
(1990) 03 BOM CK 0094

In the Bombay High Court

Case No : Writ Petition No. 2593 of 1988

Sva Udyog Viniyog Limited

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 08-03-1990

Acts Referred:

Customs Act, 1962 — Section 111, 112, 2, 2(33), 46

Citation : (1991) 52 ELT 212

Hon'ble Judges : D.N. Mehta, J

Bench : Single Bench

Advocate : Shri F.H.J. Taleyarkhan and Mr. Vikram Nankani, instructed by Mr. R.G. Sheth and Co, for the Appellant; Shri K.R. Bulchandani, Government Pleader, for the Respondent

Judgement

D.N. Mehta, J.—An interesting question arises in this Writ Petition whether almonds are seeds or dryfruits under the Customs Laws and whether they are covered by a REP (replenishment) licence issued by the Licensing Authorities. The Petitioners have prayed for a writ of certiorari calling for the records of the Petitioners' case and, after looking into the legality thereof, to quash the impugned order dated 26-7-1988 passed by the Additional Collector of Customs, Bombay.

2. The Petitioners imported two consignments of almonds on 6-5-1988 and 23-5-1988 under two licences annexed as Exhibits "B" and "C", respectively, to the Petition. In respect of these two consignments, the Petitioners submitted two Bills of Entry for Home Consumption. In these Bills of Entry, the goods were described as "Seed of Almonds - Non Pareil Quality".

3. On 25-5-1988, the Customs Authorities issued two Show Cause Notices to the Petitioners in respect of the said two consignments, asking the Petitioners to show cause why penal action should not be taken against them and the goods confiscated u/s 112 and Section 111(d) of the Customs Act, 1962. The Petitioners, by their letter dated 7-7-1988, replied to the said Show Cause

Notices. In the said reply, the Petitioners contended that the consignments consisted of seeds of almonds and hence were covered by the two licences produced by them.

4. The Additional Collector of Customs, Bombay, by two orders, both dated 26-7-1988, held that the two consignments were not covered by valid licences and hence the two consignments were confiscated. However, an option was offered to the Petitioners to clear the goods on payment of a redemption fine of Rs. 6,00,000/-, the option to be exercised within 30 days of the date of the order. The Additional Collector of Customs, Bombay also imposed a penalty of Rs. 50,000/- on the Petitioners for attempting to import goods against invalid licences. The Petitioners have impugned this order of the Additional Collector of Customs, Bombay dated 26-7-1988 in this Writ Petition.

5. Shri Taleyarkhan, learned Counsel appearing on behalf of the Petitioners, has submitted that almonds were seeds and not dryfruits or nuts; and that being the case, the two consignments were covered under Clause G. 2(i)(a)(d) of Appendix 17 of the Import & Export Policy - April 1985 - March 1988. Shri Taleyarkhan contended that under a REP licence, there was no condition that the imported goods must have some relation to the exported goods. Shri Taleyarkhan contended that the licences being under Clause G. 2(i)(a)(d) of Appendix 17 of the Import & Export Policy - April 1985 - March 1988, seeds of almond were covered and the Additional Collector of Customs had wrongly come to the conclusion that almonds were not seeds and hence they were not covered by the licences produced by the Petitioners. Shri Taleyarkhan further contended that the Customs Authorities had impugned upon the jurisdiction of the Licensing Authority by questioning the description of the goods. According to Shri Taleyarkhan, the Licensing Authority had granted a REP licence to the Petitioners entitling them to import seeds, and almonds being seeds, the Petitioners were justified in importing almonds under the said licences.

6. In support of his submission that almonds were seeds, Shri Taleyarkhan has produced before me various Certificates from several authorities. The first of such Certificates was issued by the California Almond Growers Exchange, Sacramento, California, U.S.A. In the said Certificate, "in shell almonds" have been described as almond seeds.

The Second Certificate relied upon by the Petitioners is a Phytosanitary Certificate issued by the U.S. Department of Agriculture, which also described the goods as almonds seeds.

