

(2002) 12 BOM CK 0102

In the Bombay High Court

Case No : Writ Petition No. 2068 of 1989

Phoenix Overseas P. Ltd. and Another

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 02-12-2002

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 111, 122, 125
Imports and Exports (Control) Act, 1947 — Section 3

Citation : (2003) 162 ELT 25 : (2003) 2 MhLj 84

Hon'ble Judges : V.C. Daga, J; J.P. Devadhar, J

Bench : Division Bench

Advocate : T. Vishwanathan, H. Mistry and Pandey, instructed by Pandey and Co, for the Appellant; R.V. Desai and N.V. Masurkar, instructed by T.C. Kaushik, for the Respondent

Final Decision : Dismissed

Judgement

V.C. Daga, J.—This petition is directed against the order of the Customs, Excise and Gold (Control) Appellate Tribunal, Mumbai ("CEGAT" for short) dated 20-4-1989, upholding the order of the Collector of Customs, except modification of reducing the redemption fine of Rs. 10 lakh to Rs. 5 lakh in respect of the order dated 13-6-1988.

THE FACTS

2. The facts leading to filing of the petition in nutshell are as under, The petitioners are the exporters of "Colour Picture Tubes" ("CPT" for short) to USSR. They were awarded contract for supply of CPT to USSR some time in the month of December 1987. On 23rd February 1988, they entered into a contract with one M/s Samsung Co. Ltd. of Korea ("M/s Samsung" for short) for import of CPT to fulfil their obligation under the said contract. Accordingly, on 29-2-1988, the petitioners opened irrevocable Letter of Credit in favour of M/s Samsung for import of CPT.

3. Upon publication of the new Import policy on 30th March 1988, petitioner No. 1 came to know of the Order No. 97/85-88 dated 23rd February 1988 issued by respondent No. 1 in exercise of powers conferred by Section 3 of the Import and Exports (Control) Act, 1947 (hereinafter referred to as "the Amendment Order") whereby the original Clause 11(1)(d) of the Imports (Control) Order 1955 came to be amended and the words "or otherwise" appearing in the original clause were deleted and the said clause after amendment read as under:

"(d) by transshipment or imported and bonded on arrival for re-export as ships stores to any country outside India except Nepal, Tibet and Bhutan or imported and bonded on arrival for re-export as aforesaid but subsequently released for use of Diplomatic personnel, Consular Officers in India and the officials of the United Nations Organisation and its specialised agencies who are exempt from payment of duty under Ministry of finance (O.R.) Notification No. 3 dated the 8th January 1957 and United Nations (Privileges and Immunities) Act, 1947, respectively;

4. The effect of the above amendment was that the order for re-export other than as Ship's stores, required an import licence. The amendment order came in to force on the date of its publication in the Official Gazette which petitioner No. 1 claimed to have noticed on or about 30th March 1988, when the Import Export Policy Book for 1988/90 was made available to the public.

5. The petitioner No. 1, in view of the above unforeseen change in the import policy of respondent No. 1 announced on 30th March 1988, immediately approached M/s Samsung vide their letter dated 1st April 1988 and requested them to cancel the said Import contract and insisted for return of the Letter of Credit. Similar request was also addressed to the Manager, Canara Bank to cancel the Letter of Credit opened by the petitioner No. 1, in view of the change in the import policy. Both of them refused to accept the request made by petitioner No. 1 in this behalf and rejected the same, In view of the aforesaid rejections, the petitioner No. 1 had no option but to receive and accept shipments of the said CPT. The petitioners accepted these shipments, under bona fide impression that their imports would be covered by "Open General Licence" ("OGL" for short), as such no import licence would be required since they were also processors and manufacturers the CPT.

