(1991) 01 BOM CK 0044

In the Bombay High Court

Case No : Appeal No. 807 of 1987 in Writ Petition No. 85 of 1987

Union of India APPELLANT

Vs

Sampat Raj Dugar RESPONDENT

Date of Decision : 10-01-1991

Acts Referred:
Customs Act, 1962 — Section 110, 111, 112, 122, 2(26)

Citation : (1991) 35 ECR 174 : (1991) 56 ELT 739

Hon'ble Judges : S.M. Jhunjhunwala, J;M.L. Pendse, J

Bench : Division Bench

Advocate : Mr. R.C. Master, for the Appellant; Mr. F.H.J. Talyarkhan and Shri J.C. Patel, for the Respondent

Judgement

Jhunjhunuwala, J.—This is an appeal against the order in Writ Petition No. 85 of 1987 by which the order of the Collector being order dated 15th September 1986 confiscating the goods mentioned therein was quashed, the appellants were directed to hand over four consignments to the 1st respondent for reshipment to him at Hongkong and to issue detention certificate to the 1st respondent for the period the goods were rendering the 1st respondent liable to pay demurrage to the Bombay Port Trust.

2. The 1st respondent, an Indian national, resident abroad (INRA) was doing business at Hongkong in the name and style of ''UNISILK'' and the 2nd respondent was doing business at Delhi in the name of ''ACQUARIUS'' and was holding an Advanced import Licence bearing No. P/L/3084211/C/XX/95/D/85 for import of Mulberry Raw Silk. Prior to importation of the goods covered by the four consignments in question, the 2nd respondent had imported three consignments against the said Advance Licence and had misused the same in violation of the tears pertaining to importation thereof. Between November 22, 1985 and January 22, 1986, the four consignments in question arrived at the Port of Bombay. The documents in respect of these consignments were made deliverable ''at sight'' and were sent to the 1st respondent''s bankers who had

instructions to deliver the same to the 2nd respondent against payment at the counter. Before delivery of the said four consignments could be taken by the 2nd respondent, the appellants came to know about the misuse by the 2nd respondent of the goods covered by the said earlier three consignments and as such, the said four consignments in question were seized under the provisions of Section 110 of the Customs Act, 1962 (hereinafter referred to as "the said Act"). A show cause notice dated May 12, 1986 was issued to the 2nd respondent and others calling upon them for their explanation as to why the goods covered by the said four consignments and which were seized, should not be confiscated u/s 111(d) of the said Act and why penal action should not be taken against the 2nd respondent and others u/s 112 of the said Act. No such notice was served upon the 1st respondent. However, the 1st respondent did appear through his advocate in the said show cause proceedings.

3. It may be mentioned here that the said Advance Licence granted to the 2nd respondent, was cancelled by the Joint Chief Controller of Imports & Exports, New Delhi on and from May 12, 1986 on the ground that the same was obtained by misrepresentation and fraud.

4. Before the 2nd appellant, the 1st respondent made the following submissions :-

(i) that the title in the goods covered by the said four consignments had not passed to the 2nd respondent;

(ii) that the 2nd respondent had no right to abandon the said goods;

(iii) that whatever might have been the lapses of the 2nd respondent, the said goods could not be proceeded against to realise penalty from the 2nd respondent;

(iv) that the said goods were not liable to confiscation under any provision of the Customs Act, 1962 or the Import and Exports (Control) Act, 1947 or Import (Control) Order, 1955 as they were imported against a licence which was valid at the time of shipment thereof;

(v) that the 1st respondent had a right to re-export the said goods; and

(vi) that the 1st respondent was not a party to the misuse of the imports made earlier by the 2nd respondent.

5. In his reasoned order passed on September 15, 1986, the 2nd appellant, inter alia, held that offence u/s 111(d) of the said Act was committed and as such, the goods covered by the said four consignments were liable to be confiscated. He further held that since there was no valid licence for the clearance of the said goods and as the said goods were abandoned by the 2nd respondent u/s 23(2) of the said Act who had filed the bill of entry for clearance thereof, he did not propose to allow re-export of the said goods as the same were liable to confiscation u/s 111(d) of the said Act. Accordingly, order for confiscation of the said goods was made.

