
(1991) 11 MAD CK 0057

In the Madras High Court

Case No : Writ Petition No. 15619 of 1991

Sri Tirupathi Plastics

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 29-11-1991

Acts Referred:

Customs Act, 1962 — Section 11, 110, 111, 112, 113

Citation : (1992) 38 ECC 163 : (1992) 60 ELT 366

Hon'ble Judges : K.S. Bhakthavatsalam, J

Bench : Single Bench

Advocate : Shri R. Thiagarajan, for M/s T. Muthuraman and Mr. A.K. Jayaraj, for the Appellant; Shri P. Narasimhan, Sr. Central Govt. Standing Counsel, for the Respondent

Judgement

1. The petitioner challenges an order of adjudication dated 26-9-1991.
2. The Petitioner filed bill of entry 24941 dated 30-7-1991 for the clearance of 13.8 Metric tonnes of Cellulose Acetate Cuttings. The goods were sought for clearance on the strength of invoice showing the value US \$ 250 per MT raised by the suppliers. However, as per the recorded prices, the value was enhanced to US \$ 280 per MT with importers' concurrence and the bill of entry was assessed. Subsequently, the goods were examined by Dock Inspection Staff on 14-8-1991. As per the Inspection Report it is found that 1.132 M.T. consist of concealed items like that of new spectacle frames made of Plastic, Plastic sheets decorative on both sides, Plastic granules, Plastic floor sweepings and sun glass. By letter dated 23-8-1991, the petitioner has stated that only one ton out of the quantity of 13.8 tons contained the mixed up items and also requested that the said goods may be allowed to be cleared after mutilation. The petitioner has also requested for personal hearing before decision without issue of show-cause notice. A personal hearing was given. By the impugned order, the Additional Collector of Customs, Madras, the third respondent herein has held that the concealed items weighing 1.132 M.T. are liable to be confiscated u/s 111(m) and

(I) of the Customs Act, 1962, that 12.668 M.T. of Cellulose Acetate cuttings also are liable to be confiscated as they are used for concealing of the other goods, the non-declared goods. Apart the order of confiscation, a redemption fine of Rs. 1,00,000/- has been levied u/s 125 of the Customs Act. Personal penalty of Rs. 50,000/- has also been imposed u/s 112 of the Customs Act. The petitioner challenges this order.

3. Notice of motion has been ordered by me on 3-11-1991.

4. A counter-affidavit has been filed by respondents. After narrating the facts, it is claimed in the counter-affidavit that a remedy has been provided under the Customs Act and without exhausting the same, the petitioner should not be allowed to file a petition under Article 226 of the Constitution of India. It is also claimed that the petitioner is not entitled for mutilation u/s 24 of the Customs Act and that there are no rules or notifications issued in this behalf for the subject materials to be mutilated as provided u/s 24 of the Customs Act, 1962. It is also stated that the practice of assessment of goods on the basis of documents is to facilitate the importers to take delivery of the goods if they agree with the declarations at the time of examination by the Dock Staff who would be giving "Pass Order" in terms of Section 47 of the Act, and that when the undeclared goods found concealed with declared goods and the offending goods of weight of 900 kgs are appraised at the value of Rs. 5,85,000/-, that the petitioner requested for an order of adjudication and that the adjudication order dealt with the case after giving personal hearing to the petitioner. It is further claimed in the counter-affidavit that the petitioner is not entitled for any release since it has not declared certain items by concealing the same in order to avoid payment of duty for certain concealed articles. It is further claimed in the counter-affidavit that the goods imported without declaration are liable for confiscation under the provisions of the Customs Act, and that the order of adjudication has been since passed, the petitioner may be directed to comply with the said order for getting release of the goods. It is further claimed that the department had no other option but to make assessment for the undeclared goods, and that the decisions rendered by Court fully concur with the department's action for detention that even if the goods were assessed when there was suppression of facts in disclosure of goods properly. It is further claimed in the counter-affidavit that the importation will not come under the purview of Section 28 of the Customs Act, that the present case is one where there are undeclared goods alongwith the declared items, concealed and that the same was unearthed on examination only and before giving pass orders. It is further claimed that prior to giving pass order, the misdeclaration and non-declaration of goods were noticed and as such the pass order was not given. It is further stated that the adjudication was made properly on assessment of the goods declared.

5. Mr. R. Thiyagarajan, the learned counsel appearing for the petitioner contends that once an assessment is made by the department by enhancing the value, the department has no jurisdiction to re-assess or re-adjudicate the matter.

According to the learned counsel, once the matter is closed, nothing further can be done by the respondent department. According to the learned counsel for the petitioner, if the respondents are aggrieved they should go on appeal against the assessment and they cannot re-do the assessment. According to the learned counsel, the respondent department is bound by its own order. He further contends that with regard to the redemption of fine and penalty, the dicta laid down by the Judgment of the Full Bench of the Delhi High Court in Jain Exports (P) Ltd. Vs. Union of India and Others, applies to the facts of the case on hand and that this is a fit case to be remitted to the respondents to re-do the assessment.

