

(1992) 09 CAL CK 0033
In the Calcutta High Court
Case No : C.O. No. 1446 (W) of 1988

New India Rubber Works (P) Ltd.

APPELLANT

Vs

Collector of Customs

RESPONDENT

Date of Decision : 18-09-1992

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 11, 111, 125
Imports and Exports (Control) Act, 1947 — Section 3

Citation : (1994) 72 ELT 840

Hon'ble Judges : Bhagabati Prosad Banerjee, J

Bench : Single Bench

Advocate : Mukul Prokash Banerjee, Hasmukh Kundalia and Bidyut Dutta, for the Appellant; Sunil Chatterjee, for the Respondent

Final Decision : Allowed

Judgement

Bhagabati Prosad Banerjee, J.—This is an application under Article 226 of the Constitution filed by the petitioner praying for -

(a) A writ in the nature of Mandamus commanding the respondents to act according to law and to forbear from giving effect or further to the orders of adjudication being annexure "C" to "H" hereof and from levying any fine or penalty or from holding that the consignments of Synthetic Shoe Uppers imported or to be imported are not authorised under the licence in question and to refund the redemption fine already paid with interest at the rate of 18% per annum for the date of payment till the date of refund;

(b) A writ in the nature of Certiorari calling upon the respondents to produce all relevant records before the Hon'ble Court in connection with the impugned orders of adjudication being annexure "C" to "H" so that the same may be quashed and set aside and conscionable justice may be rendered;

(c) A writ in the nature of prohibition commanding the respondents from giving

any effect or further effect to the orders of adjudication being annexure "C" to "H" hereof and from levying any fine or penalty or from holding that the consignments of Synthetic Shoe Uppers imported or to be imported are not authorised under the REP licences in question and from demanding any fine or penalty.

2. The petitioner filed the said application challenging the order of adjudication passed by J.K. Batra, Deputy Collector of Customs, Calcutta dated 11-11-1987 being order No. S-33-40-41/87A(3). By the said order it was held that importation of footwear components shoe upper without a proper licence was prohibited u/s 11 of the Customs Act, 1962 read with Section 3 of the Imports & Exports Control Act, 1947. The said goods were confiscated u/s 111(d) of the Customs Act, 1962 and in view of the fact that similar consignments had been allowed to be cleared in the immediate past against such REP licences, a lenient view was taken and option was given to the importer to redeem the goods on payment of a fine of Rs. 65,000/- on Noting No. 3323 dated 29-10-1987 and Rs. 33,000/- on Noting No. 97 dated 2-11-1987 u/s 125(i) of Customs Act, 1962.

3. The fact of this case is that between May, 1987 and August, 1987, four consignments of shoe uppers were imported by the petitioner and duly cleared and released by the Customs authorities without any objection whatsoever on the basis of several R.E.P. Import licences issued in terms of Serial No. D. 2.1(1) of Appendix 17 of the Import & Export Policy, 1985-88. The said licence was annexed as annexure "A" to the writ application. On the basis of the said order the imported goods were released by the petitioner and that the said order of assessment had never been challenged or disputed by the Customs authorities. Subsequently, in or about September 1987 six consignments of similar shoe uppers were imported by the petitioner under the similar licences. But the Customs authorities refused to clear the said goods on the basis of the licence and an adjudication proceeding was started in which it was found that the said importation was invalid and the goods were confiscated. But at the same time, the petitioner was given option to redeem the goods on payment of fine. The petitioner cleared the said consignments on payment of fine in lieu of confiscation because of the Reliance World Cup Cricket Tournament and/or for the Puja Festival. Other two consignments were kept in a Bonded Warehouse and an aggregate sum of Rs. 2,98,000/- had been paid as redemption fine in lieu of confiscation. On or about 3rd December, 1985 another consignment landed at the Port at Calcutta and the petitioner apprehended that the Customs authorities may impose redemption fine in this case also and accordingly, the petitioner moved this writ application.

