
(1961) 05 MAD CK 0010
In the Madras High Court
Case No : Writ Appeal No. 137 of 1960

Sha Rikabdoss Bhavarlal

APPELLANT

Vs

Collector of Customs, Madras

RESPONDENT

Date of Decision : 04-05-1961

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 32
Imports (Control) Order, 1955 — Section 3
Imports and Exports (Control) Act, 1947 — Section 2, 3(2)
Sea Customs Act, 1878 — Section 167, 167(8)
Tariff Act, 1934 — Section 45

Citation : AIR 1962 Mad 164 : (1962) ILR (Mad) 229 : (1961) 74 LW 672

Hon'ble Judges : P.V. Rajamannar, C.J; Kailasam, J

Bench : Division Bench

Judgement

Rajamannar, C.J.

(1) This is an appeal from the judgment of Rajagopalan, J., dismissing W. P. No. 452 of 1958 filed by the Appellant for the issue of a writ of certiorari to quash the order passed by the Collector of Customs, Madras, on 10th March 1958 confiscating certain goods imported by the appellant on the ground that the goods were imported without a valid licence in contravention of S. 3 of the Imports Control Order, 1955 read with sub-sec (2) of S. 3 of the Imports and Exports Control Act, 1947, and, therefore, an offence under S. 167 (8) of the Sea Customs Act had been committed.

(2) The main facts are not in dispute. They can be gathered from the affidavit of one Sirdarmull, the authorised agent of the appellants, Sha Rukadas Bhavarlal. Sirdarmull was also the agent for other persons carrying on business similar to that of the appellants. The appellants held a licence granted by the Government of India under the Imports and Exports Control Act, 1947, authorising them to import musical instruments and parts thereof, all sorts. This licence was converted on their application to a license for the import of electric insulations, etc, excluding 38-11 face value restricted items. The approximate value of the

goods which could be imported was fixed at Rs. 1000. There was an endorsement by the Assistant Controller relating to this conversion which ran thus :

"The import of these goods is subject to the restrictions mentioned in cl. 6 of S. 2 of January-June 1957 policy."

The material part of that column is as follows :

"Not more than 7 1/2 per cent of the face value of quota licence or Rs. 500 whichever is higher can be utilised for the import of adhesive tapes."

The relevant item of the Indian Tariff Code schedule is item 38 :

"Electric insulations including presspahn paper which fall under item No. 45 of the First Schedule to the Indian Tariff Act, 1934, but excluding ebonite casa, tubes and sheets."

In the Index a large number of electric insulations of different varieties are mentioned as covered by this item 38. They include among others : (1) Adhesive tapes, (2) Black insulating tapes, (3) Cotton insulating tapes, (4) Glass silk tape (5) rubber tapes (6) impregnated tapes. In November 1957 the appellants placed orders for import of black insulating tape under the converted licence of the total value of Rs. 999. The goods arrived at the Madras port in December 1957. The Bill of entry in respect of the goods was filed on 18th December 1957 along with the licence and other papers for clearing the consignment. But the Customs authorities raised objections on the ground that the said black insulating tape fell under the category of adhesive tape which could not be imported under the said converted licence.

The Assistant Collector of Customs called upon the appellant to show cause why the goods should not be confiscated and penalty imposed, as the goods fell under the face value restrictions of which import was prohibited under the licence. The petitioners submitted their explanation on 30th January 1958 and 7th February 1958 pointing out that black insulating tape was given as an item different from adhesive tape was given as an item different from adhesive tape in the index and that was the view taken by the customs authorities when an Enquiry was made in that behalf. The Assistant Collector sent up the papers to the Collector of Customs who passed the order sought to be quashed on 10th March 1958.

The following portions of the order are material :

"The explanation of the importers is not satisfactory. Their claim that they had made an Enquiry to the I. T. C. authorities and then imported the goods is not correct. It is seen that the enquiry had been by Messrs. Mahaveer Electric Corporation, Madras and not by the importers themselves. Further in the reply of Joint Chief Controller of imports it had been clearly stated that the face value restriction would apply to adhesive tapes and as the goods imported are

adhesive tape the restriction will apply to the importation. The importer's plea that previously they had cleared similar goods against similar type of licence produced under bill of entry cash No. 1194/26-11-1957 and that therefore they should be allowed to clear the goods now imported cannot be accepted as clearance allowed erroneous cannot be taken as a ground for allowing clearance of similar goods again. The precedent cited was apparently assessed under item 73 I. C. T. as it was prior to the decisions taken subsequently to discount such erroneous assessment and fell in line with Bombay and Calcutta custom houses to assess such goods under item 82 (5), I. C. T.

