

(1988) 03 BOM CK 0015
In the Bombay High Court
Case No : Writ Petition No. 639 of 1982

Orkay Silk Mills P. Ltd.

APPELLANT

Vs

Government of India

RESPONDENT

Date of Decision : 25-03-1988

Acts Referred:

Customs Act, 1962 — Section 111, 129

Citation : (1988) 17 ECR 250 : (1988) 36 ELT 399

Hon'ble Judges : R.A. Jahagirdar, J

Bench : Single Bench

Judgement

1. Some facts must necessarily be stated before appreciating the point urged by Mr. Jagtiani, the learned Advocate who appears in support of the petition. The petitioners were, at the relevant time, a private limited company engaged in the business of manufacturing, exporting and processing of art silk and synthetic fabrics. The petitioners were also manufacturing readymade garments. In the Import Policy for the year 1978-79, several articles were put on the Open General Licence, hereinafter for brevity's sake referred to as "OGL". The list of the capital goods allowed to be imported under the said licence was mentioned in Appendix 2 of the said Import Policy. In Part "A" of this Appendix at clause (6) thereof, there is one item called Transfer Printing Machine at serial No. 63.

2. The petitioners purported to import this item, namely transfer printing machine, but after examining the item the Collector of Customs issued a show cause notice to the petitioners on 19th of November 1979 pointing out to the petitioners that the machine which has been imported by them purportedly being one covered by the OGL is not a transfer printing machine used for the garment industry. After giving an opportunity to the petitioners of being heard, the Collector passed an order on 31st December 1979 confiscating the machine u/s 111(g) of the Customs Act, but allowing the petitioners to clear the same by paying a redemption fine of Rs. 7,92,000. It was the petitioners' case before the Collector that the transfer printing machine imported by them must be held to be

the one mentioned at serial No. 63 in clause (6) Part "A" of Appendix 2 of the Import Policy of 1978-79 for the simple reason that though the said machine is not directly used in the garment industry it is, nevertheless, used indirectly in the garment industry because the said machines is utilized for printing fabrics which are thereafter used in the preparation of garments by them. This contention was rejected by the Collector by pointing out, and in my opinion rightly, that when clause (6) mentions "Machinery for Garments/Hosiery Industry" it must necessarily mean a machinery which is used for garment industry and not a machinery which is used earlier in some other industry on a product which itself is thereafter processed in the garment industry.

3. The petitioners preferred an appeal to the Central Board of Excise and Customs u/s 129 of the Customs Act. That appeal was heard and dismissed by the Board by its judgment and order dated 27th March 1980, which order was challenged by the petitioners before the Government of India in revision. In the memo of revision application it was mentioned by the petitioners as follows :-

"Similar machine like Thermo Printing Machine has been allowed clearance without penalty by the Bombay Customs under OGL prior to this import and a Transfer Printing Machine has also been cleared by the Bombay Customs subsequent to this import under OGL without imposing any penalty. The details of these imports are available with the Bombay Customs."

The Government of India, by its order dated 9th of December 1981, refused to exercise its power in revision and confirmed the orders of the two authorities below. The petitioners have now approached this Court under Article 226 of the Constitution of India challenging the concurrent view taken by all the authorities under the Customs Act.

4. Mr. Jagtiani has urged that the view taken by the three authorities below, though concurrent, suffers from a patent error inasmuch as the said authorities imported into the description of the item in the OGL list the concept of "direct use" which is not warranted on the clear language to be found in the OGL list. According to Mr. Jagtiani, if the machine imported by the petitioners can be used in the garment industry, though not directly but indirectly, then it should be held to be covered by the description of "Transfer Printing Machine" mentioned at serial No. 63 of clause (6) in Appendix 2. There is, according to Mr. Jagtiani, a nexus between the use of this machine and the garment industry inasmuch as a product which is subjected to processing by this machine finds itself being used in the garment industry. The ultimate product which emerges from the factory of the petitioners bears the imprint of the use of this machine and, therefore, it must be, by proper and liberal interpretation of the phrase "machinery for garment industry", held that the machine imported by the petitioners falls within the category of machinery for garment industry.

