
(1992) 11 KAR CK 0027
In the Karnataka High Court
Case No : Writ Petition No. 8345 of 1988

Titanide Coating (P) Ltd.

APPELLANT

Vs

Assistant Collector of Customs

RESPONDENT

Date of Decision : 20-11-1992

Acts Referred:

Central Excise Act, 1944 — Section 11 A
Customs Act, 1962 — Section 110, 111, 113, 17, 2 (43)

Citation : (1993) 42 ECC 28 : (1993) 67 ELT 260 : (1993) 1 KarLJ 367

Hon'ble Judges : R. Ramakrishna, J;K. Shivashankar Bhat, J

Bench : Division Bench

Judgement

1. The writ petition was filed on 2nd June 1988 challenging the seizure proceedings made on 29th April 1988 with a consequential prayer to restrain the respondents from proceeding with any further action in the matter of the machinery seized.

2. According to the petitioner it carries on the business of Titanium Nitride Coatings for the cutting tools, Hobs, Press Tools and other engineering tools at Tumkur. In terms of the Import and Export Policy for the years 1985-88 the petitioner imported, under Open General Licence ('OGL' for short), coating machine with four electric discharge aided evaporators including all standard accessories for depositing Titanium and Titanium compound films on metallic or non-metallic surfaces. The machinery is categories under the list of capital goods allowed to be imported under OGL as per Appendix-I, Part-B, Item 10(56) of the aforesaid Policy. After completing the requisite formalities such as obtaining the allotment of Importers Code Number and applying to the Directorate General of Technical Development ('DGTD' for short of registration and obtaining the registration number for the manufacture of Titanium Nitride Coating on metal cutting, metal working tools and wear parts the petitioner imported the machinery (the term 'machinery' would include the entire set up imported) referred above under concessional rate of customs duty invoking the provisions of Project Import (Registration of Contracts) Regulations, 1965. On

the basis of the recommendation of the DGTD the import of the machinery was cleared. For this purpose bill of entry and invoice were filed with the Customs authorities on 16th February 1986 at Bangalore. When the customs duty was assessed at Rs. 35,87,557/- the machinery was kept in the warehouse since the petitioner was not in a position to pay the duty immediately. The machinery was de-bonded upon payment of duty of customs on 7th January 1988. By that time the duty got increased to Rs. 67,29,416.97 ps and the concession under the Project Import Regulations came to be withdrawn and full rate of duty had to be paid. The machinery was installed at Tumkur and the trial production commenced. At this stage the second respondent visited the factory on 29th April 1988 and seized the same under mahazar on the ground that the machinery had been imported in contravention of the Import Policy without obtaining import licence and consequently the petitioner was refrained from using the machinery. The petitioner attacked the action of the respondents as motivated by calling it as a male fide action taken to support another rival unit by name M/s. Dura Coaters Pvt. Ltd. The petitioner relies upon a letter written by the said rival unit to M/s. K. S. F. C., Bangalore, the financiers of the petitioner. Since the machinery was cleared after payment of customs duty, the petitioner contended that it was not liable to be confiscated u/s 111 of the Customs Act, 1962 ('the Act' for short) and therefore it cannot be seized.

3. On 8th June 1988 a learned Judge of this Court directed the second respondent to permit the petitioner to make use of the machinery for the day to day manufacturing operation subject to the petitioner executing security by way of ITC bonds for the value of the goods estimated at Rs. 66 lakhs. Subsequently the learned Judge referred the writ petition for consideration by the Division Bench. In the meanwhile the petitioner was served with a show cause notice dated 17th October 1988 (Annexure 'N'). Several grounds were stated in the show cause notice and the petitioner was called upon to show cause as to why the machinery in question should not be confiscated under Sections 111(d) and 111(m) of the Customs Act. The petitioner was also asked to show cause as to why penalty should not be imposed u/s 112 of the Act and as to why short payment of duty of Rs. 45,94,731/- should not be demanded u/s 28 of the Act. The petitioner filed an I. A. raising additional grounds in the writ petition challenging the show cause notice. The petitioner contended that the machinery having been imported and cleared after payment of the duty under the Act, the machinery cannot be confiscated, because, u/s 47 of the Act clearance was permitted by the proper officer. It was also contended that the machinery in question came within the purview of OGL under Appendix-I, Part-B, Item 10(56) of the Policy. This I. A. was filed on 21st August 1989. This date is relevant because the respondents had filed on 21st August 1989. This date is relevant because the respondents had filed their statement of objections on 12th June, 1989 wherein they have specifically asserted that the machinery did not qualify under OGL and that no electronic component or equipment was being manufactured by the petitioner by utilising the machinery.