6. The Collector of Customs, Respondent No. 4, on presentation of Bill of Entry, however, refused to allow clearance of goods in absence of import licence and also refused to treat imports of CPT under OGL on the ground that petitioner No. 1 did not fulfil the requirement of being actual users. The petitioners in the circumstances, to save demurrage, waived the service of show cause notice and appeared before respondent No. 4 in respect of first consignment of "CPT" arrived at Bombay on or about 29th June 1988. The respondent No. 4 offered second hearing to petitioner No. 1 on or about 10th July 1989 in respect of the other 8 consignments of CPT involving an import of aggregate 1,00,000 pieces of CPT which were arrived at Mumbai on various dates during the period May to

September 1988.

7. The petitioner No. 1 during the course of its submission submitted that it had entered into aforesaid export contract with the USSR in December 1987 and consequent Import Contract with M/s Samsung on 23rd February 1988 solely on the basis of the then existing Import Policy and Import (Control) Order, which permitted import of the goods without requirement of an import licence and, alternatively, it was contended that they were under the bona fide belief that the imports would be covered under OGL. The petitioner No. 1 also reiterated that they were not aware of the amendment and the changes made in the import policy until 30th March 1988. In order to bring home their submission, it was also urged that even the department was unaware of the amendment effected in the import policy till 30th March 1988. It was thus submitted that looking to the conduct of the petitioners after 30th March 1988 they have clearly established their bona fides in the matter.

8. The respondent No. 4, after having heard the petitioners, vide his order dated 13th June 1988 (issued on 8th November 1988) with respect to one consignment and by subsequent order dated 16th September 1988 (issued on 8th November 1988) with respect to other 8 consignments, was pleased to reject the aforesaid submissions of petitioner No. 1. The respondent No. 4 also rejected the submission of petitioner No. 1 that it had acted bona fide and taken all possible steps to cancel the aforesaid import contract and the Letter of Credit. However, respondent No. 4 found favour with one submission that it may be possible that petitioner No. 1 might not be aware of the amendment to the import policy at the time of entering into the Import Contract and opening Letter of Credit. The respondent No. 4 ultimately held that the "CPTs" which were imported by the petitioners were liable to be confiscated under the provisions of Section 111(d) of the Customs Act, 1962 ("Customs Act" for short), read with Section 3 of the Import and Exports (Control) Act, 1947. Accordingly, ordered confiscation of the goods u/s 111(d) read with Section 122 of the Customs Act.

9. The respondent No. 4, considering the fact that the "CPTs" were to be used for manufacturing operations under customs bond, gave an option to petitioners No. 1, u/s 125 of the Customs Act to clear the CPTs on payment of redemption fine in all aggregating to Rs. 49 lakh, out of which, Rs. 10 lakh were meant for first consignment in respect of which order was passed on 13th June 1988 and the balance amount of fine amounting to Rs. 39 lakhs meant for other 8 consignments. The petitioners deposited the entire amount of fine imposed on 9 consignments in all aggregating to Rs. 49 lakh. Each of the said consignment was thus got cleared against a Bill of Entry which bear an endorsement in writing thereon that the said fine has been paid without specifying any protest.

10. The aforesaid two orders of the Collector of Customs allowing clearance of the goods on payment of Rs. 49 lakh were challenged in appeal before the Appellate Authority viz. CEGAT. The CEGAT was pleased to uphold the order passed by the Collector of Customs, however, reduced the redemption fine from

Rs. 10 lakh to Rs. 5 lakh in respect of first consignment.

11. Being aggrieved by the aforesaid order petitioners have invoked writ jurisdiction of this Court under Article 226 of the Constitution of India.

The Arguments:

12. The learned Counsel for the petitioners contends that there is no import under the provisions of the Customs Act, consequently, there is no question of any contravention of Section 111(d) of the said Act. In his submission, though the goods entered into territorial waters of India, but the same were never cleared for home consumption. The goods were deposited in the warehouse and thereafter the same were directly re-exported to USSR from the warehouse itself. No custom duty was paid by the petitioners. Thus the submission is that the goods in question did not become part of the mass of the goods within the country. In other words, it did not mix with the land mass of India. The goods were all along under the control of the Customs right up to the date of export. Hence, there was no import into India as contemplated under the Customs Act, as such there was no question of any contravention of Section 111(1)(d) of the Customs Act.