In the writ petition filed by the 1st respondent, the 1st respondent contended that the said order passed by the 2nd appellant is illegal since the title to the said goods vests in the 1st respondent and had not passed to the 2nd respondent and as such, lapses, if any, on the part of the 2nd respondent could not be utilised to pass an order of confiscation which affected the 1st respondent and not the 2nd respondent. He further contended that at the date of import, the said goods were covered by a valid and subsisting licence and as such, Section 111(d) of the said Act could not be invoked to justify an order of confiscation.

6. The learned Judge who heard the writ petition held that in the circumstances of the case, title to the said goods did not pass to the 2nd respondent and the 2nd respondent had not become the owner thereof and as such, the said goods could not be proceeded against for lapses committed by the 2nd respondent.

7. Mr. Master, the learned Counsel appearing for the appellants, while putting reliance on Section 2(26) of the said Act, has submitted, that the said goods had vested in the 2nd respondent and that she having misused the facility of import of the said three earlier consignments and also having obtained an Advance Licence by practicing fraud, rendered herself liable to penalty under the said Act and one such penalty being of confiscation of the goods under Sec. 122 of the Said Act, the 1st respondent could proceed against the 2nd respondent for recovery of his dues. In his submissions, the 1st respondent, however, could not claim immunity from confiscation in relation to the said goods.

8. Section 2(26) of the said Act defines ''importer'' as under;

"''importer'', in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner or any person holding himself out to be the importer".

From the above definition of ''importer'' if is clear that the owner of the goods has been placed before the person holding himself out to be the importer. As rightly held by the learned Judge, as between the owner and the person holding himself out to be the importer, it is the former who takes precedence. In the instant case, it was only for the limited purpose of obtaining delivery of the said goods, that the 2nd respondent had represented herself as the importer. Title to the said goods had not passed to her, for she had not retired the relevant documents from 1st respondents bankers. The 2nd respondent had no right to abandon the said goods since in the very first place, the said goods did not vest in her.

9. While relying upon Clauses 5(3)(ii) of the Import (Control) Order, 1955, Mr. Master submitted that the 2nd respondent became owner of the said goods and hence, the said goods could be proceeded against for lapses committed by the 2nd respondent. As rightly rejected by the learned Judge, we find no merit in the said submission of Mr. Master. A deeming provision has to be confined within strict limits. The said Clause 5(3)(ii) itself indicates that the ''deeming'' is for the limited purpose of clearance through customs. Where the clearance through

customs is not even attempted but abandoned, the 2nd respondent cannot be said to be a person in whom the property in the said goods had vested.

10. We have gone through the impugned Order. We concur with the findings and conclusion of the learned Judges when it is held that the title in the said goods had not passed to the 2nd respondent. In view of the fact that the title in the said goods had not passed to the 2nd respondent, the question of confiscation of the said goods which were exported by the 1st respondent, a foreign party did not arise. The title in the said goods had remained with the foreign exporter and the foreign exporter was entitled to have the said goods re-exported on payment of requisite duty for exportation thereof. The importation of the said goods was made against Advance Licence which was validly subsisting at the time when the said goods arrived at the Port of Bombay. Merely because the said licence was subsequently cancelled for lapses on the part of the 2nd respondent, it cannot be said that the importation of the said four consignments was without a valid and subsisting licence.

11. In the circumstances, provisions of Section 111(d) of the said Act under which the order was passed by the 2nd appellant confiscating the said goods were not attracted and the said order was rightly quashed by the learned Judge in the said writ petition. The re-export of the goods covered by the said four consignments has to be permitted subject, however, to payment or requisite export duty payable in respect thereof. The 1st respondent is entitled to detention certificate in respect of the goods covered by the said four consignments for the period the said goods were wrongfully detained rendering the 1st respondent liable to pay demurrage to Bombay Port Trust.

12. In the result, the appeal is dismissed. Re-export of the goods covered by the said four consignments is permitted subject, however, to payment by the 1st respondent of requisite export duty payable in respect thereof. The 2nd appellant is directed to issue detention certificate in respect of the goods covered by the said four consignments for the period the said goods have been wrongfully detained rendering the 1st respondent liable to pay demurrage to Bombay Port Trust. In the circumstances of the case, there shall, however, be no order as to costs.