4. In Annexure-N, show cause notice, inter alia it was pointed out that the machinery imported by the petitioner was not for the purpose of manufacturing any electronic component or equipment and that the petitioner was engaged only in the work of coating Titanium Nitride on steel tools and decorative articles on job work basis and that the petitioner was not engaged in the manufacturing activity but was only rendering the above said service. While importing, it is alleged, that the petitioner suppressed the function of the machinery. It is unnecessary to refer to the several averments contained in the lengthy show cause notice. The charge against the petitioner is that there has been suppression of facts and willful misstatement while importing the machinery.

5. The learned Counsel for the petitioner contended before us the following :

(1) Action of the second respondent was vitiated by mala fides, the said authority being persuaded to take action by the rival operator.

(2) Since the machinery was cleared u/s 47 of the Act and the said order having not been reversed either in appeal or in revision, the machinery cannot be confiscated.

(3) The machinery was validly imported under OGL.

6. RE : CONTENTION 1 : Para 11 of the statement of objections refers to this ground. It is asserted that the source of information relating to the wrong doing is not a relevant matter in issue; the allegation of mala fide is denied. The learned Counsel for the Central Government pointed out that no personal ill-will has been attributed to the authorities. It is usual for the authorities to verify the information furnished to them by any one and if there is any substance in the information, consequential action is taken. In the instant case, the second respondent, obviously, was informed of the manner in which the petitioner imported the machinery by M/s. Dura Coaters Pvt. Ltd., only because the said rival unit is motivated to harass the petitioner, it does not mean that the second respondent also had developed any ill-will towards petitioner, he has only initiated the statutory proceedings having found that there is a prima facie material for taking such an action against the petitioner and the machinery.

7. We are of the view that the above submission of the learned Counsel for the Central Government should be accepted. Absolutely no personal animosity, bias or prejudice is alleged against the officers of the Customs Department who have taken the impugned action against the petitioner. It is common knowledge that the Intelligence Wing of the Customs Department has necessarily to obtain information from various sources and any action taken by the said department usually is preceded by verifying the said information; it is also quite settled that the sources of information of the department cannot be divulged or disclosed. We are not concerned with the motives of the rival unit who informed the department of the circumstances under which the machinery in question was imported by the petitioner. That information by itself would not shift the informant's motive to the second respondent. We reject this contention of the

petitioner.

