

(1989) 06 CAL CK 0006

In the Calcutta High Court

Case No : Writ Petition No's. 2726 and 2728 of 1988

Narendra Kumar Kedia

APPELLANT

Vs

Assistant Collector of Customs

RESPONDENT

Date of Decision : 28-06-1989

Acts Referred:

Constitution of India, 1950 — Article 14
Customs Act, 1962 — Section 110, 111

Citation : (1989) 24 ECC 279 : (1990) 49 ELT 352

Hon'ble Judges : Ajit K. Sengupta, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Ajit K. Sengupta, J.—These two writ applications are heard together and disposed of by this judgment and order.

2. Originally the grievance of the petitioner in these two writ applications both filed on 20th May, 1988 was against the two several show cause notices. Pursuant to the direction of this Court, the adjudication order was passed by the Additional Collector of Customs and by his order dated 1st December, 1988, the Additional Collector of Customs imposed the penalty and redemption fine. The said order is under challenge in this proceeding.

3. The facts leading to the said adjudication order which is impugned in this proceeding are stated hereinafter.

4. The petitioner carries on business as manufacturer and importer of PVC Electrical Insulating Films under the name and style of "Dee Pee Industries" which is a small scale industry. In the year 1986, the petitioner installed plant and machinery at the said factory. The petitioner also obtained Excise Gate Pass which is required for removal of excisable goods from a factory or warehouse on payment of excise duty. In October, 1986, the petitioner applied to the Joint Chief Controller of Imports & Exports, Calcutta for allotment of Importer Code

Number of or the purpose of importing various goods as per the Import Policy of the Government of India and on November 4, 1986 the petitioner was allotted Importer Code Number.

5. On August 22, 1986 the petitioner entered into a contract with M/s. Jaykant J. Shah Co. Pvt. Ltd. of Singapore for import of PVC Electrical Insulating Film in terms of Open General Licence, Appendix 6, List 8, Part 1, Serial No. 121 of the Import Policy for the year 1985-88 of the Government of India. Pursuant to the said contract, the said foreign seller on January 6, 1987 shipped 455 cartons of PVC Electrical Insulating Films per vessel "Katherine" and the said goods arrived at the Calcutta Port in the month of January, 1987. The petitioner duly submitted all the relevant documents and filed the Bill of Entry for assessment and release of the goods. The goods were duly assessed and thereafter the same was kept in a bonded warehouse duly approved by the Customs authorities. Out of 455 cartons, 155 cartons were released under two separate ex-bond bills of entry upon payment of customs duty. The petitioner thereafter submitted relevant documents for the purpose of taking delivery of a further 100 cartons out of the remaining 300 cartons. The Customs authorities assessed the customs duty payable in respect of the said 100 cartons and returned the Bill of Entry to the clearing agent of the petitioner, but before payment of the customs duty on the said 100 cartons could be made. The Assistant Collector of Customs SIB Calcutta took away the documents relating to 300 cartons which included the aforesaid 100 cartons from the petitioner's Clearing Agents and thereby prevented the petitioner from getting clearance of the said 300 cartons and the same are still lying in the Bonded Warehouse.

On 7th January, 1987 the petitioner also entered into a contract with M/s. International Commercial Syndicate of Singapore for import of 902 cartons of the said goods under the same O.G.L. Policy for the year 1985-88 under Actual Users conditions. Pursuant to the said contract, the foreign seller shipped 447 cartons of PVC Electrical Insulating Film on 31st March, 1987 and the same arrived at the Calcutta Port on 7th April, 1987. On 14th April, 1987 a further consignment of about 455 cartons were shipped by the said foreign seller and the said consignment arrived at the Calcutta Port on 28th April, 1987. On 18th June, 1987, Assistant Collector of Customs, Calcutta issued order of seizure u/s 110 of the Customs Act in respect of 455 cartons, but in respect of first consignment i.e. 447 cartons, the petitioner has not been served with any notice or order u/s 110. The Customs authorities also seized the documents from the clearing agents of the petitioner and from the office of M/s. Ratilal D. Ghelani from the petitioner takes financial assistance from time to time. In spite of repeated requests and demand made by the petitioner, the Customs authorities did not release the said documents.