4. The case of the Customs authorities in respect of the said importation was that Synthetic shoe uppers were not covered by the R.E.P. licences issued under Serial No. D. 2.1(1) of Appendix 17 of the Import & Export Policy of 1985-88 read with paragraph 8 thereof. It was further alleged that paragraph 8 of the R.E.P. Policy was general condition and as such it applied to all the entries. It was

stated that a purported clarification dated 23rd February, 1988 issued by the Chief Controller of Imports & Exports was relied upon. It was further stated that relying upon or on interpretation of the object of R.E.P. licences as defined in paragraph 188 of the Import & Export Policy, the imported materials should relate to the product exported in the instant case, it did not relate. It was alleged that the importations were unauthorised importations without a valid import licence.

5. On behalf of the petitioner it was submitted that the clarification dated 23rd February, 1988 made by the respondents could not amend the Import & Export Policy. Under paragraph 25(2) of the Import & Export Policy 1985-88, any interpretation of Import Policy given by the Chief Controller of Import & Export would prevail over any other clarification in the same matter given by any other authority or person. The said paragraph did not and could not lay down that such clarification was binding on courts of law. It was further submitted that the Chief Controller could not amend the said policy by such clarification which amounts to amendment of the policy and the same can only be issued by a public notice. It was further submitted that no public notice was issued on this matter and as such the purported clarification could not be binding upon the petitioner. It was further submitted that the licences issued against export of product group D. 2.1(1) of Appendix 17 were valid for import of items specifically appearing in column 4 of the relevant export product of the said appendix and shall not be subjected to the provisions of paragraph 8 of the general conditions of Appendix 17 of Import & Export Policy, 1985-88. In this connection, reference was made to a clarification issued by Import & Export authorities on 21st October, 1987 addressed to one M/s. Ajay Footplast (P) Ltd., Howrah, wherein it was stated that "the licence in question having been issued against export of product group D. 2.1(i) of Appendix 17, is valid for import of items specifically appearing in Col. 4 of the relevant export product of the said appendix and shall not be subject to the provisions of para 8 of General Conditions of Appendix-17 of Import and Export Policy Book (Vol. 1), 1985-88, *ibid*. The licence in question is a transferable one, issued in terms of paragraphs 225 and 226 of the Import and Export Policy Book and therefore, is not subject to Actual Users Condition."

6. The clarification dated 23rd February, 1988 issued by the Chief Controller of Import & Export did not specifically indicate that such licences were subject to paragraph 8 of General Conditions. In any event, when more than one interpretation was possible in a taxing statute, the interpretation in favour of the assessee was to be followed. It was further submitted that the R.E.P. licences were freely transferable and in terms of paragraphs 225 and 226 of the Import & Export Policy were not subject to actual user condition. In other words, it was submitted, the imported material need not be related to the product exported. It was further submitted that if paragraph 188 of the Policy is interpreted as purportedly sought to be interpreted by the Customs authorities, such a purported interpretation will unduly restrict the scope of a beneficial provision and such an interpretation should be avoided, so that it may not take away with

one hand what the policy gives with other, and in this connection, reference was made to the decision of the Supreme Court in the case of Union of India (UOI) and Others Vs. Suksha International and Nutan Gems and Another, wherein Supreme Court had held that "the interpretation will unduly restrict the scope of the beneficial provision, so that the authorities cannot take away with one hand what the policy gives with the other".

7. Paragraph 195(i) of Import Policy 1985-88 provides -

"The items permissible for import against each export product covered by this policy are given in column 4 of the policy statement given in Appendix 17 read with column 5". It was submitted that column 5 remarks here have no correlation or applicability at all with Item (j) of column 4. Therefore, it was submitted that in terms of Paragraph 195(i) item would be permissible for import in the "Footwear components including unit heels and soles". Reference was made to Import Policy of 1988-91. In the Import Policy 1988-91 at D. 2.1 Column 4(j) it is clearly specified that "Footwear components including unit soles and heels but excluding shoe uppers". "Out Import licences being of 1985-88 policy does not have such remarks, but are specifically covered to import footwear components. Nowhere it is mentioned in the licences that shoe uppers will not be permitted for import. Item shoe uppers are covered under the generic entry footwear components".