The goods were accordingly released without face value restrictions under S. 38/II as they were not then considered to be adhesive tapes. Regarding importers' claim that the goods are assessable under item 73, I. C. T as per the clarification obtained from the custom house, it is true that the custom house had given such a clarification, but it does not affect the present case which pertains to the I. T. C position. In the order-in-appeal BOR No. 329/55 dated 24-2-1955 (copy produced by importers), the then Collector of Customs had set aside the orders of the Assistant Collector of Customs as the importation there had been made in accordance with a "long-established" practice in the Custom House. In deciding to fall in line with Bombay and Calcutta Custom Houses, it was held that the assessments made by this Custom House of black insulating tapes under item 73 I. C. T were not an established practice but only a few erroneous assessments as such, the decision in this appeal does not also affect the issue in the case under adjudication.

The goods imported are adhesive tapes and are therefore restricted. The converted licence produced by the importers specifically excludes face value restricted items. The licence produced is hence not valid to cover the importation. The importation is deemed to have been made in contravention of I. T. C. regulations."

He therefore directed the confiscation of the goods but gave the importers the option to clear the goods for home consumption on payment of a fine of Rs. 1000 in lieu of confiscation.

(3) It appears from the record that though the appellants themselves had not asked for clarification, other businessmen had asked for such clarification and this is admitted in the counter-affidavit filed by the Assistant Collector of Customs, Appraising Department. There is also an admission that the practice was to consider black insulating tape as separate from adhesive tape till about, December, 1957 when there was a change in the practice. In the affidavit filed in support of their writ petition, it was alleged that both prior and subsequent to the impugned order of the Collector of Customs, black insulating tape had been allowed to be cleared under licence similar to the licence held by the appellants. By reason of the discrimination to the prejudice of the appellants, it was contended that Art 14 of the Constitution of India was contravened. The answer to this charge was

"The instances of alleged discrimination given in para 15 of the affidavit were cases in which importation was allowed on an erroneous classification. The consignments imported by Sha Pojaji Manormull and Sha Jheatmull Ghanmull cited in para 15 of the petitioner's affidavit were released on warnings."

Before Rajagopalan, J., the validity of the order of the Collector was challenged on three grounds : (1) the classification of the goods by the Collector of Customs constituted an error of law apparent on the face of the records; (2) the usage of the trade justified only the classification of the goods as "black insulating tape" and not as "adhesive tape", and therefore the Collector had no jurisdiction to treat these goods as "Adhesive tape" and (3) the order of the Collector violated Art. 14 of the Constitution because other importers were permitted to clear similar goods without payment of a fine. The learned Judge recognised that so far as the Madras Port was concerned, upto December 1957 the goods of the variety imported by the petitioners were treated by the authorities, as falling under the classification of Black insulating tape while they were classified as adhesive tape by the customs authorities in Bombay and Calcutta. It was only in December 1957 that the customs authorities in Madras decided to fall in line with the Bombay and Calcutta customs authorities and to classify these goods as adhesive tape.

The learned Judge refused to accept the first ground for the following reason :

"That the goods imported by the petitioner could be described as..... "black insulating tape" did not admit of any doubt. That they are adhesive in quality was not in issue either. The question, therefore, arose, under which head should the goods be classified, adhesive type or black insulating tape ? I am unable to find anything either in entry 38 or in the index or anywhere else in the policy book to rule out the interpretation of the term "black insulating tapes" to cover only black insulating tapes other than adhesive types. The entry "adhesive tapes" in the index has no referent to colour. Obviously, it has reference to insulation, because it is one of the sub-heads of entry 38. There was therefore material, on which the Collector could come to the conclusion that the goods imported by the petitioner, which were insulating tapes, black in colour and also adhesive in quality, fell within the sub-head "adhesive tape". As I said, on the material placed before me, I am unable to hold that it was a clear case of misclassification when the Collector held that the goods fell within the sub-head "adhesive tape".

(4) The learned Judge held that the fact that upto December 1957 the goods had been classified as black insulating tape did not affect the jurisdiction of the Collector to classify this consignment under a different head after December 1957. As regards the charge of discrimination which amounted to a violation of Art. 14 of the Constitution, the learned Judge observed thus :

"Though in March 1958, itself two importers were dealt with in the matter of penalty, in a way different from the petitioner, that would not amount, in my

opinion, to a violation of the fundamental right guaranteed by Art. 14 of the Constitution. Even with reference to these two importers, that there was any classification other than what was applied to the petitioner was not alleged. It is only on the question of penalty for an apparent breach of the law, importing goods without a proper licence that the charge of discrimination has been levelled that while two of them were administered warnings, a pecuniary fine was imposed on the petitioner. These were at least quasi-judicial proceedings. The imposition of a penalty, after a breach of the law has been established is a matter with in a discretion of the authority which has jurisdiction to impose the punishment. An apparent difference in punishment is not enough to sustain a charge that Art. 14 has been violated."

