

(1994) 01 MAD CK 0017

In the Madras High Court

Case No : Writ Petition No's. 21069 and 21613 of 1993

Probha Lohia

APPELLANT

Vs

Collector of Customs, Madras

RESPONDENT

Date of Decision : 04-01-1994

Acts Referred:

Customs Act, 1962 — Section 108, 111, 113, 2(39), 25

Citation : (1994) 70 ELT 559

Hon'ble Judges : Kanakaraj, J

Bench : Single Bench

Advocate : Shri R. Thiagarajan, for the Appellant; Shri C.A. Sundaram, Addl. Central Govt. Standing Counsel, for the Respondent

Judgement

1. Both the above writ petitions raise a common question whether the respondents have jurisdiction to investigate or enquire into the manner of imports and exports made under certain Advance Licences issued to the respective petitioners.

2. In W.P. No. 21069 of 1993 the petitioner is the partner of a firm called M/s. G. D. Enterprises engaged in the business of Imports and Exports.

The firm had obtained two Advance Licences in February, 1992 and March, 1993 under the Duty Exemption Entitlement Scheme (hereinafter

called "'D. E. E. C. Scheme'") for the import of Cassia. The licences carried on obligation to export Cassia oil to the extent of 45% value addition.

Several conditions are attached to the licences and according to the petitioner-firm it had complied with all the conditions. In respect of the first

licence issued in February, 1992 for the import of 13.5 Metric Tonnes of Cassia it is stated that the petitioner had exported necessary quantity of

Cassia Oil manufactured by the supporting manufacturer M/s. Net Con,

Bangalore. The second licence for the import of 80 Metric Tones of Cassia was utilised by importing in two lots, the first for 27 Metric Tonnes and the second for 54 Metric Tonnes of Cassia. Before the first import of 27 Metric Tonnes could be cleared, there was a raid on the premises of the petitioner-firm by the officers of the Directorate of Revenue Intelligence. The premises of the supporting manufacturer was also inspected by the officers. Thereafter the imported Cassia was cleared and similarly the second import of 54 Metric Tonnes was cleared in July-August, 1993. It is also contended that 50% of the export obligation in respect of the second licence has also been complied with. While so, the office premises of the petitioner was again raided on 21-10-1993 and all the original documents relating to the import and export of Cassia have been seized and removed by the second respondent. The petitioner is aggrieved by a summons issued by the second respondent on 22-10-1993 seeking the attendance of the petitioner to give evidence and produce documents. The summons has been issued u/s 108 of the Customs Act.

3. In W.P. No. 21613 of 1993 the petitioner is the Proprietor of one M/s. Rekha Overseas and they are engaged in the trade of imports and exports. He had obtained an Advance Licence in April, 1992 permitting the import of Cassia with an export obligation to export Cassia Oil. The consignment of 80.5 Metric Tonnes of Cassia was received and cleared through the customs. The petitioner was also relying on the very same supporting manufacturer namely, M/s. Netcon, Bangalore for the purpose of extracting Cassia Oil. According to the petitioner there are enough documents to show that Cassia Oil was extracted and after verification the same was exported outside India. An endorsement to that effect had been made in the Duty Exemption Entitlement Scheme Book, maintained for this purpose. On 21-10-1993 the Officers of the second respondent inspected the premises of the petitioner and seized 29 files containing original documents relating to the import of Cassia and export of Cassia Oil. This petitioner is also aggrieved by a similar summons issued u/s 108 of the Customs Act asking him to give evidence and produce documents on 21-10-1993.