13. In support of the above submissions the learned Counsel for the petitioner relied upon judgment of the Apex Court in the case of Siemens Ltd. Vs. Collector of Customs and Others, and Union of India and others Vs. Apar Private Ltd. and Others, . He also placed reliance on the judgment of the Apex Court in case of Garden Silk Mills Ltd. and Another Vs. Union of India and Others, and particularly laid emphasis on para 16 thereof, which reads as under :

"...It would appear to us that the import of goods into India would commence when the same cross into the territorial waters but continues and is completed when goods become part of the mass of goods within the country."

He also placed reliance on the another judgment of the Apex Court in the case of N.K. Bapna v. Union of India 1991(60) ELT 13 wherein the Apex Court held that in respect of goods deposited in a warehouse, the import is not complete till they are cleared for home consumption. In his submission, in the present case, import has never taken place, as such the fine could not have been imposed. Petitioners were required to pay redemption fine at that time for depositing the goods into the warehouse; otherwise the Customs would not have permitted them to warehouse these goods, as such this payment has to be treated as having been made under protest.

14. The learned Counsel further contends that no redemption fine is imposed if goods are re-exported. In this case, it was not imposable as the goods were actually re-exported. He borrowed strength from the judgment of the Apex Court in the case of Siemens Ltd. (supra) and relied upon Sankar Pandi Vs. Union of India (UOI), to support his contention in this behalf. He further pointed out that prior to 23-2-1988, Clause 1 I(I)(d) of the Import Control Order permitted import

of "any goods" without licence to re-export as ship stores or otherwise to any country outside India except Nepal, Tibet, Bhutan and after amendment i.e. with effect from 23-2-1988, Clause 11(1)(d) permitted import of goods as ships stores only. According to the petitioners, the contract for import of goods was entered into with Samsung on 23-2-1988. Thus, on the date of contract, the Import Control Order did permit import of goods without licence for re-export. Thus, on the day of the contract, the import into India was permissible. If that be so, subsequent restriction will not, therefore, apply. It shall have no effect on the valid contracts. He placed reliance on the decision of the Apex Court in the case of State of Haryana Vs. Lakhbir Singh and another, to support his submission in this behalf.

15. The learned Counsel for the petitioner further submitted that non imposition of penalty on the petitioners shows that there were no mala fides on the part of the petitioners in importing these goods. He further submitted that the Collector has not imposed any penalty on the petitioners u/s 112 of the Customs Act. Redemption fine was however imposed on the ground that ignorance of law is no excuse. He also pointed out that the Apex Court in the case of Akbar Badrudin Jiwani of Bombay Vs. Collector of Customs, Bombay, has held that mens rea is necessary for imposing penalty on the importer u/s 112. In the present case the fact that no penalty was imposed on the petitioners is one of the indications to show that there were no mala fides or mens rea on the part of the petitioners in importing the goods so as to contravene the Import Control Order. It is also suggested that re-export has earned valuable foreign exchange for the country, as such, imposition of redemption fine in the facts of the present case being unjustified is liable to be quashed and set aside.

16. Per contra, Mr. R. V. Desai, learned senior counsel for the revenue refuted all the submission and relied upon the judgment of the Apex Court in the case of D. Navinchandra and Co. and Others Vs. Union of India (UOI) and Others, and contended that once having paid redemption fine without any protest the petitioners cannot be allowed to blow hot and cold so as to contend contrary to their conduct. He urged that once having accepted the adverse orders, this Court should not interfere with the impugned orders of the authorities below in exercise of writ jurisdiction of this Court.