6. The petitioner moved these two petitions before this Court on 20th May, 1988 when directions were given for filing affidavits and the matter was adjourned till 8th July, 1988. In respect of the first show cause notice (Matter No. 2726 of

1988) the respondents were directed to complete the adjudication proceedings by 16th June, 1988 after giving the petitioner an opportunity of being heard. The respondents were further directed to return the documents seized by them after retaining the xerox copy of such documents. In respect of the second show cause notice (Matter No. 2728 of 1988) the respondents were similarly directed to release documents in the same manner. It was also directed that the petitioner, after obtaining the release of the documents shall file Bill of Entry and the respondents shall assess the Bill of Entry within two weeks thereafter. The proceedings under the show cause notice dated 11th September, 1987 were stayed.

7. No affidavit-in-opposition to the aforesaid two writ petitions was filed by the respondents. Both the matters appeared from time to time and necessary directions were given.

8. On 25th November, 1987, this Court passed an order in the aforesaid two writ applications on the following terms :-

"The petitioner is given liberty to file supplementary reply to show cause notice by 28.11.88. Collector of Customs, Calcutta is directed to pass adjudication order by 6.12.88 after giving personal hearing to the petitioner. The order of adjudication would be communicated to the petitioner but would not be given effect to without leave of this Court."

9. On 16th December, 1988, this Court passed another order directing the respondents to assess the Bill of Entry by 20th December, 1988.

10. On 23rd December, 1988, the adjudication order and other papers were placed before this Court and hearing was concluded.

11. Personal hearing to the petitioner was granted by the Addl. Collector on 1st December, 1988 when the aforesaid proceedings were heard and concluded. On perusal of the show cause notices, replies to the show cause notices, supplementary reply to the show cause notices and the correspondence passed by and between the petitioner and the respondents, primarily the following issues emerged :-

(1) Whether the value declared by the petitioner is acceptable for the purpose of assessment?

(2) Eligibility of the petitioner of claim O.G.L. Benefit being the Actual User under Serial No. 121 of Appendix 6, List 8, Para 1?

(3) Whether the subject goods are to be assessed under Chapter 85.46 of the Customs Tariff Act or under Chapter 39.19 of the said Act?

12. The Additional Collector of Customs passed a common adjudication order dated 1st December, 1988, whereby he held the first issue in favour of the petitioner. He, inter alia, observed as follows :-

"Since the contracts were made at different periods at a gap of about four months an increase in price from US 2.50 to 2.80 per roll cannot be anticipated. Therefore, it would not be proper to allege under-valuation keeping in view of the facts of the cause."

Regarding the second issue, the adjudicating authority came to the following findings :-

"From the facts of the case it is to be concluded that there was no factory at the address declared in the provisional registration certificate issued by the Directorate of Cottage & Small Scale Industries, Calcutta and that it has to be necessarily inferred what the importers indicated a wrong address with a view to circumvent the provisions of para 92 of the Import & Export Policy. The tenancy Agreement for making available the premises at 3 Tarpan Ghat Road, Calcutta was signed only on 25th May, 1987. Therefore, the factory of M/s. Dee Pee Industries could not have started production before that date. On the other hand, the goods under dispute had been imported in January, 1987 and April, 1987 itself. Since the importers have already cleared one consignment arrived per s.s. Katherine, they have deliberately violated the Actual User Condition which is required to be fulfilled before availing of the benefit of OGL condition for "proposed unit". The importers have submitted that they are now having a factory at 3 Tarpan Ghat Road, Calcutta and they have produced certain evidence in support thereof. However, they have still not been able to obtain a permanent SSI registration certificate so far."