4. The case of the petitioners in support of the prayer sought for, is that the D.E.E.C. Scheme as contained in the Policy Book and explained in the

Hand-book of Procedures, is a complete code by itself and for any violation of the conditions imposed in the licence, it is only the Scheme which

has to be looked into and not any other provision of law. The condition imposed in the licence cannot partake the character of an order u/s 3(1) of

the Import and Export Control Act, 1947 (hereinafter called "the I.E.C. Act). The argument is that if there is a violation of an order passed u/s 3(1)

of the I.E.C. Act, then only the penal provisions of the Customs Act are attracted. The emphasis is on the contention that a violation of a condition

of the licence cannot be equated to a violation of the I.E.C. Act. It is further contended that the jurisdiction of the Customs Authority is only to see

and to verify whether the goods imported answer the description given in the licence and they have no jurisdiction to verify whether the conditions

imposed in the licence have been carried out. If there is a post-importation violation, the jurisdiction to initiate action vests only with the Licensing

Authority and not the Customs Authorities. The petitioner relies on the recent judgments of this Court to which I will make a reference a little later.

5. In the counter-affidavit filed on behalf of the second respondent, it is stated that under the D.E.E.C. Scheme no part of the goods imported

could be sold or otherwise diverted to the local market. The exemption from paying of duty was in accordance with the Customs Notification

159/90. The information received by the respondents goes to show that in contravention of the Customs Notification, the petitioner had also sold

the consignment of Cassia imported free of duty. Further, instead of exporting Cassia Oil they had exported only groundnut oil. According to the

respondents the said act of the petitioners would attract the provisions of the Imports and Exports and Control Policy as well as Customs

Notification 159/90. It is also contended that only after investigation it can be found whether there is a violation of the licence conditions or the

provisions of I.E.C. Act or the Customs Act. The second respondent as an investigating agency after investigating the matter, they would submit

reports to the competent authority whether it is the licensing authority or the Customs Authority. The argument is that the petitioners cannot scuttle

even an investigation and that they will have time enough to raise the argument regarding the jurisdiction at the time when a show cause notice is

issued. It is also pointed out that there is an apprehension that there was a misdeclaration at the time of the export of the goods and therefore,

Section 113(i) of the Customs Act is likely to be attracted. The contention is that if the information received by the second respondent is proved

there would be a violation of Customs Notification issued u/s 25 of the Customs Act. An exemption from Customs Duty can be extended only

under the provisions of the Customs Act and it is precisely under such a notification that the goods were imported free of duty. Any violation of the

Customs Notification 159/90 would give rise to evasion of Customs duty rendering the goods liable for confiscation and levy of penalty. Therefore,

it is stated, that the summons issued u/s 108 of the Customs Act is perfectly within the jurisdiction of the second respondent and the writ petitions

are liable to be dismissed.

6. Before adverting to the various decisions cited by both the parties it would be convenient to look into the provisions of the Scheme and the Act

for a better appreciation of the points involved in the case.

7. A.L.C. Circular 4/92 dated 23-6-1992 provides for the grant of licence under the D.E.E.C. Scheme for import of cloves, cinnamon and cassia.

Similarly, A.L.C. Circular 9/92 dated 12-8-1992 gives details of the licensing conditions and the input and output norms and value addition

requirements for the import of those goods under the D.E.E.C. Scheme. The D.E.E.C. Scheme is adumbrated in Chapter XIX of the Import

Export Policy for 1990-93. Mr. R. Thiagarajan for the petitioners relies on Clauses 344, 345, 348, 363, 365, 366 and other similar clauses for

emphasising the point that it is the licensing authority who has all the powers including the power to take action for the violation of any of the

clauses. On the other hand, Mr. C.A. Sundaram for the respondents refers to Clause 366(1)(c), to suggest that the Customs Authorities have also

a role to play if the licence holder is not able to fulfil the export obligation both in terms of quantity and value. He also refers to ALC Circular 8/90

dated 10-8-1990, which contains the following clauses :-

The above actions shall be without prejudice to any other action that may be taken against the licence holder under the IMPEX Act and the

Customs Act for non-fulfilment of export obligation, mis-utilisation of imported materials, violation of the provisions of this scheme, including

enforcement of the legal undertaking and also disentitling the licence holder for further licences/release orders under the Import & Export Policy.