The third Certificate relied on by the Petitioners is a Certificate issued by Dr. Dale E. Kester, Professor of Pomology, University of California. It is stated in the said certificate that the almond nut used in commerce was the edible seed of the almond tree classified as *prunus dulcis* and was of the same structure as was used for reproduction.

The Petitioners have next relied on the fourth Certificate issued by the DFA

(Dried Fruit Association) of California. In this Certificate, it was stated by the President of the Association that it could be stated without equivocation that almonds were not dried fruit. Dried fruit was composed of the fleshy pulp surrounding the seed of pome and stone which had been picked at full ripeness and dried either, after splitting, in the sun or whole in drying chambers. Almonds were the seeds of almond tree.

The petitioners next relied on a Certificate issued by the Director of Horticulture, Maharashtra State, Pune, Shri S. V. Jayawant. It was stated in this certificate that the common practice followed in propagating almond was to raise the plants from the seed of him shelled varieties and plant the seedlings.

The Petitioners have lastly relied on a Certificate issued by Professor K. C. Sheriar, Principal, Head of Biology Department, Jai Hind Collage, Bombay. It was stated in the said certificate that almond seed with the stony hard shell could be used for propagation. In botanical terms, almond seed could not be called dried fruit.

7. Shri Taleyarkhan then relied on a brochure issued by the Almond Board of California, which stated that although not all nuts were seeds, almond belonged to this food family. Shri Taleyarkhan drew my attention to the Encyclopaedia Britannica, Volume 1, 15th Edition, page 289, where almond has been described as - almond tree native to south-western Asia and its edible seed, or nut. The nuts were of two types, sweet and bitter. Sweet almonds were the familiar edible type consumed as nuts and used in cooking or as a source of almond oil or almond meal. Relying on the certificates and the brochures, extracts of which are cited heretofore, Shri Taleyarkhan contended that almonds were seeds inasmuch as they germinated.

8. Shri Taleyarkhan relied on a ruling of the Supreme Court in the case of Avadh Sugar Mills Ltd. Vs. The Sales Tax Officer, Sitapur and Another, , wherein it was observed :-

"We shall now proceed to consider whether groundnuts are seeds and further whether they are oilseeds. In finding out the true meaning of term "oilseeds" found in the Sales-tax law in question. We are not to refer to dictionaries. We are to find out the meaning ascribed to that term in commercial parlance. There can hardly be any doubt that in commercial circles groundnut is dealt with as oilseeds. The commercial journals and newspapers while quoting the market price of oilseeds list groundnuts as one of the species of oilseeds. From this, it is clear that in commercial circles groundnut is treated as oilseed."

9. Shri Taleyarkhan also relied on a ruling of the Calcutta High Court in the case of Vinod Gupta Vs. Collector of Customs, wherein it was held that the import of rapeseed had been made under freely transferable REP import licences permitting importation, inter alia, of seeds/bulbs/mother plant/germ plasm having no condition whatsoever for the use of materials imported and/or for their use in the exported product. The restrictions imposed by the general conditions

were not applicable to the licences. The REP licences obtained by the Petitioner were issued against the export of items mentioned in Column 2 of G. 2(i)(a) as import replenishment to aforesaid exports.

10. Now, it appears to me that these rulings cited by Shri Taleyarkhan will not help his case for the reason that groundnut and rapeseeds have been covered under Chapter 12, clause 1202.10 and clause 1205.00 of the First Schedule of the Customs Tariff Act, 1975. Almonds, however, have been classified under Chapter 8, clause 0802.11.

I shall consider Chapter 8 and Chapter 12 of the First Schedule of the Customs Tariff Act in detail hereafter.