However, in respect of the second issue, the Additional Collector of Customs held as follows :-

"Having regard to the facts and circumstances of the case, it is held that the importers have deliberately given a wrong declaration while claiming OGL benefit for the consignment arrived per s.s. Katherine and already cleared by them thereby violating the provisions of Sections 111(d) and 111(m) of the Customs Act, 1962.1 accordingly impose a penalty of Rs. 50,000/- (Fifty thousand) only on M/s. Dee Pee Industries, Calcutta. For the same offence of mis-declaration, the goods arrived by vessel s.s. Indian Courier and s.s. Port Har Court (totally valued at Rs. 4.12 lacs) and pending clearance are ordered to be confiscated. However keeping in view of the fact the importer's declaration that the factory at 3 Tarpan Ghat Road had started functioning and that their application for a permanent SSI Certificate is pending consideration by the State authority, a lenient view is taken and the importers are given option on to redeem the goods on payment of a nominal fine of Rs. 25,000/- each for each of the two consignments."

13. The said findings of the adjudicating authority have been assailed being without jurisdiction and contrary to the Import Export Policy of 1985-88.

14. Clause 8 of the Import Trade Control Order No. 1/85-88 (Order No. 35 of 1986) Open General Licence No. 1/85 dated 12th April, 1985 as contained in the

Supplement to Import Export Policy & Procedures, 1985-88 provides as follows :-

"Actual User (Industrial) having provisional registration with the sponsoring authority will also be eligible to import raw materials, components and consumables under this licence."

Further para 124 of Import & Export Procedure, 1985-88 provides as follows :-

"As in the matters relating to import-export policy and procedure the interpretation given by the Chief Controller of Imports & Exports is final, in case of doubt regarding these matters the Customs Authorities should consult the Import Trade Control authorities before clearance of the goods."

15. In support of the above contentions, reliance was placed on the decision of the Bombay High Court made in the case of Ricardson Hindustan Ltd. Vs. Union of India (UOI) and Another,

16. Moreover, the said conclusion is based on the purported enquiry made by the respondent authorities as alleged in the show cause notice that "a provisional certificate holder cannot start the production unless he has taken a permanent certificate and that the holder of such certificate can only obtain bank loans and other Government facilities."

17. No copy of the enquiry report was annexed with the show cause notice nor was the petitioner given any opportunity to have a copy of the enquiry report and to have inspection thereof. Even it was never made clear whether the said report was oral or based on information derived from the Directorate of Small Scale Industries. Neither any person was examined in support of such enquiry before the adjudicating authority. There is no such provision. The respondents have failed to satisfy this Court that production could not be commenced or bank loans or other facilities could not be obtained by a provisional certificate holder. The said finding is not based on any evidence on record. That apart, the respondent adjudicating authority should not have relied upon the said report, and the said report even if any, cannot be used against the petitioner unless copy thereof was supplied and/or inspection was given and/or opportunity was given to the petitioner to cross-examine the concerned persons.

18. The second basis for arriving at the aforesaid conclusion is paragraphs 92(1) and (2) of the Import & Export Policy AM 1985-88. It was submitted by the petitioner that the said provision of paragraphs 92(1) and (2) is also not applicable in the case of the petitioner inasmuch as the same is meant for the proposed unit.

19. Paragraphs 92(1) and 92(2) provide that the sponsoring authority will issue the registration certificate to proposed unit should clearly mark the registration certificate with the words "proposed unit" at the top. In the case of the petitioner, the licence issued to him does not contain the word "Proposed unit" but the word "Provisional" is written at the top and as such the same is not applicable. Moreover, paragraph 92(1) of the said Policy deals with the banned and/or

restricted items which can be imported only against the necessary licences while the subject goods are placed under O.G.L and subject to Actual User Condition with no value restriction. As such the said provision has no application at all.

20. Furthermore, the respondents had been clearing the goods on the basis of the provisional certificate to several importers and are still clearing on the basis of the provisional certificate and there is no basis for making discrimination and creating a class between "similarly placed" importers. It would appear from the following Bills of Entry that the respondent authorities have cleared goods on the basis of the provisional certificates :-

(1) Issued to M/s. Premier Microsystem Pvt. Ltd., Vide B/E No. 1-41 dt. 5.8.88, B/E No. 392 dt. 15.7.88, B/E No. 1-40 dt. 1.6.86.

