of the learned trial Judge upholding the contentions of the petitioners to be found in the later part of paragraph 17 (a) of the petition appears to us to be erroneous and will be required to be set aside. As stated earlier, the learned trial Judge has expressly not gone into the other submissions urged by Mr. Rana as are to be found in the remaining paragraphs of the petition and as summarized by the trial Court. As indicated earlier, we do not propose to deal with these submissions as it appears that full material necessary for dealing with them is not available before us; the respective counsel have also submitted that in this state of affairs interest of justice would require the matters to be remanded back, to the single Judge.

35. In the result, the appeal is allowed and the order made by the learned trial Judge making the Rule absolute in the petition is set aside and the petition will now stand remanded back to the trial Court to be disposed of in accordance with the legal position as is to be found in our decision. We make it clear once again that we have proceeded to discuss the legal position on an assumption in accordance with the findings of the Customs authorities (the correctness of which we have not gone into), which were to the effect that the goods had crossed the Hungarian border after 28th February 1962. We make it further clear that on remand the entire carriage and control of the petition will be with the trial Court.

36. As the appellants have succeeded in the appeal, the proper order for costs would be that the respondents should be directed to pay to the appellant the costs of this appeal quantified at Rs. 500/-(five hundred). The appellants will also

be entitled to the refund of the amount deposited by them in this Court by way of security for costs, There will be an order accordingly.

37. Mr. Joshi has drawn our attention to the order passed on 1st November 1974 made by the appeal Court. Under this order the appellants were required to deposit the amount of Rs. 2,00,000/- within the time mentioned in the said order and the respondents were given liberty to withdraw the same upon furnishing security to the satisfaction of the Prothonotary and Senior Master and upon their undertaking to the Court to refund the same if the appeal is allowed. We accordingly direct that, in accordance with the said undertaking, as the appeal has been allowed, the respondents (original petitioners) will refund to the appellants the amounts withdrawn, if at all, on or before 27th March 1978. Mr. Rana informs us that according to his instructions the respondents have not withdrawn the amounts deposited by the appellants and they are lying in Court. If that is so, these amounts deposited together with the accrued interest, if any, are directed to be refunded to the appellants.

38. The Prothonotary to act on the minutes on the usual undertaking to be given by the Appellants' Advocate.

39. Appeal allowed.