
(1984) 09 BOM CK 0008

In the Bombay High Court

Case No : Appeal No. 414 of 1979 in Miscellaneous Petition No. 320 of 1973

N.K. Kapur, Assistant Collector of Customs and others

APPELLANT

Vs

Kirloskar Cummins Ltd.

RESPONDENT

Date of Decision : 28-09-1984

Acts Referred:

Sea Customs Act, 1878 — Section 23

Citation : (1984) 86 BOMLR 609 : (1985) 21 ELT 392

Hon'ble Judges : P.B. Sawant, J;M.H. Kania, J

Bench : Division Bench

Judgement

Kania, J.—This is an appeal against a Judgment and order of Pendse, J., dated 25th June, 1979 allowing the aforesaid writ petition filed by the respondent herein. By the said judgment certain orders passed by the appellants were quashed and the appellants were directed to refund to the respondent an amount of Rs. 9,91,537.14.

2. As we are inclined to accept the view taken by the learned trial Judge and as the facts have already been set out in the impugned judgment, it is not necessary to set out the same in detail here. We do propose, however, to set out such facts as are essential for the appreciation of the controversy arising before us.

3. The main question which arises in this appeal is whether the imported component parts utilised for the assembly or manufacture of the type of diesel engines manufactured by the respondent are eligible for exemption under Notification No. 82/60, dated 6th August, 1960 issued u/s 23 of the Sea Customs Act, 1878 (hereinafter referred to as "the said Exemption Notification").

4. The respondent-company carries on the business of manufacture of internal combustion engines which are also known as diesel engines. The relevant part of the said Exemption Notification runs thus :

"..... the Central Government hereby exempt component parts of any

machinery when imported into India or the State of Pondicherry and proved to the satisfaction of the Customs Collector to be required for the purpose of the initial setting up of the machinery or for its assembly or manufacture, from so much of the customs duty leviable thereon under the Indian Tariff Act, 1934 (32 of 1934), as in excess of the rate applicable under the last mentioned Act to the said machinery when imported complete subject to the following conditions....."

The conditions provide the Development Wing of the Ministry of Commerce and Industry must be satisfied and certify that the component parts in question were or would be required for the purposes specified above in the said Notification and recommended grant of the above exemption. The further condition was that the importer would execute a bond to satisfy the Customs Collector that the component parts had been used for the aforesaid purpose and failing that to pay an amount equal to the difference between the duty leviable on such component parts but for the exemption contained in the Notification and that already paid at the time of importation. During the period 1964 to 1968, the respondent imported component parts of internal combustion engines of the total value of Rs. 39,13,400.98 for the manufacture of diesel engines after the Directorate General of Technical Development issued to the respondent a development wing certificate as set out earlier and the respondent also executed the requisite bonds. In the relevant bills of entry for import, the respondent described the goods as "component parts of diesel engines for assembly of stationary type under Notification No. 82/60". After the goods were imported, the respondent applied for the cancellation of the bonds. The Assistant Collector of Customs asked information and as to how the component parts imported were used as to the purpose for which the diesel engines assembled with the aid of components were actually used. Such information was supplied. It appears that the imported parts were used for the manufacture of over 1686 diesel engines out of which 166 were fitted on to dumpers which could be considered as motor vehicles and 41 were fitted on locomotives. The Assistant Collector took the view that the component parts utilised in the manufacture of all the aforesaid diesel engines fitted on dumpers as well as locomotives were not entitled to the exemption granted under the said Exemption Notification, and as such customs duty had been short levied on the respondent. The view of the Assistant Collector was that the exemption was limited only to what he described as "stationary type of diesel engines", and he placed reliance on similar words appearing in the bill of entry. The Assistant Collector by his letter dated 25th November, 1969 demanded an amount of Rs. 10,84,418.79 as the amount of duty short-levied. Out of this an amount of Rs. 92,881.65 was claimed as the amount of short levy on the component parts used as spares and the balance of Rs. 9,91,537.14 was claimed as the short levy on the component parts used in the manufacture of what were alleged to be vehicular type of diesel engines. We propose to deal only with the demand of Rs. 9,91,537.14 which amount we propose to refer hereinafter as "the amount demanded" as that is the only demand we are concerned with. The

