

(1988) 09 MAD CK 0030

In the Madras High Court

Case No : Writ Petition Nos.1767 and 1768 of 1982

Raja Agencies

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 23-09-1988

Acts Referred:

Citation : (1993) 42 ECC 168

Hon'ble Judges : Ramalingam, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Ramalingam, J.—The petitioners are letter of authority holders of two REP Import Licences of Export Houses, for import of raw materials,

components and consumables covered by Appendix 10, Entry No. 1 of Import Policy, April 1981-March 1982. The petitioners placed an order

for supply of 300 M.T. of Acid Oil (Raw material for soap) with M/s. Hardial Enterprises Private Limited, Singapore, which was confirmed by

their letter dated 2.1.1981. The goods arrived by ship on 2.5.1981. The petitioners filed the bills of lading Nos. 6, 7, 8 and 10 dated 30.3.1981.

The customs authorities did not release the goods but issued a show cause notice stating that though the ship's manifest shows that the goods

loaded are coconut acid oil, in view of the fact that the goods are imported from Singapore where "Palm" is grown in abundance, the imported oil

should be palm acid oil which is a canalised item. It was also stated that though the bills of lading are dated 30.3.1981, the goods were not actually

put on board the ship till 14.4.1981 and therefore the bills of lading were pre-dated to cover the import of the goods within 1981-82 Import

Policy. The petitioners submitted their explanation but it was not accepted and by order dated 12.6.1981 it was held that the import is

unauthorised and redemption fine of 30% on the CIF value and also a personal penalty of 10% on CIF value of the goods was levied. The

petitioners preferred an appeal to the 4th respondent in which they inter alia contended that they had imported only acid oil and not palm acid oil.

In any event they are protected by para 222(3) of Appendix 10 of 1981-82 Policy and they are not in any way responsible and they had no

knowledge of pre-dated bills of lading. The appeals preferred by the petitioners were rejected on 3.10.1981 on the ground that taking advantage

of the transitional arrangements provided under [Para] No. 222(3) of the 1981-82 Policy the importers should have opened an irrevocable letter

of credit, and in the instant case it was not done. Consequently both the imposition of redemption fine and the personal penalty were confirmed by

the 4th respondent. Against this order, the present writ petition is filed praying for issue of writ of certiorarified mandamus to quash the order dated

3.10.1981 passed by the 4th respondent and directing refund of the amount paid by them.

2. Mr. Habibullah Badsha, learned Counsel appearing for the petitioners contends that there is no allegation made against the petitioners that they

were guilty of fraud or that they had acted in such a manner as to defeat the provisions of any law. When such is the petition [position?] and when

they had bona fide acted on the bills of lading issued by the shipper which bore the date 30.3.1981, and wanted the clearance of the goods, .the

question of imposition of penalty would not arise. Elaborating this contention, it is stated that the imposition of penalty would arise only when the

transaction has criminality attracted to it and that unless it is established that the importer had a criminal mind(mens rea) no question of penalty

would arise. In support of this contention, the learned Counsel relies on the judgment of the Supreme Court reported in.

Hindustan Steel Ltd. Vs. State of Orissa, .

Sha Rikhabdas v. Collector of Central Excise AIR 1963 Mad 336.

Charandas Malhotra Vs. Assistant Collector of Customs and Superintendent Preventive Service and Others, .

On the question of redemption fine, learned Counsel submits that a bill of lading

issued by the Shipping company agent is a document of title which is conclusive proof of the fact that the goods covered by the said bill of lading are boarded on the ship and the contents of bills of lading should be taken as true. The learned Counsel relies on *The State of Mysore Vs. Padmanabhacharya etc.*, for this proposition. He has also placed reliance on *Malabar Steamship Co. v. Central Bank of India* AIR 1934 Sindh 229. He refers to the provisions of paragraph 200 and 201 of Chapter VIII of the Hand book of Import-Export Procedures, which states that The period of validity means the period of shipment/despatch permissible for the goods concerned and in the case of shipments made by sea, this will be the date on the bill of lading.