11. Now, in support of his submission that the scope of the duties of the Licensing Authority and those of the Customs Authorities were different and the Customs Authorities could not impinge upon the jurisdiction of the Licensing Authority, Shri Taleyarkhan relied on a ruling of the Supreme Court in the case of Union of India (UOI) Vs. Tarachand Gupta and Bros, ; wherein it was observed :-

"The result is that when the Collector examines goods imported under a licence in respect of goods covered by entry 295 what he was to ascertain is whether the goods are parts and accessories, and not whether the goods, though parts and accessories, are so comprehensive that if put together would constitute motor cycles and scooters in C.K.D. condition. Were he to adopt such an approach, he would be acting contrary to and beyond entry 295 under which he had to find out whether the goods imported were of the description in that entry. Such an approach would, in other words, be in non-compliance of entry 295."

12. Shri Taleyarkhan also relied on a ruling of the Bombay High Court in the case of Lokash Chemical Works Vs. M.S. Mehta, Collector of Customs (Preventive) Bombay and others, , wherein the learned Single Judge was pleased to state :-

"The effect of Section 47 read with Section 2(33) is that once licence is granted the proper officer has to ascertain (i) whether the goods sought to be imported correspond to the description in the licence, (ii) whether the conditions imposed in the licence and required to be complied with by the importer have been complied with by the importer and if his finding on the aforesaid issues is in the affirmative he is bound to allow clearance of the goods on payment of duty. It is not for the Customs authorities to interpret licensing policy or to enforce the same once a valid licence is produced. This function is of the licensing authority. If this bifurcation of function is not adhered to there is every likelihood of utter confusion. The licensing authority may interpret the policy one way and the Customs authorities may take contrary view producing a conflict between the two authorities resulting in harassment to the importer. It is, therefore, that the functions of the two authorities which operate in two different spheres must be kept within their proper ambit. If a licence is granted in respect of a particular item by the licensing authority the Customs authority will have no right or power to go beyond the licence and determine as to whether the said licence related to

prohibited item. It is only the licensing authority who has to determine the said question at the time of granting licence."

13. Now, on the aspect of the differing spheres of duty of the Licensing Authority and the Customs Authorities it will be relevant to cite at this stage the provisions of Section 47 of the Customs Act, 1962 which stated :-

"Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same the proper officer may make an order permitting clearance of the goods for home consumption."

14. It will also be relevant at this stage to cite the provisions of Section 3 of the Imports and Exports (Control) Act, 1947. Sub-section (1) of Section 3 in the following terms :-

"The Central Government may, by order published in the Official Gazette, make provisions for prohibiting, restricting or otherwise controlling in all cases or in specified classes of cases and subject to such exception, if any, as may be made by or under the order :-

(a) the import, export carriage costwise or shipment as ships stores of goods of any specified description;

(b) the bringing into any port or place in India of goods of any specified description intended to be taken out of India without being removed from the ship or conveyance in which they are being carried."

15. Section 3 of the Imports (Control) Order, 1955 is relevant and it provides :-

"3. Restriction of Import of certain goods. -

(1) Save as otherwise provided in this Order no person shall import any goods of the description specified in Schedule I, except under and in accordance with a licence or a Customs clearance permit granted by the Central Government or by any Officer Specified in Schedule II."

Sub-section (3) of Section 3 of the Imports (Control) Order, 1955 is in the following terms :-

"(3) If in any case, it is found that the goods imported under a licence do not conform in every respect :-

(i) to the description or value of the goods as contained in the licence; or

(ii) to the other conditions relating to such goods, as contained in, or applicable to the licence, the import of such goods shall be deemed to be prohibited."

16. It will also be relevant to point out that prohibited goods have been described under sub-section (33) of Section 2 of the Customs Act, 1962 to mean

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"any goods the import of export of which is subject to any prohibition under this Act or any other law for the time being in force but does include any such goods in respect of which the condition subject to which the goods are permitted to be imported or exported have been complied with;"

Now, I do not think that Shri Taleyarkhan is justified in his criticism that in this case the Customs have impinged on the jurisdiction of the Licensing Authorities by challenging the REP licences produced by the petitioners. The Customs Authorities had, after investigation, merely concluded that the consignments imported by the Petitioners i.e. almonds, were not almond seeds and hence the consignments were not covered by the REP licences. I think the Customs Authorities have only carried out their duty as prescribed by the Customs Act. I must, therefore, negative the contention of Shri Taleyarkhan that the Customs Authorities had traversed beyond their rights and trespassed upon the jurisdiction of the Licensing Authorities.