8. RE : CONTENTION Nos. 2 & 3 : These contentions could be considered together. While considering these contention it is also necessary to consider the contention of the learned Counsel for the Central Government that the petitioner could as well participate in the proceedings in response to the show cause notice issued and that we should not interfere with the proceedings at this stage. We are inclined to accept this contention but the reasons would cover some aspects of the contentions advanced by the learned Counsel for the petitioner. Normally, every fiscal legislation has a provision to assessee the tax levied and a machinery to collect the same. If there is any mistake or illegality, etc., in the order of assessment, it is usual to find a proper provision to reopen the assessment or to rope in the tax which has escaped earlier. The Act provides for the assessment of the duty; this is to be after an importer has entered in the imported goods, u/s 46. The assessment procedure involves examination and testing of the imported goods. The Proper Officer is empowered to require the importer to produce any document which he finds necessary. Sub-section (4) of Section 17 provides for a temporary assessment on the basis of the statements made in relevant documents, prior to the testing of the goods. The other provision relating to exemption and refund of duty etc. is not very relevant here. Section 28 provides for issuance of a notice in case no duty has been levied or it has been short levied or erroneously refunded. This provision certainly provides for the reopening of the assessment so that the proper duty could be levied and collected. As per Section 28(1)(b) normally the proceedings could be initiated within 6 months for the above purpose. However, if the short levy or non-levy or refund is by reason of collusion or any willful misstatement or suppression of facts by the importer, the proceedings could be initiated within five years from the relevant date. These provisions are to be read along with Chapter VII of the Act. The imported goods shall not be released until cleared. In the case of the goods imported goods shall not be released until cleared. In the case of the goods imported for home consumption Section 47 provides for the Proper Officer to be satisfied that the goods are not prohibited goods and that the importer has paid the import duty, if any, assessed thereon. Therefore Section 47 could come into operation only after the goods are assessed to duty u/s 17. The Act also provides for the depositing of the goods in the warehouse pending clearance and in such a situation the rate of duty payable would be normally the rate prevailing on the date of clearing the goods from the warehouse. Chapter XV provides for appeals. As per Section 129D the Revenue also may go in appeal or revision against an order of assessment. Chapter XIV which was highlighted at the outset provides for the confiscation of the goods and imposition of penalties. Section 111 details the goods brought from a place outside India which are liable to be confiscated. Mr. Chander Kumar, learned Counsel, contended that when the goods are cleared u/s 47 the goods cease to be prohibited goods and thereafter they cannot be confiscated unless the order u/s 47 is modified or reversed in an appeal that may be filed against the said order. Mr. Ashok Harnaahalli, learned

Counsel for the Central Government, on the other hand contended that Sections 17 and 47 shall have to be read together and whenever a case is made out for the reopening of the assessment u/s 28, it will be a case of the importation of the goods without payment of proper duty. Similarly if it is found that the goods were cleared u/s 47 on the assumption that they are not prohibited goods or they were imported validly but late if it is realised that there was some prohibition against importing the said goods, the goods are liable to be confiscated u/s 111(d). In the instant case the show cause notice refers to Section 111(d) and 111(m) under which the goods in question are liable to be confiscated.

9. The primary question is whether the goods cleared u/s 47 could be subsequently confiscated without the said order being reversed or set aside. The simple answer lies in Section 111(o), according to which;

"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 officer",

is liable to be confiscated. This shows that goods may be cleared on the basis of the exemption which in turn was granted subject to any condition. If the condition is violated or not complied with subsequently by the importer, the said goods are certainly liable to be confiscated. This can happen only after the goods are cleared u/s 47. Secondly an order of clearance u/s 47 involves two aspects; (i) the duty assessed on the goods shall have to be paid; (ii) the goods are not prohibited goods. If the assessment order is modified u/s 28 resulting in the payment for further duty, the clearance granted earlier would be technically in contravention of Section 47 itself. It may come to light that the imported goods were really prohibited goods as defined u/s 2(33) of the Act. Failure of the condition to be satisfied by the importer in respect of the goods would result in treating the goods as prohibited goods. Section 47 specifically does not say that the order made thereunder is final subject to any appeal, etc. The usual legislative practice of granting finality to such an order is not found in Section 47. In the circumstances, we are not inclined to agree with the submission of the learned Counsel for the petitioner. Several decisions cited by the learned Counsel will be referred presently. Before that some more facts of the case shall have to be referred.

10. The petitioner relies on Appendix-I, Part-B, Item 10(56) of Import and Export Policy. Appendix-I, Part-B enumerates the list of capital goods allowed under OGL. Item 10(56) reads thus :

"Machinery for manufacture of Electronic Components & Equipment :

(56) Automatic Vacuum coater, evaporator including Electron beam evaporation systems/sputtering unit, heat aided coater for depositing various metal films, metal oxides film and photo resist films."