3. Thiru Narasimhan, learned Counsel appearing for the respondents, vehemently opposes the contentions of the petitioners. He states that admittedly the petitioners had not imported goods during the period covered by Import Policy 81-82 and consequently unless the import is allowed by the subsequent policy, the confiscation of the goods and imposition of penalties are in order. He further states that the petitioners are not entitled even to the transitional provision in para 222(3) of 1981-82 policy, since on their own showing, the petitioners have not opened irrevocable letters of credit, prior to 31.3.1981. He relies upon a passage occurring in *Payne & Ivaay's carriage of goods by Seta*, Eleventh edition, at page 62 wherein Bill of Lading is described thus:

A bill of lading has, in the eyes of law, various aspects:

- (1) It is very good evidence of the contract of affreightment, though not the contract itself, for the contract is usually entered into before the bill of lading is signed.
- (2) It is a receipt for the goods shipped and contains certain admissions as to their quantity and condition when put on board;
- (3) It is a document of title, without which delivery of the goods cannot normally be obtained.

He further relies upon the decisions in 1981 E C C 81 (sic) and *Raj Parkash Chemicals Ltd. and Another Vs. Union of India (UOI) and Others*, and submits that only in cases where irrevocable letters of credit have been opened prior to the expiry of licence period, importers can take the

benefit of the said transactional [transitional?] provision and not otherwise.

4. The question of imposition of penalty can be first disposed of. According to the petitioners, there was a valid REP licence to import raw

materials covered by Appendix 10 Entry 1 of April-March 1981-82 Import Policy. Import of these raw materials was allowed as OGL items

under Appendix 18 Entry I of the said Import Policy. Acid oil was not a canalised item included in Appendix 9 and import of acid oil was

permissive under OGL. The only relevant entry in Appendix-9 dealing with canalised items is palm oil, but acid oil is a different and distinct

commodity from palm oil. The import of acid oil would not come under canalised items. Therefore, honestly and with bona fide intentions the

petitioners placed an order for the import of acid oil, through a merchant in Singapore even as early as in January 1981 and this order placed by

the petitioners was confirmed in January 1981 itself. In pursuance thereof, the bills of lading duly signed by the shipping agent were delivered to the

petitioners, so as to enable them to clear the goods on their arrival in Madras Port. These bills bear the date 30.3.1981 which will be within the

licence period. Therefore merely because the ship had arrived in Madras harbour in May 1981, there is no illegality committed by the petitioners,

nor had they committed any fraud. Hence no question of imposition of penalty would arise. In Hindustan Steel Ltd. Vs. State of Orissa, which

arose under the Sales Tax Act, the Supreme court dealt with the question of imposition of penalty and held as follows:

An order of imposing penalty for failure to carry out a statutory obligation is the result of a quasi- criminal proceeding, and penalty will not

ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or

acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be

imposed for failure to perform a statutory obligation is a matter, of discretion of the authority to be exercised judicially and on a consideration of all

the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to

impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the

offender is not liable to act in the manner prescribed by the statute.

In *Charandas Malhotra Vs. Assistant Collector of Customs and Superintendent Preventive Service and Others*, which arose under the Customs

Act, it was held as follows:

The next point with respect to notice is that it proposes to levy a penalty in accordance with the provisions of Section 112 of the said Act, but does

not make the necessary allegations in order to support it. This may be explained as follows: Where any goods are smuggled, the authorities are

entitled to seize and confiscate the same wherever they find it. In other words, it is the goods that are tainted and it does not matter as to how and

where they are found. But penalty u/s 112 is another matter altogether. Penalty can only be inflicted when, in relation to such goods, a person has

done something or omitted to do something according to law. Thus, whereas confiscation can be ordered irrespective of knowledge of the person

in whose possession goods are found, the imposition of a penalty requires deliberate action and knowledge.

In the instant case, the penalties were imposed on the petitioners, on the allegations that the bills of lading should have been antedated; because the

ship in which the goods were supposed to have been loaded at Singapore had not arrived in the Singapore port till the middle of April-May 1981.

On the surmise that the petitioners would have had knowledge about these facts, had only they kept a close watch of the activities that may take

place in pursuance of the order that they had placed, it was held that the petitioners were aware of the fact that the goods were shipped from

Singapore in the middle of April-March [May?] 1981 and this shows the culpability of the petitioners. All these allegations made against the

petitioners are in the realm of surmise and conjectures. It is well accepted theory that, surmises and conjectures cannot take the place of proof and

guilt should be proved by unimpeachable evidence which can stand close scrutiny. In the instant case, insofar as there is no acceptable evidence of

guilt of the petitioners the imposition of penalty is unwarranted and the same is set aside.