8. Serial No. D. 2.1(i) of the Appendix 17 of the Import & Export Policy 1985-88 provides as follows :

No. Export product Import Materials Remarks replenishment permitted per- for import	Serial centage
----- Footwear (ex- (a)--- (1) Import of cluding) canvass Zip /Snap Fas- footwear teners (include- ing zip in coils) shall not ex- ceed 10% of the face value of the licence. (a) Closed shoes 20% with leather up- pers (b) Leather foot- 15% (j) Foot- (2) Import of a wear other than wear com- single item of closed shoes ponents trimmings and with leather up- including embelish- pers units soles ments shall and heels. Not exceed Rs. one lakh in value. -----	D. 2.1(i)

9. It was submitted that the restrictions in Column 5 were not relatable to the goods under importation. They relate only to zip/snap fasteners or trimmings and embellishments. It was submitted that Paragraph 8 of General Conditions did not apply to all the entries unless specifically mentioned in column 5. It was submitted that in the absence of such special restriction in column 5, the provisions of Paragraph 8 of the General Conditions could not be made applicable in case of such importation. It is not necessary to relate the imported materials to the products exported as R.E.P. licences are freely transferable and any can buy it in open market. It was further submitted that in a similar and/or identical

matter the Customs, Excise, Gold (Control) Appellate Tribunal, East Regional Bench, Calcutta, by an order bearing No. 27/1989-Cal-27, dated 2nd January 1990 in Appeal No. C-286/87-Cal (Ajay Footplast Pvt. Ltd. v. Collector of Customs, Calcutta) had held that there was a practice of allowing imports of synthetic shoe upper against import licence issued under product group D. 2.1 of Appendix-17 of the Import Policy 1985-88 in the Customs Houses, therefore order of confiscation and redemption fine was set aside. It was further submitted that the Customs authorities are bound by their own precedents and/or bound to follow prevalent practice permitting clearance. When they have cleared the earlier four consignments and/or similar consignments which are annexure T to the writ petition, the Customs authorities cannot take pleas that the latter importations were unauthorised more so in view of the CEGAT judgment dated 2nd January 1990. It was further submitted that in the Import Policy of 1988-91 it was specifically explained that the relevant entry was "footwear components including unit sole and heels but excluding shoe uppers". On the basis of entries in the subsequent Import & Export Policy, it was submitted that in the Import & Export Policy 1988-91, the entry was "footwear components including unit sole and heels" and when the same was amended subsequently excluding shoe uppers, in that event, the authorities concerned were fully aware that the original entry included shoe upper, that is why, shoe upper was specifically included by subsequent policy. If shoe upper was not considered as footwear components, in that event, it was not necessary to exclude the same in the subsequent policy. This amendment throws light that the entry footwear components in the earlier policy included shoe uppers.

10. When an importer imports goods on the basis of an import licence, the validity of the importation has to be judged on the basis of the representation contained in the relevant Import & Export Policy and not by any administrative or departmental clarification made from time to time. To an importer the guideline is the provision of the Import & Export Policy which is published, printed and circulated for administration. In view of the provision contained in the relevant policy, it has to be considered whether the goods in question are importable on the basis of the R.E.P. licence in question. Shoe upper amounts to footwear components and that at the relevant time the entry was footwear without any exclusion of footwear components. But in subsequent years in the Import & Export Policy, it was clearly provided that footwear components exclude shoe upper. When shoe upper has been specifically excluded in the subsequent policy period, in that event, the intention of the policy for the year was clear. The subsequent change by which shoe upper was excluded from the shoe components, throws light as to the meaning of the word "shoe components". As the authorities concerned were fully aware that shoe upper is treated as shoe component that's why, shoe upper is specifically excluded in the subsequent policy period. If it was the case of the respondents that shoe upper did not include within the expression "shoe component", in that event, there was no necessity for changing the definition of the expression shoe component. In my

view, from the language used in the relevant provision of the policy, shoe upper, cannot be said to [fall] outside scope and ambit of the expression shoe component. In the instant case, it is not in dispute and which has been admitted by the Deputy Collector of Customs during the adjudication proceeding that similar clarification had to be cleared. But in the instant case, all on a sudden, a contrary view was taken. If the Customs authorities followed practice of treating shoe upper as shoe component and allowed the importation to be made, and considered the same to be valid, in that event, the Import & Export authority and/or customs authority cannot deviate from such practice without communicating its decision to all persons likely to be affected in advance, so that nobody can be induced to make such importation on the basis of the fact that the respondents have treated the same to have been validly imported. Such practice in the matter of allowing the goods to be imported on the basis of the said R.E.P. licence, amounts to a legitimate expectation. Halsbury's Laws of England, 4th Edition, Vol. 1(1) para 81 it has been observed that-

"A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation or from consistent past practice.