5. I find it impossible to accept this proposition for the simple reason that by accepting the said interpretation one would be introducing a word "indirectly" in

the item specified in the list of the goods allowed to be imported under the OGL. That the machine which has been imported by the petitioners cannot at all be used for printing on the garments is an admitted position. It was in fact conceded before the Government of India on behalf of the petitioners that "the transfer printing machine imported by them is used only for printing on fabrics and that it cannot be used for printing on garments direct". In view of this admitted position, I do not see how it can be legitimately argued that an article which can be indirectly used in the garment industry should be regarded as an article which is said to be used for the garment industry. What was contemplated by the Import Policy was that all the particular machines, which are used for the garment industry alone, should be placed on the OGL list and not machines which are used elsewhere and may have some nexus ultimately with the garment industry.

6. An argument was advanced that a transfer printing machine does not cease to be an item of garment industry if it is used earlier in the fabric industry. This argument, in my opinion, discloses a fallacy at the outset because it pre-supposes that the transfer printing machine is a machine used in the garment industry. In my opinion, this is an incorrect approach. The basic question is whether it is an item of garment industry then the position must necessarily be in favour of the petitioner, whether it is used for the fabric industry also. On the other hand, it might be suggested that a machine which is used in the fabric industry does not become a machine used for the garment industry merely because the fabrics themselves are ultimately used in the garment industry. A machine used in the fabric industry does not become a machine for the garment industry merely because a product of that machine is ultimately consumed in the garment industry.

7. My attention was also invited to some of the items in clause (6) of Appendix 2, Part "A" in order to canvass a view that there are several items which prima facie cannot be used in the garment industry and yet the policy-makers have included these items in the said clause of machinery for garment industry. I refuse to indulge in an exercise of determining a question of fact raised for the first time in this petition under Article 226 of the Constitution of India. That these items could not be used merely in garment industry is a question of fact which was not urged before the authorities below. The determination of this question of fact, will require technical knowledge. Therefore, in my opinion, no foundation has been laid to enable me to go into this question. If anything, I would take the view that all these items which are included in clause (6), namely machinery for garment industry, could only be machinery for garment industry if they are used for that purpose. It was also suggested, by placing reliance upon item 13, that where the policy-makers thought it fit to give description of the machines for the garment industry, they are specifically so provided. Item 13 in clause (6) of Appendix 2, Part "A" reads as follows :-

"Elastic Inserting machine on variety of garments."

In my opinion, this is hardly relevant because the policy-makers must have given a description which is more detailed in item 13 or, for example, in item 11 because they thought that such a detailed description was necessary. This argument, in my opinion, is of no assistance to the petitioners.

8. I have already mentioned above that in the memo of revision before the Government it had been mentioned by the petitioners that one similar machine, which is transfer printing machine, had been cleared by the Bombay Customs under OGL without imposing any penalty. This contention was rejected by the Government by pointing out, and in my opinion rightly, that an error committed in one case cannot be perpetuated by taking a similar erroneous view in another case. This position, in my opinion, has not been destroyed by the argument of Mr. Jagtiani, relying upon several authorities which need not be referred to in detail, that in matters of taxation, including matters of import duties, it is incumbent upon the authorities to take a consistent view both in the interests of natural justice and for the purpose of finality of judgments, though in law the principles of *res judicata* or the law of precedents does not apply to the departmental proceedings. I have, with his assistance, gone through the authorities cited before me. There is no dispute about the proposition that the taxation authorities should take a consistent view and a view once taken should not be changed except for strong and cogent reasons. But on the facts of this case, it is impossible for me to hold that merely because subsequently a different view has been taken, the view taken in the instant case is erroneous. Indeed, I am of the opinion that no view other than the one taken by the authorities in the instant case is plausible. This apart from the fact that specific details of the incidents on which the petitioners relied have not been furnished to the authorities below nor in this petition.

9. In the result, the petition must fail. Rule is accordingly discharged with costs of respondents Nos. 1 and 2 in one set.