respondent appealed against the said decision to the Appellate Collector of Customs and also requested that the payment of the amount demanded may be waived pending the appeal. This request, however, was not granted and the respondent had to deposit the amount demanded as a condition precedent to the maintainability of its appeal. The appeal was dismissed by the Appellate Collector on 22nd December, 1972 and the aforesaid amount demanded which was deposited by the respondent on 3rd February, 1970, as set out earlier, was appropriated by the Customs Authorities. In June 1973, the respondent preferred a revisional application which was rejected on 19th March, 1976. Before filing the said revision application, the respondent filed the aforesaid writ petition in this Court on 10th April, 1973 praying that the order of the Appellate Collector dated 25th November, 1969 as well as the other orders impugned be set aside and the appellants be directed to refund to the respondent the said amount demanded by them which had been deposited by the respondents as set out earlier. The learned trial Judge by his judgment allowed the said petition and gave the direction to refund the said amount to the respondent. It is this judgment which is sought to be impugned in the present appeal.

(29-9-1984)

5. The learned trial Judge has set out in his judgment certain facts which were not seriously disputed before us. These are as follows :

The component parts which were imported by the respondent under a duty exemption certificate were used for the assembly of diesel engines. There was no difference or distinction between a stationary type of diesel engine and one of a vehicular type while assembling. The diesel engines manufactured by the respondent can be used for various purposes, such as for excavators, shovels, cranes, oil drilling rigs, generators sets, compressors and so on. The case of the respondent is that the principal use of the diesel engines manufactured by it was in respect of over a dozen industrial applications and only in rare cases such diesel engines were fitted on dumpers as prime movers. This claim was substantiated by the statements made in the affidavits and the facts on record. In fact, as we have already pointed out, out of 1685 diesel engines manufactured by the respondent with the help of the imported components with which we are concerned only 166 were fitted on dumpers, 41 were fitted on locomotives which cannot be called motor vehicles and the rest were used for stationary purposes. Thus it was not in dispute that the proportion of diesel engines used for stationary purposes was much higher than the proportion of diesel engines used for vehicular purposes and the primary use of the said diesel engines was for stationary purposes. It also appears to be beyond controversy that the diesel engines manufactured by the respondent out of these components were of the same type. Such of them as were used for stationary purposes were loosely referred to as the stationary type of diesel engines. Only a small fraction of the said engines was used for vehicular purposes and these were loosely referred to as vehicular type of diesel engines. The contention of the respondent before the

learned trial Judge was that the components imported by it were used for assembly of diesel engines and such diesel engines fell within the tariff entry No. 72(a) of the Indian Tariff Act, 1934. The contention of the Department, that is of the appellants herein, on the other hand, was that diesel engines manufactured by the respondent which were fitted on dumpers would fall within the entries Nos. 75(10) to 75(12) of the Indian Tariff Act. The contention of the respondent that the diesel engines in question fell within tariff entry No. 72(a) was accepted by the learned Judge. It was held by the learned trial Judge that the view taken by the Customs Authorities as set out earlier was entirely erroneous and could be set aside in a petition under Article 226 of the Constitution. It is the correctness of this conclusion which is challenged before us.

6. The first submission of Mr. Sethna, learned Counsel for the appellants is that the respondent is not entitled to the benefit of the said Exemption Notification dated 6th August, 1960 in respect of such components imported by the respondent as were utilised in the assembling of such diesel engines which were fixed on dumpers. Curiously enough, they have also taken the same stand in respect of the components utilised by the respondent in the manufacture of diesel engines which were ultimately fitted on locomotives. We have already set out earlier the portion of the said Exemption Notification material for our purpose. The submission of Mr. Sethna is that the exemption therein is limited to such imported components as were required for the purpose of assembling of what is referred to in the said notification as "that machinery". It was contended by him that expression would take its meaning from the various entries in Indian Customs Tariff. We need not consider at this stage whether this submission is correct or whether the word "machinery" should be given its plain grammatical meaning, but we do propose to consider the relevant entries in the Indian Customs Tariff, because, even for the purpose of determining what is the excess rate to which the exemption relates, it will be necessary to consider as to which is the entry in the Indian Customs Tariff which will cover the imported component parts in question. We may point out that if the question had to be considered apart from such entries, it is quite obvious that the term "machinery" would include a diesel engine, according to its dictionary meaning. No authority is really needed to support so obvious a proposition. We might however refer to the decision of the Supreme Court in *Commissioner of Income Tax v. Mir Mohammad Ali* AIR 1964 S.C. 1693 which takes the same view following a decision of the Privy Council (see paras 13 and 14 of the said report). Coming next to the entries in the Indian Customs and Central Excise Tariff, we find that at the relevant time item No. 72 was in section 16 of the said Tariff and dealt with the topic "machinery and apparatus; electric materials". The relevant portion of the said item runs thus :