5. The next question to be considered is whether the goods are liable to be confiscated. The petitioners' main contention is that on the strength of

REP import licence they had placed order for import of Acid Oil which is not a

canalised item even in January 1981, and that they were given bill of lading dated 30.3.1981. They acted on that and cleared the goods when the ship arrived in May 1981. The reasons given by the respondents for rejecting the [case] of the petitioners are two fold. Firstly, it is [shown] that Acid Oil imported by them can only be Palm Acid Oil since in Singapore Palm Acid Oil is available in plenty and Palm Acid Oil was a canalised item even during the Import Policy April-March, 1981. The import in the instant case was prohibited and confiscation was permissible. The second contention of the respondent is that though the bills of lading bear the date 30.3.1981, the goods were not actually put on board till the middle of April 1981 and therefore the import on the strength of licence valid for the period till 31.3.1981 cannot cover the goods in question. Palm Acid Oil had been included as a canalised item the 1981-82. The third submission of the respondent is that insofar as the petitioner had not opened irrevocable letter of credit during the currency of the licence the petitioner is not entitled to the transitional provisions contained in para 222(3) of the 1981-82 Policy.

6. On a careful consideration of these objections raised by the respondent it could be seen that none of these contentions can help the respondents.

The petitioner had placed an order for the import of acid oil. The description of the goods in the bills of lading, invoice, etc., is Acid Oil. Acid Oil was one which could be imported under OGL during 1980-81. Merely because the respondents felt that palm acid oil is available in plenty in Singapore, they cannot come to the conclusion that what had been imported by the petitioners should be Palm Acid Oil. Therefore, this conclusion of the respondents that what was imported should have been Palm Acid Oil is a conclusion based on no evidence. Hence the first contention of the respondents is rejected.

7. The next contention of the petitioners is that though the bills of lading were dated 30.3.1981 the goods were actually put on board only in April 1981, and therefore the benefit of the Import Policy for the year April-March 1980-81 is not available to the petitioners. The learned Counsel for the petitioners in refuting this contention relies on the decision in Home Insurance Co. Ltd. and Another Vs. Ramnath and Co., Madras, in which it is stated in para 6 that the bill of lading is sufficient evidence to establish the fact

that the goods were actually put on board and were received by

the master of the ship. In AIR 1939 Sindh 228, it was held as follows:

Now the bill of lading is a document of title, it is a symbol of the goods; it represents the goods themselves, and it appears to us that as a document

of title it is a document of title to specified goods in specified place and that a pledge of goods not on board ship by way of the pledge of the bill of

lading is no more a pledge of goods on board the ship than the deposit of the keys of warehouse B in which the pledged goods are not stored

would transfer possession or evidence a pledge of goods stored in warehouse A. A bill of lading is a document of title signed by the ship owner or

by the master or other agent of the ship owner which states that certain specified goods have been shipped [on] a particular ship and which

purports to set out the terms on which such goods have been shipped upon a particular ship and which purports to set out the terms on which such

goods have been delivered to and received by the ship. This is the definition given in Halsbury, Volume 26, para 229, page 144 and it is the

definition generally accepted, and the bill of lading is a symbol of the right of property in the goods specified therein. Its possession is equivalent to

the possession of the goods themselves, and its transfer being a symbolical delivery of the goods themselves has by mercantile usage the same

effect as an actual delivery in the circumstances.

In The Madras Port Trust Vs. K.P.A.T. Annamalai Nadar and Another, there is elaborate discussion about the provisions of the Indian Carriage

of Goods by Sea Act, Indian Bills of Lading Act and it would be proper for the purpose of this case to extract the following:

(13) Clause 3 of Article III of the schedule to the Indian Carriage of Goods by Sea Act, XXVI of 1925, relating to the bills of lading provides:

"After receiving the goods into his charge, the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a

bill of lading showing among other things--

The lading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods

starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or covering in which such goods

are contained, in such a manner as should ordinarily remain legible until the end

of the voyage;

(b) Either the number of packages or pieces of the quantity or weight, as the case may be as furnished in writing by the shipper;

(c) the apparent order and condition of the goods:

Provided that, no carrier, master or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity or weight

which he has reasonable grounds for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means

of checking".

(14) Clause 4 of the Article III provides--

"such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with para 3(a), (b)

and (c) ½.