(2) Another B/E being No. 2656 dt. 6.6.87 (goods valued at Rs. 2,18,288.04) filed by M/s. Chrimi Optical Industries 2/633 Jawahar Nagar, Jaipur.

(3) Another B/E No. 2374 dt. 12.6.87 filed by M/s. Durga Optical Industries, Howrah.

21. The aforesaid Bills of Entry would clearly demonstrate that the goods have been released on the basis of provisional certificates and irrespective of value of the consignment. As such there is no reason as to why the petitioner's would be discriminated. It is clearly in violation of Article 14 of the Constitution of India.

22. It cannot be lost sight of that the said provision clearly and unequivocally provides that the Actual User (Industrial) having provisional registration certificate will be eligible to import raw materials, components and consumables under the licence. It is evident from the said provision that the licensing authorities may permit such import and such import is legal and valid. It is within the jurisdiction of the licensing authority to formulate policy for the purpose of Import & Export. The petitioner stands on the same footing. The finding of the Customs authorities is contrary to the said provision and is liable to be set aside.

23. It was next submitted by the petitioner that at the initial stage, provisional certificate is issued by the Small Scale Industries Department and the permanent certificate is only issued when the production of the factory starts and after inspection by the competent officer of the Department of Small Scale Industries. It is beyond doubt that unless the necessary machinery are installed and raw materials are purchased, the production of the factory cannot be commenced and in fact, in the instant case, the machinery were installed and for the purpose of production the subject goods being the raw materials were imported for the purpose of starting production at the factory. The said fact has been stated in paragraphs 3 and 4 of the writ petition which remains uncontroverted. It is well-settled that a business is set up when it is established or set on foot. There may be a interregnum between the setting up of a business and its actual commencement. It cannot be disputed that the petitioner set up the business and took all steps for commencement of production. In view of the above, the

enquiry report as mentioned in the adjudication order is without any basis and merit.

24. The third basis for arriving at the aforesaid conclusion is that the tenancy agreement was signed on 25th May, 1987. According to the petitioner, the same is also a distortion of the actual fact. In fact, the petitioner was allowed to set up machinery for the factory at 3 Tarpan Ghat Road by a letter dated 18th December, 1986 issued by the Intertray Industries and the terms and conditions as contained in the said letter and the said letter was duly placed and was within their knowledge, but the respondents have ignored the same as it appears, with oblique motive. In fact, in terms of the letter dated 18th December, 1986 allowing the petitioner to set up the machinery and to start production, the petitioner has been making necessary payments by cheques and as well as cash in terms of the said letter. There is no reason or justification to ignore the same. All the necessary machinery were installed in December, 1986 as would appear from the Gate Pass issued by the Excise Authority to the petitioner.

25. The third issue relates to the question whether subject goods should be assessed under Chapter 39.19 of the Customs Tariff of India 1988-89, as contended by the Customs Authorities or under Chapter 85.46 as claimed by the petitioner at all material times the issue was raised before the Customs authorities including the adjudicating authority. It also finds place in the show cause notice as well as in the supplementary reply, but the adjudicating authority has wrongly ignored the entire issue and did not make any whisper in the said adjudication order. But the Bill of Entry filed by the petitioner has been assessed under Chapter 39.19. It would appear from the facts stated hereafter that the said assessment is prima facie wrong and the subject goods are assessable under Chapter 85.46 of the Customs Tariff Act, 1988-89. Since the financial year 1986-87 the Government of India has introduced tariff bills for the Customs and Excise based on the harmonized system of classification, meaning thereby that particular goods would be classified under the same heading under Customs Tariff Act and the Central Excise Tariff Act. Chapter 39.19 and Chapter 85.46 of the Customs Tariff Act as well as the Central Excise Tariff Act are reproduced herein below.

Customs Tariff Act Central Excise Tariff Act Chapter 39.19 Chapter 39.19

Self-adhesive plates, sheets, film, Self-adhesive plates, film, foil, tape, strip and other flat shapes, foil, tape, strip and other of plastics flat shapes, of plastics whether or not in rolls. Whether or not in rolls.