(5) The learned Judge's order concludes as follows :

"It might be that the petitioners throughout acted in good faith, and that when he placed the order for the goods in question, he had the backing of the trade usage and the backing of the usage of the customs authorities at Madras that the goods were properly classifiable as black insulating tape under the sub-heads enumerated in the index of the policy book. But, while good faith might be a factor that could be taken into account in determining the quantum of the penalty to be imposed, that would not affect the proper classification of the goods, nor the question whether a contravention of S. 167 (8) has been established. Obviously, I am not concerned with the soundness or otherwise of the discretion exercised by the Customs Collector in levying a fine on the petitioner."

Mr. Gopalaratnam, learned counsel for the appellants, relied on the admitted practice which prevailed both with the businessmen and with the customs authorities of considering the kind of goods which were imported by the appellants as not falling within the class of "face value restricted goods". He relied on certain correspondence between other merchants and the Customs authorities relating to the same class of goods, with special reference to the importance of correct classification emphasised in the Handbook of Rules and procedure relating to Import Trade Control (1956).

The following three paragraphs deal with this matter :

"Para. 4 : Importance of correct classification." It is necessary for the intending importer to ascertain the correct classification of the goods he intends to import (with reference to S. No and part of the I. T. C. Schedule) so that he may be able to apply to the proper licensing authority for a licence and to know exactly the licencing policy in respect of the item for which he is applying. For the sake of convenience, an exhaustive index of articles is attached to this book, and this will enable the importer to ascertain the correct I. T. C. Classification of any particular item. An attempt has also been made to co-relate as far as possible, the I. T. C. Schedule (except in Part VI) with the Indian Customs Tariff.

5. The importance of ascertaining the correct classification of an article and

entering it in the application for an import licence is too well known to be over emphasised. If an item is incorrectly classified by an importer, there is a possibility of its being delivered to the wrong licensing authority, or of being rejected. It is, therefore, in the interest of importers to make sure of the correct classification of the articles for which they are applying. In addition, an importer should give the fullest description of articles applied for, so that any mistakes in classification can be corrected at the time of licencing. A further advantage of giving the full description is that when an item is correctly described in the import licence, even if the classification shown is incorrect, no difficulty will be experienced in the clearance of the goods on arrival.

6. If an importer is in doubt as to the correct classification of a store, he may make a reference to the appropriate licensing authority, for clarification. In special circumstances, however, a reference in this behalf can also be made to the Chief Controller of Imports. When seeking the advice of the authorities concerned in regard to the classification of an item, the importer should, to enable the classifying authority to take a correct view of the matter, give the fullest description of the article and its detailed end-use. He should also send illustrative literature about the article and, wherever possible, samples thereof. If the tariff item under which these goods are assessed to duty by customs is known, it should also be indicated.

(6) Undoubtedly the equity is entirely in favour of the appellants. Here was a merchant who imported goods under a license which at the time when he placed the order was according to the trade usage and the customs authorities covered by such a licence. The goods arrived when such practice was still in vogue. It is only when the goods were sought to be cleared that there was a change in the practice so far as the customs authorities were concerned and the appellants found themselves faced with the objection which, it maybe said that a clarification by the Customs authorities based on a misconception cannot preclude the same authorities from changing their view and adopting the correct view. Logically this cannot be challenged. There can be nothing like a legal estoppel precluding the Customs authorities from ever correcting a mistaken view. But this fact will have a bearing when we discuss, later the question from a different aspect.

(7) Mr. Gopalaratnam contended that even on the merits the order of the Collector was vitiated by an error apparent on its face. In the Index goods of different description was included in the same item 38 of Sec. II "Adhesive tapes" and "Black insulating tapes" were enumerated separately. Mr. Gopalaratnam contended that these two categories must be exclusive. If there was a category of goods known in the market as "Black insulating tape", such category would not fall within the category of "adhesive tape", even assuming that the tape had an adhesive quality. The learned Government Pleader, on the other hand, contended that adhesive tape is a qualitative description and not a particular commercial article and any of the categories enumerated in the Index

under item 38 had the adhesive quality. It is common ground that there is a category of goods known in the market as "black insulating tape". Prima facie, therefore, without further clarification such kind of tape cannot be taken out of that category simply because it has an adhesive quality and may fall within the other class of adhesive tape. We did not know if there is in the market a class of tape called adhesive tape.