6. Per contra, Mr. P. Narasimhan, the learned Senior Central Government Standing Counsel, appearing for the respondents relies upon an unreported decision in Madanlal Steel Industries Ltd., Madras v. Union of India; represented by Secretary, Ministry of Finance, Department of Revenue, New Delhi and Others (Writ Appeal No. 620 of 1991 dated 21-8-1991) [since reported in Madanlal Steel Industries Ltd. Vs. Union of India, and submits that when there is a suppression of facts, the department has to look into the matter and pass an order of assessment. The learned Counsel further contends that when no final order has been passed in a case where assessment is made, it is open to the department to make a re-assessment depending upon the facts and circumstances of the case, if the department found deliberate suppression of facts on the part of the importers. The learned counsel further states that the petitioner has got an alternative remedy by way of an appeal under the Act and as such it should exhaust the effective remedy before approaching this Court under Article 226 of the Constitution,. The learned Counsel relies upon Section 119 of the Customs Act for the proposition that the goods which were concealed are liable for confiscation and the order of assessment has been made rightly for mis-declaration and non-declaration and the duty had to be paid for undeclared goods which comes to Rs. 8,99,560/-.

7. I have considered the arguments of Mr. R. Thiyagarajan, the learned Counsel appearing for the petitioner and of Mr. P. Narasimhan, the learned Senior Central Government Standing Counsel appearing for respondents. First of all regarding the argument with regard to the levy of redemption of fine and imposition of personal penalty, I am of the view that it is not sustainable. The Full Bench of the Kerala High Court in Jain Exports (P) Ltd. Vs. Union of India and Others, looking at the operative portion of the order of Collector therein has held that the Collector therein did not even investigate what was the market price of the goods imported and that the Collector overlooked that the confiscation and penalty are penal provisions of the statute and such provisions are to be strictly construed and exercised with Judicial discretion,. In Shah Rikhabdas Bharwanlal v. Collector of Customs 1961 II M.L.J. 443 speaking for the Division Bench of this Court, Raj Manner, C.J., has held that the Collector of Customs while acting u/s 167 of the Sea Customs Act is obviously acting as a quasi-judicial Tribunal, and such discretion must be exercised judicially and not arbitrarily. The learned Chief

Justice has further held that the Collector must decide in each particular case if there were circumstances which would call for the drastic punishment of confiscation. If the Principle laid down by the Division Bench of this Court in abovementioned case is applied to the facts of the case on hand, I am of the view that the levy of redemption fine and imposition of personal penalty cannot at all be sustained. As such the impugned order has to be set aside.

8. Apart from that on facts, as rightly pointed out by Mr. R. Thiyagarajan, the learned Counsel for the petitioner nowhere in the operative portion of the order, the respondents have considered the value of the goods, especially non-declared goods weighing 1.132 M.T. Except stating as a passing reference in para 6 of the order that the appraised value of the non-declared goods be Rs. 5,94,950/-. I do not find any other finding in the operative portion of the order which states that the importation of the goods has been done in violation of the provisions of Section 11 of the Customs Act, 1962. As such, it is clear that the entire order proceeds on the question of classification and about the non-declared items. Hence, I am of the view, that the impugned order cannot be sustained even on this ground that nowhere in the order, the Additional Collector of Customs has considered the value of the goods or the petitioner has been given a chance to meet such a question.

9. Mr. P. Narasimhan, the learned Senior Central Government Standing Counsel relies upon an unreported decision of the Division Bench of this Court in Madanlal Steel Industries Ltd. Madras v. Union of India represented by Secretary, Ministry of Finance, Department of Revenue, New Delhi and Others (W.A. No. 620 of 1991, dated 21-8-1991) [sine reported in Madanlal Steel Industries Ltd. Vs. Union of India, . In the above-mentioned case, the Division Bench consisting of Mishra, J. and Janarthanam, J. has considered the decision of Bombay High Court in Union of India and others Vs. Popular Dyechem, wherein it has been held that once it is found in respect of any goods that it has been released after clearance u/s 47 of the Act, no action to seize or confiscate could be taken. In the abovementioned case, the Division Bench has considered the decisions of the Bombay and Delhi High Courts in Union of India and others Vs. Popular Dyechem, and also the Judgment of a Full Bench of this Court in A. Subbaraj and Another v. Union of India, represented by the Assistant Collector of Customs, Madras - 1. (W.P. Nos. 5296 of 1973 etc. dated 22-10-1973) culled out the Principles that an order for clearance of the goods for home consumption is a quasi-judicial order and some sort of finality has to be attached to it and that ordinarily no action to confiscate such goods which are cleared for home consumption will be taken, but there may be exceptions to it. The Division Bench has further held that goods cleared were subject to confiscation and that the finality cannot be disturbed unless the Department successfully shows that there was fraud or deliberate suppression. The Division Bench has further held that it is difficult to accept the same as a law, as once there is a clearance u/s 47 or Section 51 of the Act is ordered, unless that order is set aside, the proper officer cannot act on his reasonable belief under Sections 110, 111 or 113 of the Act.

Mr. P. Narasimhan, the learned Senior Central Government Standing Counsel heavily relies upon Judgment of the Division Bench of this Court, cited supra. I do not think that for the purpose of this case, that point which arose in the abovementioned decision of the Division Bench of this Court cited supra, has to be decided at this stage, since I am satisfied that the matter has to go back to the Adjudicating Officer on the ground that there is no finding with regard to the value of the non-declared goods, and the redemption fine and imposition of penalty have been done without application of mind, forgetting that Adjudicating Officers are exercising quasi-judicial functions. In view of that, the writ petition is allowed, the impugned order is set aside and the matter is remitted back to the Adjudicating Officer for making an order of adjudication afresh within four weeks after giving opportunity to the petitioner herein. However, there will be no order as to costs.