11. In the application filed for allotment of Importer Code Number the petitioner seems to have mentioned the principal commodity to be imported as (i) Vacuum Coating Equipment to monitor for vapour deposited thickness; (ii) Leak Tester. Thereafter in the order of the DGTD dated 20th April 1985 addressed to the petitioner, it was informed that a Nitride coating of metal cutting, metal working tools and wear parts. Subsequently, at the time of importation, the DGTD wrote to the Collector of Customs on 3-4-1986 that the petitioner was importing coating machine for the manufacture of the aforesaid items and the same is required for setting up of a project at Tumkur and that the Project Import under Heading No. 84.66 of Section XVI of the Customs Tariff Act, 1975 was recommended. The bill of entry, Annexure- D, also refers to P. V. D. coating machine, etc. It also refers to OGL Appendix-I, Part-B, Item 10(56) of ITC. Subsequently the bill of entry dated 7-1-1988 filed for the de-bonding of the goods also refers to the same machinery. It is the contention of the respondents that the machinery imported by the petitioner is not for manufacture of electronic components and equipments and in fact there is no such statement anywhere made by the petitioner in the relevant documents. Therefore the goods could not have been imported and liable to be confiscated. In the course of the argument Mr. Chander Kumar contended that the process involved for which the machinery was imported and installed at Tumkur resulted in the manufacture of electronic components and equipments. However the respondents contended that the petitioner nowhere manufactures any article but performs only job work by treating the tools, etc. So that those tools could have better cutting performance, increased production, etc. etc. It was further contended on behalf of the respondents that the recommendation of the DGTD and the allotment of Importer Code Number by themselves would not bring the case of the petitioner for import under OGL.

12. The show cause notice, Annexure-N, also refers to several other aspects including the allegation that the petitioner has been guilty of suppression of facts and wilful misstatement. These matters are to be properly adjudicated and determined by the appropriate authority, and this could be achieved if the petitioner is directed to face the proceedings in response to the said notice. A few decisions cited by the learned Counsel will have to be referred.

13. The sheet-anchor of Mr. Chander Kumar's case is based on the decision of the Delhi High Court in Jain Shudh Vanaspati Ltd., etc. Vs. Union of India and Others, It was a case where the petitioner imported palm oil in stainless steel containers, as there was no restriction as to the container of the oil during the relevant period. The imported goods were cleared u/s 47 of the Act. Subsequently the respondents capital that importation of stainless steel drums was banned and therefore the containers in which the petitioner imported palm oil are liable to be confiscated. The facts were not under dispute at all, as could be seen from para 3 of the judgment which reads thus :

"There is no dispute that the importation of stainless steel as such, as a

consumer items is banned and prohibited. It is also an admitted fact, that under the relevant rules and instructions, the goods which are permitted to be imported under Open General Licence are also permitted to be imported in containers. The question for determination is, whether the stainless steel drums which were used for importing the palm oil in this case, were imported as a separate items of stainless steel or were imported as mere containers for the palm oil. "

Thereafter the Court found that the market practice was to have the palm oil in steel containers and therefore the Court held that when importation of palm oil is permitted, necessarily it will have to be imported in a container and therefore the steel containers in the said case were properly brought into India. Para 8 of the judgment shows that the short levy notices and confiscation notices were attacked on two grounds and the first one related to the merits of the case which the court already dealt with as above. The second ground was based on the clearance of the goods u/s 47. The Court observed on this aspect thus :

"Considering Section 47 of the Customs Act in the light of the legislative history, we are clear that the section attaches finality to the satisfaction of the officer that the goods are not prohibited. The finality cannot be disturbed unless the Department successfully shows that there was fraud or deliberate suppression."

We asked Mr. Chander Kumar, the provision under which the finality u/s 47 could be disturbed if fraud or deliberate suppression is established. The learned Counsel could not point out to any provision other than Section 28. In other words the decision of the Delhi High Court in no way establishes the principle that the clearance u/s 47 is absolutely final. But the finality alleged could be disturbed. If so, the ground for disturbing the finality are to be found in the very provision permitting its disturbance and when the Delhi High Court said that fraud or deliberate suppression has to be shown for disturbing the finality, obviously the Court meant the various jurisdictional facts stated in Section 28 such as collusion, wilful misstatement or suppression of facts.