(8) Learned Government Pleader argued that even assuming that the goods in question fell properly under both the categories, it was entirely a matter for the Customs authorities to decide whether the goods fall within one or the other of the categories. For this position he relied on the decision of the Supreme Court in *Gulabdas and Co. and Another Vs. Assistant Collector of Customs and Others*, . That case related to the amount of duty payable in respect of certain imported articles. The importer claimed that the goods should be assessed to duty under S. 45 (a). The Customs authorities assessed duty under item 45 (4) of the Indian Customs Tariff. There was no question of the necessity of a licence in that case. The matter came up before the Supreme Court on an application under Art. 32 of the Constitution. Das, J who delivered the judgment of the court held that there was no violation of any fundamental right which will warrant the interference of the Supreme Court under Art. 32 of the Constitution.

Dealing with the question whether crayons should be treated as coloured pencils. His Lordship observed thus :

"The contention that the impugned orders are manifestly erroneous because "crayons" have been treated as "coloured pencils" is not a contention which can be gone into on an application under Art. 32 of the Constitution. It has no bearing on the question of the enforcement of a fundamental right, nor can the question be decided without first determining what constitutes the distinction between a "coloured pencil" and a "crayon" a distinction which must require an investigation into disputed facts and materials. This was a matter for the Customs authorities to decide and it is obvious that this court cannot, on an application under Art. 32 of the Constitution, embark on such an investigation.

We do not understand that in making these observations their Lordships were laying down a rule of general application that the High Court under Art. 226 would not have the power to quash the order of the Collector made on a demonstrably absurd basis that a particular article fell within a particular class. Moreover, as we have already mentioned, the case before the Supreme Court dealt with only the imposition of duty. A passage similar to that which we have extracted above from the Handbook of Rules and Procedure was cited to their Lordships and they said.

"We do not think that the aforesaid observations which relate to licensing policy have any bearing on the question at issue, namely, whether "Lyra" brand crayons should be assessed under item 45 (a) as stationery not otherwise specified or item 45(4), as coloured pencils."

These observations are not without significance because if the matter related to licensing, the fact that there was clarification by the authorities on the faith of which the merchant imported the goods might make a difference and might entitle the importer to relief.

(9) It should not be overlooked that here we have the case of deprivation of property because confiscation is just that. It is idle to say that it is not because on payment of a fine which is equal to the value of the goods, the importer can take delivery of the goods. It only means that the appellants having been deprived of their goods, are given an offer to purchase such goods. Keeping this in mind we shall refer to the penal provision under which the Collector of Customs purported to act. Section 167 of the Sea Customs Act mentioned the offences which shall be punishable to the extent mentioned in the third column of the same with reference to such offences. Item 8 of the schedule in so far as it is material runs thus :

Offence Section of this Act to which offence has reference Penalties

If any goods, the importation or exportation of which is for the time being prohibited or restricted..... be imported into or exported from India contrary to such prohibition. 18 and 19 Such goods shall be liable to confiscation. Any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods, or not exceeding one thousand rupees.

The third column says that if an offence under item 8 is committed, the goods concerned "shall be liable to confiscation". The learned Government Pleader has to concede that the customs authorities have got the discretion either to confiscate or not in a particular case. In this very case reference has been made to two other cases in which in spite of an offence having been committed, the party in each case has been let off with a warning and without the goods being confiscated. The language does necessarily imply that there is a discretion because the language is not "such goods shall be confiscated". On the other hand, the language is "such goods shall be liable to confiscation". The collector of customs when acting under S. 167 is obviously acting in a quasi-judicial capacity. When discretion is vested in such a quasi-judicial tribunal, such discretion must be exercised judicially and not arbitrarily. The Collector must decide in each particular case if there were circumstances which would call for the drastic punishment of confiscation.

If there was a case in which discretion should have been exercised in favour of the importer, this was such a case. The appellants had placed the order and the goods had arrived when admittedly the practice prevailing both with the merchants and with the Customs authorities permitted goods of the category which the appellants imported under a licence such as the appellants held. The Collector does not appear to have dealt with the case as if he was vested with judicial discretion because he has not given any reason why the drastic punishment of confiscation should have been imposed on the appellants whereas

two other similar merchants who had committed the same offence had been let off with a warning.

(10) Therefore on both the grounds, namely that there was an error apparent on the face of the record, and that the Collector as a quasi-judicial tribunal had not exercised his discretion judicially, the order of the Collector should be quashed. We allow the appeal and the writ petition and quash the impugned order of the Collector dated 10th March 1958. No order as to costs.

(10) Appeal allowed.