Mr. Thiagarajan also relies on the form of indemnity-cum-guarantee bond executed by an applicant for a licence under the DEEC Scheme, to

suggest that the application is only towards the Chief Controller of Imports and Exports. On the other hand Mr. C.A. Sundaram, brings to my

notice Clause 6(e) and 6(f) of the bond which clearly indicate that the importer makes himself liable for various legal action including the

confiscation of the imported material at any time before or after the completion of the export obligation period. Clause 6(f) of the bond is very

important and in my opinion, cuts at the root of the case of the petitioners. It is as follows :-

That the importer is liable to action taken for recovery of Customs or other duties, penalty and interest etc. thereon under provisions of the

Customs Act, 1962.

8. It will now be convenient to refer to the Notification 159/90 relied upon by the second respondent. That Notification is issued in exercise of the

powers conferred under sub-section (1) of Section 25 of the Customs Act. It says that the Government being satisfied that it is necessary in the

public interest to exempt certain goods imported into India against an Advance Licence issued under the Imports (Control) Order, 1955 which are

materials used in the manufacture of resultant products exported on certain terms and conditions. Clause (a) of the Notification says that materials

imported under the D.E.E.C. Scheme are permitted to be imported free of duty subject to the condition that the importer executes an undertaking

to comply with the conditions of licence and also a declaration that the licence holder binds himself to pay on demand an amount equal to the duty

leviable, but for the exemption on the imported material in respect of which the conditions specified in this notification have not been complied with.

It is not necessary for me to refer to the other clauses of the notification which clearly fasten a liability on an importer to utilise the materials

imported for the manufacture of resultant products and an obligation not to sell, transfer materials in any other manner. It is needless to point out

that a violation of this notification would involve an action being taken under the Customs Act. So far as the status of the Officers of the Directorate

of Revenue Intelligence, reliance is placed on the notification issued under sub-section (1) of Section 4 of the Customs Act, giving them powers to

act as Collector of Customs, Deputy Collector of Customs, Assistant Collector of Customs, according to the rank of the respective officers.

Therefore, the Officers of the second respondent have every right to invoke Section 108 of the Customs Act. As rightly contended by the learned

counsel for the respondents the second respondent is only an investigating agency, but they have been invested with certain powers of Customs

Authority. Their identity as an investigating agency cannot be lost because of the conferment of the power under the Customs Act.

9. It is now necessary to refer to certain provisions of the Customs Act. In particular I am of the opinion that the definition of the word "smuggling"

u/s 2(39) of the Customs Act is important.

smuggling"" in relation to any goods, means any act or omission which will render such goods liable to confiscation u/s 111 or Section 113;

sequently we will have to refer to Sections 111 and 113 of the Customs Act. In particular Section 111(o) of the Customs Act is relevant and it is

quoted below :-

any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the

time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper

office;

Suffice it to note that Section 113 of the Customs Act provides for confiscation of goods attempted to be improperly exported and indicates the

circumstances under which the goods are said to be improperly exported.

10. East India Commercial Co. Ltd., Calcutta and Another Vs. The Collector of Customs, Calcutta, is relied on, for the proposition that Section

167(8) of Sea Customs Act, could be invoked only if an order issued u/s 3 of the I.E.C. Act was infringed during the course of import or export. It

was also held that Section 3(2) of I.E.C. Act would not expressly or by necessary implication empower the authority concerned to confiscate the

goods imported under a valid licence on the ground that a condition of the licence not imposed by the order, is infringed or violated. It appears to

me that the entire argument of the petitioners is based on the ratio of the judgment of the Supreme Court above referred to. But it has to be

remembered that the Supreme Court was not concerned with a Notification

issued under the Customs Act as the one referred to in this case

namely, Notification 159/90. This aspect of the case has been adverted to by a recent judgment of the Karnataka High Court dated 27-2-1991 in

Writ Appeal No. 1868 of 1990 to which I will make a detailed reference a little later.

11. Learned counsel for the petitioner relies on *Audio Vision Electronics v. Collector* 1987 37 E.L.T. 796 which is judgment by the Tribunal. The

following passage is relied on :-

Imported goods cannot be confiscated on the assumption that the Actual User Importer would most likely sell them in the market. If he does sell

them in the market, there are provisions in the Imports and Exports (Control) Act and the Import (Control) Order to take action against the errant

importer. The jurisdiction to do so vests in the Chief Controller of Imports and Exports, it being a post-importation violation, and not with the

customs.