17. The learned Counsel for the Revenue further contends that the judgment of the Apex Court in the case of Garden Silk Mills Ltd. (supra) does not apply to the present case. He contended that in that case issue of import was related to taxable event whereas in the instant case taxable event is not in issue. The question involved herein is what is the effect of the amendment of the Import Trade Control Order vide Order No. 97/ 85-88 dated 23-2-1988 whereby import and bonding on arrival of the goods without a license have been restricted and made available only with respect to the exports made as Ship Stores. In the instant case, the goods imported were sought to be re-exported not as ships stores as such its clearance was rightly objected to under Clause 11(1)(d) of the

Import Control Order and therefore the goods were rightly ordered to be confiscated with option to redeem the goods on payment of redemption fine.

18. Shri Desai further contended that in view of the provisions of Section 2(23), 2(27) and 2(28) of the Customs Act 1962, which define Import, "India" (includes the territorial waters of India) and "Indian customs Water" it cannot be contended that there was no import. In his submission, in the instant case the actual import of consignment took place between 27-5-1988 and 8-9-1988 without cover of valid license as per amended provisions as such import was illegal and unauthorised. He further brought to our notice the statement made by the petitioners themselves that they tried their best to prevent the said unauthorised import but could not achieve their object as the foreign suppliers and the bank refused to accept their request. He tried to construe this part of the pleading and submission as admission on the part of the petitioners and urged that in view of the admission, the petition deserves to be dismissed with costs.

Findings and Consideration.

19. A submission sought to be build by the petitioners, based on the decision of the Apex Court in the case of Siemens Ltd., Garden Silk Mills Ltd. and/or Apar Private Limited (All cited supra) is that the duty was to be paid with reference to the relevant dates as mentioned in Section 15 of the Act. In other words, the contention is that the import of goods into India would commence when the same crosses the territorial waters and it continues and completes when the goods become part of the mass of goods within the country. Based on this premises further extension of the same argument is that since the goods were warehoused and were exported from warehouse itself there was no import of goods into India as such the redemption fine could not have been imposed on the ground that the goods were imported into India. The submission of the learned counsel for the petitioners, that there was no import as contemplated under Sections 14 and 15 of the Act as the taxable event was not complete, in our view, is misplaced for the reasons recorded hereinafter.

20. In order to appreciate the contention raised in this behalf, it is necessary to notice the scheme of the Customs Act. The Customs Act is an Act to consolidate and amend the law relating to customs. In order to appreciate the contention raised in this petition, it is necessary to notice a basis premise that under the Customs Act goods entering into India becomes imported goods and chargeable to duty u/s 12, unless they are exempt from payment of duty by virtue of some of the specific provisions. Section 14 deals with the valuation of goods for the purpose of assessment, whereas, Section 15 provides for determination of rate of duty and tariff valuation of imported goods. Section 17 and 18 deal with assessment and provisional assessment of duty respectively. So far as other provisions falling in Chapter-V are concerned, they are not relevant for the purpose of deciding the controversy in this petition.

21. Chapter - VI of the Act contains provisions relating to conveyances carrying

imported or exported goods. Chapter - VII of the Act contains provisions regarding the clearance of imported goods and export goods. Reading the provisions contained in the said chapters, it becomes apparent that all goods carried by vessel or aircraft entering from any place outside India has to land the goods at a customs port or customs airport and that too with the permission of the Customs Officer (Section 29).

22. The import manifest of the vessel is required to be delivered to the Customs Officer in terms of Section 30. Unloading of imported goods can take place only after the import manifest has been delivered and an order permitting entry inwards of the vessel has been given by the Customs Officer in terms of Section 31. Section 32 provides that unloading of only those goods is permitted as are mentioned in import manifest. The goods are to be unloaded as per Section 33 only at the place which is approved for that purpose and the same cannot be unloaded except under the supervision of the Customs Officer (Section 34).

23. All imported goods unloaded in a customs area are required to remain under the customs authorities until they are cleared for home consumption or are warehoused or are transshipped (Section 45). The goods can be cleared by the importer only after, as provided by Section 46, the importer files a bill of entry for home consumption or warehousing pursuant to which clearance of goods is granted u/s 47 by the Customs Officer.