17. Now, almonds are prohibited goods and they can be imported under a valid licence or permit issued by the Central Government or by the Licensing Authority. It is relevant to point out that both the licences have been issued under Clause G. 2(i)(a) of Appendix 17 of the Import & Export Policy - April 1985 - March 1988 under the heading "Import Policy for Registered Exporters". Now, Appendix 17 contains a statement of import replenishments. Column 2 of this statement relates to Export Product, and Column 4 relates to materials permitted for import. Under Clause G. 2(i)(a), the export products are fresh, vegetables and flowers. In Column 4 relating to materials permitted for import, there are five following items :-

"(a) Packing material, namely LDPE, HDPE, Polypropylene, plastic pots, GRP roof lite sheets, kraft liner and Fluting media, Grape guard paper, kraft paper, Tissue paper for wrapping, Peal moss.

(b) Sodium Metabisulphite (10%).

(c) Chemicals appearing in Appendix 3 and used in cultivation/growth of fruits, vegetables and flowers, and freshening chemicals for fruits, vegetables and Flowers.

(d) Seeds/bulbs/mother plant/germ plasm.

(e) Perlite horticulture grade and vermiculate."

For the purpose of this discussion, clause (d), which includes seeds/bulbs/mother plant and germ plasm, is material. Clauses (d) and (e) have been enumerated in both the licences. Therefore, the importer under these licences could import either seeds or bulbs or mother plant or germ plasm or items mentioned in clause (e).

18. Shri Taleyarkhan has contended that since almonds were seeds as shown by him with the support of the statements in the dictionary, the brochures and the

Encyclopaedia Britannica, the two consignments were covered under the REP licence. Shri Taleyarkhan argued that there need be no relation between the exported product with the product imported under a REP (replenishment licence. On this aspect, Shri Taleyarkhan does not appear to be quite correct for the reason that Appendix 17, Paragraph 8, which enumerated general conditions, made the position abundantly clear that only such items could be imported which were in some way related either as raw material, or components or packing with the product exported. The relevant portion of Paragraph 8 is as under :-

"Therefore, in such cases, while applying for REP licence, each exporter should submit with the import application the list of such items as are actually used as raw materials/components in the manufacture of the product(s) exported except items which have been specifically excluded in Col. 4 or Col. 5. It should be also ensured that only those items are included in the list which are actually used as raw materials and components in the manufacture of the relevant product exported. The licensing authority may, after due scrutiny of the list, exclude therefrom any item which in his opinion is not actually used as raw material/component in the manufacture of product(s) exported. If at any time, it is found that an exporter obtained REP licence under this provisions for an item which was not actually used as raw material/component for the manufacture of the product exported against which the REP licence was issued, the licence in question, shall be liable to cancellation."

19. This paragraph is important for the reason that it makes it clear that the imported item must have some relation by way of being raw materials, or components or packing material to the product exported.

20. Now, on a perusal of items (a) to (e), it becomes clear that the packing items, or the chemicals or the seeds, bulbs, mother plant or germ plasms are products which in some way have relation to the product exported i.e., fresh fruits, vegetables and flowers. Almonds, either inshell or shelled, would not have any relation to fresh fruits, vegetables and flowers. On this ground, therefore, the order passed by the Authority in confiscating the goods appears to be justified.

21. There is another aspect from which this matter has to be viewed. For this purpose, we shall have to refer to Chapters 8 and 12 of the First Schedule of the Customs Tariff Act, 1975. Chapter 8 deals with Edible fruit and nuts; peel of citrus fruit or melons. Under item 08.02 are classified other nuts, fresh or dried, whether or not shelled or peeled. Item 0802.11 relates to in-shell almonds, and item 0802.12 deals with shelled almonds. Therefore, the two consignments in the instant case would fall under item 0802.11 for the reason that the imported product was in-shell almonds.