Here again the Tribunal had no occasion to consider a Customs Notification which also imposes an obligation on the importer. Reliance is also

placed on *Tapti Oil Industries v. State of Maharashtra* 1984 2 E.C.C. 307. That case primarily relates to the principle of promissory estoppel.

There is a stray sentence in the judgment which says, in a scheme, the implementing agency has to act according to the mandate of the scheme

itself. The next reference is *Durga Prasad Private Limited v. Union of India* I.L.R.1968 421. The Division Bench of this Court was concerned with

the jurisdiction of the Customs Authorities in issuing a number of show cause notices, in respect of alleged offences u/s 12(1) read with Section

23A of the Foreign Exchange Regulation Act, 1947. The Division Bench held

The real point here is that the gist of the offence u/s 12(1) of the Foreign Exchange Regulation Act read with Sections 19 and 167(8) of the Sea

Customs Act, is an export or attempted export, which is in violation of the obligation of the intending exporter to make a declaration, to furnish

documents called for, to satisfy the authorities, and to obtain permission to export. Where he has done all this, clearly he has not violated Section

12(1). If he has misled the authorities by false representations, or failed thereby to repatriate foreign exchange, by virtue of his obligation u/s 12(2)

those are different offences, for which separate and specific penalties can be

imposed.

Accordingly, it was held that the Customs Authority had no jurisdiction to proceed with the show cause notice. In my opinion, even this case does

not deal with the implications of the scheme in question taken along with Customs Notification 159/90.

12. On the other hand, there are two interesting and illuminating judgments of the Supreme Court reported in Madan Lal Anand Vs. Union of India

and others, and M/s. Jacsons Thevara Vs. Collector of Customs and Central Excise, . The first case related to the detention of a person under the

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, with a view to prevent the detenu from indulging in smuggling

activities. But the facts of the case have a close resemblance to the facts of the present case. In that case also certain Advance Licences were

obtained by certain non-existing firms and the goods were disposed of in the local market without fulfilling the export obligations in contravention of

a Customs Notification 117 dated 9-6-1978 as well as the conditions of the Import Licence. While meeting a similar objection the apex court

observed as follows :-

In view of clause (o) of Section 111, if any goods exempted from payment of duty is imported without observing the condition, subject to which

the exemption has been made, it will be a case of smuggling within the meaning of Section 2(e) of the COFEPOSA Act.

The Supreme Court also pointed out that there was a violation of Section 111(o) of the Customs Act. In the second case, certain goods were

imported under ""Project Import"" Scheme, without disclosing an agreement of transfer to a third-party/company at the time of clearance of the

imported goods. The Supreme Court held that the goods could be subjected to a reassessment to collect the short levy of duty. The Supreme

Court held that the goods imported had not been installed by the importer at their premises and the same was never utilised for the substantial

expansion of the factory and that the declaration made in the application for registration of contract and in the Bill of Entry filed for clearance of

goods in question was not correct and that the importer had misdeclared and suppressed the actual facts for claiming the benefit of concessional

assessment available to project imports. It was found that the goods were liable

for confiscation under Clauses (m) and (o) of Section 111 of the Customs Act. The apex court held that action was not being taken for breach of any condition of the licence but that action was being taken only for violation of the provisions of the Customs Act for obtaining clearance of the goods by paying a concessional rate of duty.