The existence of a legitimate expectation may have a number of different consequences; it may give locus standi to seek leave to apply for judicial review, it may mean that the authority ought not to act so as to defeat the expectation without some overriding reason of public policy to justify its doing so."

11. In the instant case, there was no overriding reason of public policy to justify a departure from consistent past practice. Relevant entry in the Import & Export Policy as well as consistent past practice amounts to a clear and equivocal representation to the Board and to the public that such importation of such goods on the basis of such licence is valid and if any person acts on such representation, in that event, the respondents have no jurisdiction to hold it otherwise. After all, an importer can import any goods unlawfully, but change of view is not permissible in case of importation of goods by an importer who had bonafide relied on the representation contained in the policy as well as on the consistent past practice. It must be remembered that an importer cannot take the risk of importing goods on the basis of the licence if he has reason to believe that such importation would be invalid and the goods will be liable for confiscation. After all, when an importer imports goods, he is aware that such goods are liable to be checked and verified by the Customs authorities to find out whether the goods can be imported on the basis of the licence and if it is found that the goods cannot be imported on the basis of the licence, the same would be confiscated. The provision of the licence could not be allowed to show interpretation in the manner which would cause tremendous hardship and which would result in confiscation of goods of a citizen who had no mala fide intention

and who never intended to violate the law. It cannot be said that the importers who import goods on the basis of the licence, intended to violate law and to import goods in contravention of the provisions of law. In the instant case, it is not in dispute that similar goods on the basis of similar licence were held to be validly imported and I do not find any reason whatsoever to make a departure from the stand earlier taken. In this connection, reference was made to a decision of Customs, Excise and Gold (Control) Appellate Tribunal, Calcutta, East Regional Bench, in Appeal No. C. 286/87-Cal. (Ajay Footplast Pvt. Ltd. v. Collector of Customs) wherein the Tribunal had rightly held that "when similar importation was allowed by the Customs authorities earlier and when there does not appear to be any deliberate intention and also that the importation has been made with reasonable belief that such type of importation has been allowed in the past, the said importation cannot be held to be invalid. Relying upon the decision of this court in the case of Impex International v. Collector of Customs, Calcutta and Ors. reported in 1985 (4) ECC 60 ., wherein it was held that "in view of past practice of allowing the import of identical goods against REP licence, it could not be said that the import of such goods was in contravention of the provisions of Section 111(d) of the said Act and/or was liable for confiscation". Similar view was taken by this court in the case of Vinod Gupta Vs. Collector of Customs, , wherein it was held that "Having regard to the facts and circumstances of the case, the Customs authorities cannot be allowed to ignore their past practice and to adopt different standard and to take different views at different point of time with regard to the importation of the same commodity. It is their duty to inform the general public who are importing the goods and making it quite clear that what types of goods would not be allowed. Even if there is a dispute as to the interpretation of the Policy and the licence, the dispute should be resolved in favour of the subject".

I respectfully agree with the views by the aforesaid two decisions which had been followed by the Customs, Excise and Gold (Control) Appellate Tribunal, Calcutta (supra).

12. In the result, the writ petition succeeds. The Order No. S.-33-30-41/87A(3), dated 11th November, 1987 passed by the Deputy Collector of Customs, Calcutta is set aside and the respondents are directed to make assessment of duty, clear and release the consignments which had already arrived and pending clearance in respect of the self-same goods on the basis of the REP licences issued under the product at Serial No. D. 2.1(i) of Appendix 17 of Import Policy 1985-88 treating the same as validly imported in accordance with the provisions of the Policy.