22. Now, as paras seeds are concerned, the classification is under Chapter 12. Chapter 12 bears the heading "Oil seeds and oleaginous fruits; miscellaneous grains, seeds and fruit; industrial or medicinal plants; straw and fodder". Item

12.02, as I have pointed out heretofore, dealt with ground-nuts. Item 12.05 dealt with rape-seeds or colza-seeds. From item 1206.00 to item 1209.29 dealt with different types of seeds. It is pertinent to point out that in none of these items, containing deferent types of seeds, are almonds included. However, what is more important is that there is a note at the commencement of Chapter 12 which reads as follows :-

"1. Heading No. 12.07 applies, inter alia, to palm nuts and kernels, cotton seeds, castor oil seeds, sesamum seeds, mustard seeds, safflower seeds, poppy seeds and shea nuts (karite nuts.). It does not apply to products of Heading No. 08.01 or 08.02 or to olives (Chapter 7 or Chapter 20)."

Therefore, the note makes it abundantly clear that items 08.02 which deal with almonds, in-shell or shelled, will not fall under Chapter 12.

23. On a perusal of the provisions of Chapter 8 and Chapter 12 of the First Schedule to the Customs Tariff Act, 1975, there can be no doubt that almonds could not be classified as seeds under Chapter 12. They must, therefore, of necessity, be classified under Chapter 8, under item 08.02. This position appears to have occurred to the Petitioners themselves because in the two Bills of Entry of Home Consumption, annexed as Exhibits "D" and "E" to the Petition, the Petitioners have described the imported consignments as 0802.11 i.e., almonds in-shell.

24. Shri Bulchandani, the learned Government Pleader appearing for the Respondents, contended that this description given by the Petitioners in the Bills Of Entry was an admission of the fact that almonds were not seeds as contended by the Petitioners in this Writ Petition. Shri Bulchandani submitted that the Petitioners were estopped from contending that almonds were seeds and covered by the two REP licences.

25. Shri Taleyarkhan has contended that the Bills of Entry created no liability whatsoever. In support of his submission, Shri Taleyarkhan relied upon a decision of the Supreme Court in the case of Dunlop India Ltd. v. U.O.I., AIR 1977 S.C. 597, wherein it was held that there was no estoppel in law against a party in taxation matter. If a party, in order to clear the goods for customs, had given the classification in accordance with the wishes of the authorities or even under some misapprehension, and if the law allowed him a right to ask for refund on proper appraisalment and which was actually applied for, the party could not be estopped from making such application and ask for such refund.

26. Shri Taleyarkhan also relied on a ruling of a Division Bench of this Court in the case of Union of India and others Vs. Chowgule and Co. Pvt. Ltd., , wherein the learned Judges opined :-

"In our opinion, such a bill of entry is an innocuous matter. It does not create any obligation or liability on the petitioners. There is much substance in the contention of Shri Sethna that the petitioners could not or should not be

permitted to make a grievance with respect to a demand which is innocuous so far as the petitioners are concerned. Shri Setalwad was not able to tell us as to how the filing of the bill of entry would be such a prejudicial act which would require interference in the writ jurisdiction of this Court."

27. Now, it is true that a bill of entry does not create any liability. u/s 46 of the Customs Act, 1962, the importer of any goods must present to the proper officer a bill of entry for home consumption or warehousing in the prescribed form and the bill of entry should include all the goods mentioned in the bill of lading or other receipt given by the carrier to the consignor. Therefore, a bill of entry is a document which facilitates the clearance of the goods for home consumption. I have referred to the Bill of Entry in the instant case only to show that even the Petitioners at the time when they wanted to clear the goods, they had classified the goods under item 0802.11, which related to almonds in-shell.