14. In N.K. Bapna Vs. Union of India (UOI) and Others, the Supreme Court was considering the validity of an order directing detention of the petitioner under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act ("the COFEPOSA Act" for short). Petitioner had brought into India certain goods and kept them in the bonded warehouse after assessment to duty; some parts were cleared after payment of duty; warehouse was under the custody of the customs officials. It was found that there was a shortage of stock in the warehouse due to clandestine removal of goods which was abetted by the petitioner; this act was termed as `smuggling" and order of detention was made. One of the questions before the Supreme Court was whether, clandestine removal of goods from the bonded warehouse was an act of `smuggling". A contention was advanced that since the goods were assessed to duty, there was no escapement from duty and removal of goods warehoused u/s 49 was not an act of smuggling. The argument of the petitioner was summarised thus, at page 17 :

"... Even if the goods are clandestinely removed from the bonded warehouse there is no escapement of duty since the duty is adequately safeguarded by a bond for double the amount of duty with which the goods are chargeable. The only remedy of the Department in such cases is the recovery of the duties etc. u/s 72 and no confiscation of the goods is permissible in such cases. Indeed, there can be no confiscation of goods once they are cleared from the customs area u/s 47, vide Union of India v. Jain Shudh Vanaspati Ltd. (1992-1 Scale 340 affirming Jain Shudh Vanaspati Ltd., etc. Vs. Union of India and Others, In the light of these concepts the urges that the scope of Section 111(j) should be restricted to goods which are dutiable and in respect of which no duty has been assessed and their removal from warehouse where they lodged pending assessment of duty."

In the next para, the Supreme Court observed :

"We are of the opinion that, interesting as these arguments are, they cannot be accepted. The interpretation sought to be placed by counsel on the provision contained in Section 111(j) is unduly narrow and imports, into the clear language thereof, words that are not there. There is no justification to restrict "dutiable goods" to "dutiable goods not yet assessed to duty". The suggestion that "warehouse" referred to in the clause should be understood to mean a warehouse to which goods are removed u/s 49 but not one to which goods are taken in pursuance of Section 59 is without basis and ignore the wide definition of that expression set out in Section 2(43) of the Customs Act."

Proceeding further, Supreme Court, again observed that,

"..... In a case where the goods are warehoused u/s 49 and they are clandestinely removed, there would be `smuggling' as the duties payable thereon have been evaded altogether. But even in a case where the goods are assessed to duty and allowed to be warehoused u/s 59, a clandestine removal can result in loss of duty. No doubt, there is a provision in Section 72 for collection of the duty and forfeiture of the bond furnished to secure due payment of duty but these may not always be adequate cover to the Revenue if the goods are spirited away without permission. The mere fact that the goods have been ostensibly cleared, after assessment of duty, to a warehouse does not preclude the applicability of the concept of smuggling even in such a case."

Supreme Court also held that the scope of its earlier decision in Union of India and others Vs. Jain Shudh Vanaspati, affirming the decision of the Delhi High Court - Jain Shudh Vanaspati Ltd., etc. Vs. Union of India and Others, need not be gone into and in the said case "goods had been completely cleared accepting the plea of the importer that their input was not permitted".

15. M. M. Joys Industries v. Union of India (38 ECC 339) is a decision of Madras High Court. It was held therein that,

"..... it cannot be taken as a proposition of law that once a clearance u/s 47 of the Act is ordered, unless that order is set aside, the proper officer cannot act on

his reasonable belief u/s 110, 111 or 113 of the Customs Act".

The Court held that it is for the petitioner to show cause against the proposal, before the statutory authorities and the filing of the writ petition immediately on seizure was premature. The Court did not accept as correct the law laid down in Union of India and others Vs. Popular Dyechem, and Jain Shudh Vanaspati Ltd., etc. Vs. Union of India and Others, The learned Judge preferred the view expressed by the full Bench of Calcutta High Court in Euresian Equipments and Chemicals Ltd. and Others Vs. The Collector of Customs and Others, Petitioner was directed to respond to the summons issued by the Department and writ petition was rejected.