"Machinery, namely, such of the following articles as are not otherwise specified :-

(a) prime-movers, boilers, locomotive engines and tenders for the same, portable engines (including power-driven road rollers, fire engines and tractors),

and other machines in which the prime-mover is not separable from the operative parts;"

Now it is quite plain that a diesel engine is both a prime mover because it is capable of producing power itself and it is also a fire engine being an internal combustion engine. This was not disputed before us and it is in fact beyond dispute. Thus a diesel engine would plainly fall within the meaning of the term "machinery" as used in item 72(a). The only submission of Mr. Sethna was that the diesel engines in question were not covered within the said entry, because they were otherwise specified in the said Tariff and the definition of machinery in term No. 72 itself took out of its scope articles which were otherwise specified. In response to the query as to where else in the said tariff the diesel engines could be said to be specified, Mr. Sethna drew our attention to sub-items (9) to (12) of item No. 75. Item 75, it may be mentioned, is in section 17 of the said tariff and deals with transport materials. Sub-items (9) to (11) of item 17 need not detain us, because the plain reading thereof makes it clear that these items could only cover components of diesel engines and not diesel engines themselves. As far as item 75(12) is concerned, the material portion thereof runs as follows :

"Articles other than rubber types, tubes, batteries and such other components as are specified in Items Nos. 72(35), 75(9), 75(10), 75(11), 75(14), 75(15), 75(16) and 75(18)(b)(ii) adapted for use as parts and accessories of motor vehicles other than motor cycles and motor scooters."

It appears to us that a plain reading of this item shows that what is covered thereunder can only be articles which are adapted for use as parts and accessories of motor vehicles. In the present case, it is on record before us that the diesel engines manufactured by the respondent were of the same type and the main use thereof was for stationary purposes. True that some of them were fitted on dumpers, but it is nobody's case that any process was carried out on such diesel engines to adapt them for use on dumpers. Moreover it was not the respondent who fitted them on dumpers but some of its customers. Thus, these diesel engines cannot possibly fall under item No. 75(12). We may in this regard to the proviso to item No. 75(13) which lays down that where any articles referred to in item No. 75(12) and 75(13) are also ordinarily used otherwise than as parts and accessories of motor vehicles, they shall be dutiable at the rates of duty specified for such articles. This would clearly show that for the purposes of assessment of duty even the diesel engines manufactured by the respondent-company out of the said imported components which diesel engines were fitted on to dumpers would be still assessable under item 75(2) and not under item 75(12). In these circumstances, in our view, the contention of Mr. Setalvad, learned Counsel for the respondent that the aforesaid diesel engines fitted on to dumpers must be regarded as covered under item 72(a) must be accepted and the contention of Mr. Sethna to the contrary must be rejected. Although it is strictly not necessary for us to do so, in connection with the above question, we may refer to the leading judgment of the Supreme Court in the case of

Annapurna Carbon Industries Co. Vs. State of Andhra Pradesh, A question arose there under Andhra Pradesh Sales Tax Act, 1957 and in particular Schedule I, Entry No. 4 thereof. The dispute related to the classification of are carbons which were known as cinema are carbons and used for projection of bright light required for cinematic projectors. The Supreme Court held that the main use of the are carbons under consideration was duly proved to be that of production of powerful light used in projectors. The fact that they can be used for search-lights, signalling, stage lighting or where powerful lighting for photography or other purposes may be required, could not detract from the classification to which the carbon arcs belong. That is determined by their ordinary or commonly known purpose or user.

7. The next submission of Mr. Sethna was that whatever, might be the position under the Exemption Notification, the respondent had committed a breach of the conditions of the bonds executed by them at the time of importing the said component parts; for the purpose of securing the benefit of the Exemption Notification the respondent had in the bills of entry described the said components as "component parts of diesel engines for assembly of stationary type under Notification 82/60" as set out earlier whereas the aforesaid diesel engines were fitted on vehicles and hence the Customs Authorities or the Department was entitled to forfeit the bonds and recover the amounts thereunder. It is not necessary to set out the entire form of the bond here. The bond inter alia recites that at the request of the importer and on production of a certificate from the authority prescribed under the said Exemption Notification at the time of clearance to the effect that the component parts to be imported from time to time during the period in question as were required for the purpose of initial setting up of machinery or for its assembly or manufacture, the Government allowed the importers, namely, the respondent-company, to import component parts of machinery fully described in the schedules to be furnished to the Government separately from time to time in respect of clearance of each consignment of components. The bond further provides that the decision of the Collector of Customs as to the sufficiency of proof or evidence adduced by the importer to establish that the said component parts are imported for the purpose of initial setting up of machinery or for its assembly or manufacture shall be final and binding on the importer. It was submitted by Mr. Sethna that in so far as the diesel engines manufactured out of the imported components which diesel engines had been fitted on to dumpers were concerned, the Collector of Customs had rightly taken the view that the imported components had not been utilised for the purpose contemplated in the said bonds. In our view, it is not possible to accept this submission. All that the bond provides is that the imported component parts shall be utilised in assembling or manufacture or setting up of machinery. As we have already pointed out even the diesel engines which were fitted on to dumpers were machinery, even if the meaning of that term is to be gathered in the light of the relevant items in the Indian Customs Tariff. In view of this, we fail to see how it could be said that the importer, namely, the respondent