28. Shri Taleyarkhan has produced before this Court a number of certificates, brochures and extracts from the Encyclopaedia Britannica to show that almonds were seeds. Now, in gauging the classification, the Court must first consider the classification made under the relevant Acts which were applicable, like the Import & Export Policy, for the reason that the two licences were applicable, like the Import & Export Policy, for the reason that the two licences were issued under Clause G. 2(i)(a) of Appendix 17 of the Import & Export Policy. Therefore, one has to refer to the provisions of the Policy. When the classification is contained in the Customs Tariff Act, 1975, one must, of necessity, refer to other authorities, like Encyclopaedias, dictionaries, brochures, etc. In the instant case, the classification is crystal clear, without giving rise to any ambiguity or doubt and, the classification is crystal clear, without giving rise to any ambiguity or doubt and, therefore, to my mind, the various certificate produced by the Petitioners and reference to Encyclopaedias and brochures become thoroughly irrelevant.

29. Now, as pointed out by Their Lordships in the case of Avadh Sugar Mills Ltd. Vs. The Sales Tax Officer, Sitapur and Another, cited heretofore, in order to find out the true meaning of the term "oilseeds", one need not refer to dictionaries. One has to find out the meaning ascribed to that terms in commercial parlance. In commercial parlance, therefore, groundnuts had always been regarded as dryfruit and nut as a seed. Shri Taleyarkhan contended that one must construe the word in its scientific term or botanical meaning or sense. Learned Counsel relied on an unreported Judgment of the Supreme Court in Civil Appeal No. 355 of 1989 [Akbar Jiwani v. Collector of Customs, Bombay] where the product imported was marble under Tariff Item No. 25.15 (Marble, travertine, ecaussin and other calcareous monumental or building stone of an apparent specific gravity). It is pertinent to point out that Their Lordships made the following observations :-

"Therefore, the word "marble" has to be interpreted, in our considered opinion, in the scientific or technical sense and not in the sense as commercially

understood or as meant in the trade parlance. There is no doubt that the general principle of interpretation of Tariff Entries occurring in a text statute is of a commercial nomenclature and understanding between persons in the trade but it is also a settled legal position that the said doctrine of commercial nomenclature or trade understanding should be departed from in a case where the statutory content in which the Tariff Entry appears, requires such a departure. In other words, in cases where the application of commercial meaning or trade nomenclature runs counter to the statutory context in which the said word was used then the said principle of interpretation should not be applied. Trade meaning or commercial nomenclature would be applicable if a particular product description occurs by itself in a Tariff Entry and there is no conflict between the Tariff Entry and any other Entry requiring to reconcile and harmonise that Tariff Entry with any other Entry."

30. In the instant case, the Tariff Entry with regard to almonds appears by itself. There is no ambiguity or complexity about the term which would require a departure from the common principle of commercial nomenclature or resorting to a scientific or technical meaning. As I have pointed out, the Tariff Entry 0802.11 makes it sufficiently clear that almonds fall under Chapter 8 and not under Chapter 12, which covered all kinds of seeds. That being the case, the submission made by Shri Taleyarkhan that almonds were seeds and, therefore, covered by the two REP licences granted under Clause G. 2(i)(a) of Appendix 17 of the Import & Export Policy must be rejected. The two consignments imported by the Petitioners are not covered by the REP licences relied on by the Petitioners. There appears to be no reason for interfering with the order passed by the Additional collector of Customs, Bombay.

31. Finally, Shri Taleyarkhan submitted that I should set aside the redemption fine of Rs. 6,00,000/- as also the penalty of Rs. 50,000/-. Once it is found that the goods were attempted to be cleared under an invalid licence, this Court under its writ jurisdiction cannot, on any ground, interfere with the order passed by the Additional collector of customs.

32. In the result, rule stands discharged. The Writ Petition is dismissed with costs.

33. Shri Taleyarkhan applies for stay of my order for a period of six weeks. The operative part of the order is stayed till 23-4-1990.