24. The aforesaid provisions of the Act, therefore clearly show that unloading of the imported goods can take place only after import manifest has been delivered and order permitting entry has been given by the Customs officer and unloading of only those goods are permitted as are mentioned in the import manifest. The goods are to be unloaded only at the place which is approved for that purpose and same cannot be unloaded except under the supervision of the Customs Officer. With these restrictions on unloading of the imported goods, it is obligatory on the part of the Customs Officer to consider whether or not the goods are imported or attempted to be imported or are brought within Indian customs waters for the purpose of being imported and whether or not the same have been imported in accordance with the provisions of the Customs Act. If he finds that the goods are imported or 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, then, he is empowered to confiscate those goods [Section 111(d)] after following procedure laid down under the Customs Act.

25. Once the goods are confiscated in accordance with the provisions of the Customs Act, the officer adjudging it, in the case of any goods, the importation or exportation whereof, is prohibited under the Act or under any other law for the time being in force, may give to the owner of the goods an option to pay in lieu of confiscation such fine as the said officer thinks fit [see 125(1)]. It further provides that where any fine in lieu of confiscation of goods is imposed under Sub-section (1) of Section 125 of the Act, the owner of such goods or the person

referred to in Sub-section (i), shall, in addition, be liable to any duty and charges payable in respect of such goods, [Section 125(2)]. Therefore, the scheme of the Customs Act unequivocally goes to suggest that if the prohibited goods are imported, then such goods are liable to be confiscated and after confiscation it is open for the adjudging officer to give an option to pay fine in lieu of confiscation such fine as the said officer may think fit which is popularly known as "redemption fine". On payment of redemption fine, if clearance is sought, then the question of duty liability would come in picture. In that event, the duty liability would be determined on the basis of Section 12 read with Sections 14 and 15 of the Customs Act. Section 12 deals with chargeability, Section 14 deals with the valuation of the goods for purposes of assessment and Section 15 deals with determination of rate of duty and tariff valuation of imported goods. In this case, we are not concerned with the valuation or the applicable rate of duty because on payment of redemption fine the petitioners had not sought clearance of the goods for home consumption. Instead the petitioners, after paying the redemption fine had requested that the goods be kept in bonded warehouse. Thereafter, the petitioners sought clearance of the warehoused goods for exportation. Since the redemption fine was already paid on the confiscated goods, the petitioners were entitled to clear the said goods either for home consumption or for re-export. Since the petitioners opted for re-export, it was permitted. After the goods were re-exported it is not open to the petitioners to take turn around and contend that since the goods are re-exported, there was no import and hence redemption fine could not be levied. The goods in question which were confiscated were allowed to be bonded only on payment of redemption fine and even the re-export was permitted only because, on payment of redemption fine, the said goods ceased to be confiscated goods. Under the circumstances it is not open to the petitioners to contend that in view of the re-export of goods, the redemption fine paid by them should be refunded. In this view of the analysis of the scheme of the Customs Act, we are of the confirmed view that the judgments sought to be relied upon by the petitioners do not deal with the question raised in this petition. They are not at all applicable to the facts of the present case. We therefore, do not agree with the submission made by the petitioners.

26. The learned counsel for the revenue rightly relied upon the Apex Court judgment in the case of D. Navinchandra and Co. (supra), wherein it was clearly laid down that entitlement of import is governed by the policy prevailing at the time of import. In the present case, import of the items being prohibited after amendment of the policy by the public notice dated 23-2-1988, the petitioners cannot be allowed to avoid their liability prevailing at the time of import of goods. In this view of the matter, both the authorities below have rightly held that the goods were liable to be confiscated as they were illegally imported in contravention of the provisions of the import policy of the country as such the same were rightly released on payment of redemption fine, as per the provisions of the Act. The petitioners having paid redemption fine without any protest, in

our opinion, it was not open for the petitioners to challenge the same on any count whatsoever. On this count also, in our opinion, the petition must fail.

In the result, petition is dismissed with no order as to costs. Rule stands discharged.