(15) The Indian Bills of Lading Act IX of 1856, provides by Section 3:

"Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a

vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or

some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the

same that the goods had not in fact been laden on board:

Provided that the master or other person so signing may exonerate himself, in respect of such misrepresentation, by showing that it was caused

without any default on his part, and wholly by the fraud of the shipper, or of the holder or some person under whom the holder claims".

(16) The bill of lading generally is prima facie evidence against the ship-owner of the shipment on board of the goods acknowledged under the bill

of lading to have been shipped. As noted in the foot-note at page 70, Article XX in Sir Thomas Edward Scrutton, Charter Parties and Bills of

Lading, 16th Edn.:

"The evidence to displace the bill of lading must show not merely that the goods may not have been shipped, but that they were not; Smith v.

Bedouin Steam Navigation Co. 1896 AC 70, but this may be shown by conclusive evidence that after receipt by the ship-owner none of the

goods were lost or stolen and that he has delivered all that he received.

The statement in the bill of lading is to be displaced merely by a consideration of the balance of probabilities".

On the basis of the above provisions extracted in paras 13 to 16 it was held in para 17 of the [report] that it must be held that the consignment

bears marks as shown in the bill of lading, had been at the port of origin. The learned Counsel [contended] that in the instant case when the shipper

delivered goods to the agent of the ship and when the agent gave him a bill of lading, that bill of lading will be conclusive proof of the fact that the

goods have been boarded. The petitioners contend that in the international trade, in practice, the date given in the bill of lading is invariably taken as

the date on which the goods were put on board the ship. Delivery to the agent of a ship and the issue of bills of lading by that agent cannot be

questioned by stating that the description of the goods Which had been boarded or the date noted therein, is incorrect, except in cases where fraud

can be established. In the instant case, no such fraud has been proved. The bill of lading is dated 30.3.1981, and it is well within the licence period

[and] would enable the petitioners to import Acid Oil under OGL conditions, on the strength of the REP licence held by the principals of the

petitioners. Hence, the second contention advanced by the respondent counsel cannot also be sustained.

7. The only other contention of the respondents is that insofar as the petitioners have not obtained irrevocable letters of credit before the expiry of

the licence period, they are not entitled to the transitional provisions contained in paragraph 222(3) of the Import Policy for 1981-82. Reliance is

placed on the judgment of the Supreme Court, reported in April 1986 SCC 297 wherein it was held in para 27, as follows:

All imports effected pursuant to such letters of credit should be deemed to have been legally and properly made, and should entail no adverse

consequences whatsoever. In taking this view we are impressed by the broad principles of justice, equity and fair play and by the need to avoid

undeserved hardship, and we are not persuaded to the contrary by legal technicalities.

Proceeding further, in paragraph 28, the Supreme Court held as follows:

At the same time we make it clear that diamond exporters who pursuant to the

issue of Additional Licences under the Import Policy 1978-79 have opened and established irrevocable letters of credit on or after October 18, 1985 will not be entitled to the benefit of this order.

Relying on this judgment, the learned Counsel for respondents contended that insofar as the petitioners have not opened irrevocable letters of credit before the expiry of the licence period, the transitional [provision] of para 222(3) is not applicable to them. In [his] contention, the learned Counsel for the petitioners states that it is not the petitioners' case that they are entitled to the benefit under the transitional provisions. On the contrary their case is that insofar as the import was made during the currency of the import licence viz. March 1980-81 and it is evidenced by the Bills of Lading dated 30.3.1981 and there is no need for the petitioners to seek umbrage under the transitional provisions. This contention of the learned Counsel for the petitioner is accepted, in view of the fact that it has already been held that the petitioners' import was covered by the licence granted to the petitioners principals for the year 1980-81 and the date of import is the date of the bill of lading.

8. The only other point that was urged by the learned Counsel for the respondents is with reference to the statements contained in Rayne & Ivamy's Carriage of Goods by Sea, in page 62, the relevant passage of which has already been extracted. But this is a general statement of law and in the face of the provisions of the Carriage of Goods by Sea Act, and the Bills of Lading Act, the bill of lading issued in the instant case being dated 30.3.1981, the import is valid. For the foregoing reasons, W.P. No. 1767 of 1982 is allowed. No costs.

9. In view of the order passed in W.P. No. 1767/82, W.P. No. 1768/82 is not pressed and is dismissed. No Costs.