16. M/s. Jacsons Thevara Vs. Collector of Customs and Central Excise, was cited by Mr. Ashok Haranahalli to point out that Section 111(o) of the Act would be applicable even in respect of the goods partially exempted from the levy of duty. The machinery was sought to be imported for the actual user of the importer and a concessional duty was paid. Thereafter the goods were sought to be transferred. The Revenue contended that Section 111(o) was attracted to such a situation and therefore the machinery was liable to be confiscated. This contention of the Revenue was upheld by the Supreme Court. It was held that the importer, after getting goods cleared from the Customs, transferred the same to another company; it was a failure to observed the condition on the basis of which the benefit of concessional rate of duty was obtained and therefore Section 111(o) was attracted. The proceedings u/s 28 of the Act was affirmed.

17. In Gurupriya Tele Auto (P) Ltd. Vs. Supdt. of Central Excise, this Court was considering the scope of Section 11A of the Central Excises and Salt Act. It was held therein that even though the classification list was approved by the Department earlier, it did not preclude the initiation of proceedings u/s 11A in the appropriate cases; in other words the application of the mind of the authorities in approving the nature of the goods cannot be held to be final irrespective of the statutory provisions. A provision like Section 11A of the Central Excises and Salt Act was necessary so that tax which was not properly collected for reasons stated in the particular provision, could be collected.

18. The order of the Calcutta High Court in Rotoflex Industries Vs. Collector of Customs, is an interlocutory order. Therefore any observation made therein cannot be considered as a precedent for any purpose by us.

19. In Kamath Packaging Ltd. Vs. Union of India, it was held that an action can be taken against the goods imported, if, subsequently it is found that "the goods were prohibited goods". The prayer of the petitioner in the said case to restrain the respondents from proceedings with any further enquiry in relation to the utilisation and the movement of the goods, etc. was rejected.

20. In Madanlal Steel Industries Ltd. Vs. Union of India, a Division Bench of the Madras High Court also left it to be statutory authorities to consider the question whether the seizure and any consequent confiscation is warranted on the facts at

a later stage after issuance of notice u/s 124. The necessary implication is that the fact that the goods were cleared u/s 47 by itself would not bar the competence of the authorities to initiate proceedings either u/s 28 or u/s 124 of the Act.

21. It is unnecessary to multiply the decisions. It is suffice if we refer to M/s. Euresian Equipments & Chemicals Ltd. 's case (supra) which is a decision of the Full Bench. Though the question arose in the context of export, the relevant provisions are similar to Section 47 governing the importation of goods. It was held that the clearance of goods for export u/s 51 by itself would not bar the initiation of appropriate proceedings, if subsequently it is found that the clearance was not justified on facts.

22. In M/s. C. J. Sheth and Co. v. M. G. Abrol 70 BomLR445 a learned Judge of the Bombay High Court also expressed a similar view; the relevant provisions were under the earlier Sea Customs Act. It was held that the clearance of the goods would not result in any estoppel against the Revenue. At page 449 the observations of Chief Justice Chagla in an earlier decision is quoted, which reads thus :

"There is nothing in Section 167 which suggests that the power of the Collector to determine whether an offence has been committed with regard to the goods or not and to impose penalty and to confiscate the goods can only be exercised at a particular time or under certain circumstances. Section 178 of the Act provides that `anything liable to confiscation under this Act may be seized in any place.... " Therefore even if an order of clearance is made, if the goods are liable to confiscation they may be seized in any place if they have left the custody of the customs authorities. But if they have not left the custody of the customs authorities then the effect of the confiscation order would be automatically to reverse the clearance order which was passed ad hoc and pro tanto by the customs officer. Every order of clearance is conditional upon the goods not being liable to confiscation under any offence committed by the owner of the goods. The order in terms is not an absolute order which prevents the Collector from confiscating the very goods in respect of which he has authority to clear the goods, but that authority may cease to exist if there is liability upon the goods to be confiscated under any provision of the Sea Customs Act."

23. In view of the above we have no hesitation in declining to interfere with the proceedings initiated by the respondents. It is open to the petitioner to show cause in response to the notice issued to the petitioner. However, we record the statement made on behalf of the respondents that the petitioner will be permitted to utilise the machinery imported and installed at Tumkur to run the petitioner's factory during the pendency of the proceedings subject to the result of the said proceedings. However, the petitioner shall not shift nor alienate the machinery from the present place of its operation.

24. Writ petition is accordingly dismissed.