13. The argument of Mr. Thiagarajan for the petitioner is that Section 111(o) of the Customs Act contains the words ""in respect of which the

condition is not observed unless the non-observance of the condition was sanctioned by the proper office;" and that the same gives a clue to the

authority who can take action for violation of the condition of a licence. I do not accept this plea. Those words only indicate that if the competent

authority approves of a modification of the conditions of the licence, then the same cannot be made a ground for confiscation. On the other hand I

am impressed by the arguments of Mr. C.A. Sundaram that the investigation may disclose a misdescription at the time of export, warranting action

u/s 113(i) of the Customs Act. Such an action has nothing to do with the conditions of licence. It is only the investigation by the independent

agency like the second respondent which will disclose whether there is violation of the conditions of licence or whether there was escaped duty on

account of the violation of the Notification 159/90. In other words, it is only the completion of the investigation which will disclose the necessity for

and the nature of action to be taken and it is at this stage only the question of jurisdiction will arise. Further, I am relieved of the necessity to go into

more details, because of the recent judgment of the Karnataka High Court in Writ Appeal No. 1868 of 1990. This case is identical on facts and

identical arguments were advanced. All the above judgments and certain other judgments were also relied upon. Chief Justice Mohan, as he then

was, speaking for the Bench held as follows :-

The appellants are bound to comply with the conditions of the Notification No. 116 of 1988 dated 30th March, 1988 issued u/s 25 of the

Customs Act which in turn attracts Section 111(o) of the Customs Act.

They confirmed the view of the learned single Judge and held that the Customs Authorities had every jurisdiction to investigate into the matter. The

Karnataka High Court had taken note of a judgment of a Division Bench of this Court in Writ Appeal Nos. 1043 to 1049 of 1988 and held that

the Notification under Customs Act had made all the difference in coming to the conclusion that the Customs Authority had jurisdiction to proceed with the matter.

The Division Bench judgment of this Court in Writ Appeal Nos. 1043 to 1048 of 1988 dated 9-9-1988 is certainly binding on me. Had the

judgment been a final judgment disposing of the matter at the stage of final disposal of the case. On the other hand, the said Division Bench

judgment is against a miscellaneous petition pending disposal of a writ petition. No doubt, the Division Bench accepted the view of the Bombay

High Court in Shivshankar Tilakraj Vs. Union of India and others, to the extent that the Customs Authorities are not empowered to sit in judgment

over the powers of the Controller of Imports and Exports. But I cannot fail to take note of the conclusion of the Division Bench which is expressed

in the following words :-

Further, the learned judge having relied upon a Division Bench decision of this Court in the Union of India and Others v. Chyveno Southern

Incorporation (W.A. No. 1126 and 1127 of 1985, dated 18-2-1986) and as the respondents have made out a prima facie case about lack of

jurisdiction of the Customs Authorities to deal with the goods covered by the said Scheme, these Writ Appeals deserve to be dismissed.

It is interesting to note that even the judgment in Writ Appeal Nos. 1126 and 1127 of 1985 is pending final adjudication in writ petition. The

Division Bench in Writ Appeal Nos. 1126 and 1127 of 1985 say ""We make it clear that the reasonings expressed both by the learned single Judge

and by us are meant only for the purpose of disposing of the interim applications and it is needless to state that they shall not be counted for the

purpose of deciding the writ petitions at the final hearing on merits."" Therefore, it is clear that the Division Bench had only expressed a prima facie

and had not decided the matter conclusively. On the other hand the judgment of the Karnataka High Court is a final adjudication and laying down a

precise ratio which I am inclined to follow.

14. The only argument of Mr. Thiagarajan for the petitioner is that against the judgment of the Karnataka High Court Special Leave Petitions have

been filed and the proceedings of the Directorate of Revenue Intelligence had been stayed. In fact, it is only on the basis of the interim order of the

apex court that I had admitted these two writ petitions and granted an interim order. But I am of the opinion that when the writ petitions are being

disposed of finally I cannot adopt an interim order of the apex court as constituting the ratio of the judgment of the apex court. On the other hand,

the considered judgment of the Karnataka High Court forms the basis for my decision. That apart I have already indicated from the.... of DEEC

Scheme in Chapter XIX of the Policy for 1990-93, as well as the form of undertaking in the Appendix XIX-E, which in my opinion conclusively

establishes the jurisdiction of the Customs Authorities to proceed with the investigation and enquiry.

15. For all the above reasons the writ petitions fail and they are accordingly dismissed. All the interim orders are vacated.