had failed to prove that the said component parts were utilised for the assembly or manufacture of machinery as provided in the said bond. It has not been disputed, and it cannot be disputed, that if the Collector of Customs has taken a view which is totally erroneous or totally unjustifiable or a view shown to be taken without application of mind or by misdirecting himself in law the Court is entitled to interfere with such view, notwithstanding the term in the bond that the decision of the Collector of Customs shall be final and binding on the importer. We may mention here that what has been described in the Schedules furnished to the Government from time to time are the component parts imported and not the machinery itself, namely, the diesel engines. It was sought to be contended by Mr. Sethna in this regard that in the bills of entry, the respondent-company had described the component parts to be imported as required for the manufacture or assembly of diesel engines of stationary type and to the extent set out earlier they had used them for the purposes of manufacture of diesel engines of vehicular type and hence they have committed a breach of the bills of entry. It was also submitted by him that the bond must be as describing the machinery of the same type as described in the bill of entry. There is no merit whatsoever in any of these submissions. In the first place, we fail to see why the machinery referred to in the bond should be limited to the machinery described in the bill of entry, because the bond nowhere refers to the bill of entry at all. What is more important still is that all the diesel engines manufactured by the respondent out of the imported component parts were of the same type and hence the words "stationary type" used in the bill of entry are meaningless. In fact looking to the normal use of these diesel engines one could say that all the diesel engines manufactured by the respondent out of the component parts were diesel engines of the stationary type. None of them had been adapted specially for using them in vehicles. It was just that some of them happened to be used by the buyers for fixing them on dumpers over whom the respondent had no control. In our view, it is absurd to say that because of these circumstances over which the respondent had no control, the type of diesel engines assembled or manufactured by the respondent turned from stationary type to vehicular type.

8. It was faintly urged by Mr. Sethna that in respect of the aforesaid diesel engines, the respondent had violated the certificate issued by the Development Wing of the D.G.T.D. (Directorate General of Technical Development). In our view, this contention is hopelessly unsustainable. All that the certificate says is that the imported component parts were required for the purpose of initial setting up assembly or manufacture of machinery, namely, diesel engines and it is beyond doubt, for the reasons we have already pointed out, that these components have been used for the assembly or manufacture of diesel engines which are machinery.

9. The last submission of Mr. Sethna was that in any event the claim of refund made by the respondent-company should be limited to three years from the date of the petition. This, we must observe, is an ingenuous submission. We have

pointed out that the claim of the respondent relates to the amount which the respondent-company had to deposit on 3rd February 1970 as a condition precedent to its appeal being entertained. The dispute relates to the differential customs duty on component parts imported between 1964 and 1968 with the result that if the contention of Mr. Sethna is accepted after succeeding in the petition the respondent would get nothing at all. What Mr. Sethna has probably lost sight of is that the amount in question was never paid by the respondent-company as such. It had to be deposited as a condition precedent to the maintainability of the appeal preferred by the respondent and as the Customs Authorities were threatening to call in or enforce the bank guarantees. It was on 22nd December, 1972 that the appeal preferred by the respondent was dismissed and the amount deposited by the respondent appropriated by the Customs Authorities towards the aforesaid amount demanded, without any choice or volition on the part of the respondent at all. The aforesaid petition was filed by the respondent as early as April 1973 and hence we fail to see where the question of limitation or laches comes in at all. It is not that the people are expected to rush to Court before the departmental appeals which are provided in law are disposed of. In fact, it was after the petition was filed that the respondent-company preferred a revisional application in June 1973 to the Government which was rejected on 19th March, 1976. There is no merit, therefore, in the contention regarding limitation.

10. In the result, the appeal fails and is dismissed with costs.