Chapter 85.46 Chapter 85.46

Electrical insulators of any material Electrical Insulators of any material. 26. It would appear that the subject goods being PVC Electrical Insulators Films do not find place in Chapter 39.19 and in fact it is assessable under Chapter 85.46 inasmuch as it has electrical insulating properties.

27. In support of the above contention, the learned counsel for the petitioner has referred to the decision of Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi, Special Bench where the issue for decision was whether insulating tapes were classifiable under Central Excise Tariff H/85.46 as contended by the appellants therein or under H/39.19 as held by the department and after hearing the contention of the parties, it was held as follows :-

"Neither in trade nor in common parlance, are Electrical Insulating Tapes known as Adhesive Tapes and as per Board's Tariff Advice No. 70/81 as well as earlier Tribunal decisions, they are different items falling under separate headings..."

"CLASSIFICATION: Electrical insulating tapes being insulating material, and not self-adhesive tapes, fall under H. No. 85.46, Sub-heading 8546.00, which covers insulators of any material (Ratio of Tribunal decision) "The Tribunal came to the conclusion that articles made from materials which have electrically insulating properties (examples mineral fibre, cellulose, glass fibre, certain plastics, glass, porcelain etc.) can be appropriately described as insulators.... Following the reasoning of this Tribunal in the Bakelite Hylam case, described as electrical insulators."

28. The aforesaid finding of the Special Bench of the Tribunal is binding on the Department. The Collector of Customs cannot take a view contrary to the view taken by the Special Bench of the Tribunal. The order passed by the Customs, Excise and Gold (Control) Appellate Tribunal has a binding effect on the department including the Collector of Customs, unless it is stayed or set aside by a competent court. An issue whether the order of the Tribunal is binding upon the Board and all the authorities including the Collector of Customs, Calcutta came before the Tribunal, Special Bench, where the said Tribunal held that the decisions of the Tribunal are binding on the quasi-judicial authorities except when it is stayed or set aside by the Court.

29. In my opinion the Special Bench took a correct view. There must be finality of the proceedings. The Collector cannot sit on appeal over the decision of the Tribunal and come to a contrary finding or conclusion on the interpretation of the same provision or on the identical issues. Reference may be made to a decision in Talit Exports Ltd., Bombay v. Union of India reported in 1988 ECR 134.

30. It is, therefore clear that the assessment under Chapter 39.19 is bad and the subject goods are to be assessed under Heading 85.46. In fact, the Excise Authorities are assessing the said goods under Chapter 85.46 as would appear from the Excise Gate Pass of M/s. Bhor Industries Limited, Bombay and also in the case of Chetna Polycoats (P) Ltd., Jaipur. It would appear from the labels attached to the products of the said M/s. Bhor Industries Limited, Bombay and M/s. Chetna Polycoats (P) Ltd., Jaipur which have been assessed by the Excise Authorities under Chapter 85.46 that the same bear the certificate of ISI No. IS: 2448 (Part II), 1968. The said ISI specification provides minimum required specification for Adhesive Insulating Tapes for Electrical purpose and the said

specification is provided at table 1 at page 3. The goods imported by the petitioner are Adhesive Insulating tapes for Electrical purpose only of 13 mm thickness. From the copy of the Test Certificate issued by the manufacturer of the subject goods, it would appear that it conforms to all the minimum specifications provided for Self-adhesive Insulating Tapes for Electrical purposes of 13 mm thickness as stated at page 3 of the said ISI Standard. The samples of insulators manufactured by M/s. Bhore Industries Limited, Bombay and M/s. Chetna Polycoats (P) Ltd., Jaipur. Sample of the subject goods were produced before this Court. The same item cannot be assessed under two different heads. The goods are liable to be assessed under the Heading 85.46.

31. For the reasons aforesaid, these applications are allowed. The order of adjudication dated December 1, 1988 is set aside and quashed. The respondents are directed to assess the Bill(s) of Entry and release the goods upon payment of the Customs Duty. The Bill(s) of Entry shall be assessed within a week from the date of communication of this order and the goods shall be delivered within two days after the payment of duty is made.

32. All parties shall act on a signed copy of the minutes of the operative part of this judgment and order.