

(1979) 11 BOM CK 0018

In the Bombay High Court

Case No : Misc. Petition No. 149 of 1976

Yahya F. Zaveri

APPELLANT

Vs

J. Datta and Others

RESPONDENT

Date of Decision : 21-11-1979

Acts Referred:

Customs Act, 1962 — Section 28, 65

Citation : (1989) 25 ECR 106

Hon'ble Judges : B. Lentin, J

Bench : Single Bench

Judgement

B. Lentin, J.—At present, the petitioner carries on business of exporting diamonds (with which this Petition is not concerned) in the name and style of M/s. Y.S. Fazlehusen as the sole proprietor thereof. In 1944, the petitioner was carrying on the business of manufacturing jewellery. From 1953, the petitioner carried on gold import and jewellery export business. The petitioner ceased doing this business in about July 1972. Since 30th April 1963, the petitioner carried on in a bonded warehouse, business of manufacture of gold jewellery using the imported gold belonging to his foreign customers. During the period 1963 to 1972, in connection with this gold jewellery business, the petitioner held the requisite Customs licence renewable from year to year and last renewed till 1972. He also held the requisite licence issued by the Superintendent, Central Excise, Gold Circle, Bombay. The petitioner imported the gold belonging to his various customers, melted it with copper and silver, manufactured the jewellery and after setting the stones and polishing the jewellery, re-exported it to his various foreign customers (to whom the gold belonged) under the requisite permit issued by the Reserve Bank of India. The gold was received by the petitioner without making any payment of duty payable for the same. The petitioner also executed the requisite Bonds he was required to do from time to time.

2. The imported gold consignments were brought into the Bonded Warehouse by

a Customs escort and were handed over to the Proper Officer In-charge of the Bonded premises, who entered the consignments in an Import/Export Register. The entries were verified and signed by the Customs escort and the Proper Officer In-charge of the Bonded premises. The quantity of gold thus imported by the petitioner was also immediately entered upon its receipt in the Bonded premises in a Register known as "the Gold Register". All the withdrawals required for alloying into different carats according to the requirements of the petitioner's foreign customers for making the different pieces of jewellery and ornaments and all the remnants left after the alloying work was done, were also entered in the Gold Register. The balance of gold remaining in stock after taking the melting loss arising out of alloying was also entered in the Gold Register. Simultaneously, entries were made of the items of gold issued for manufacture of the jewellery, of the receipt of the finished jewellery, for the loss of gold at the end of the process and after the work of recovery was done. All the entries, including the ones pertaining to loss of gold in the process of manufacture of the jewellery, were checked and after weighment and verification by the Proper Officer under whose surveillance the entire manufacturing work was done and the bonded warehouse maintained, the Proper Officer initialled the entries in token of his being satisfied as to the correctness thereof. The Proper Officer also maintained his own Register and records wherein was noted the items of gold imported by the petitioner, the ornaments manufactured by the petitioner out of that imported gold and the net loss of gold resulting from the process of manufacturing. These records of the Proper Officer were maintained at the bonded licence warehouse and at the closure thereof the same were taken away by the Proper Officer.

3. From time to time, the petitioner submitted the periodical returns of import, export, quantity of manufacturing loss incurred and the stock position to the Customs authorities as also to the Exchange Controller, Reserve Bank of India, showing the imports, exports, loss of gold in the process and foreign exchange earned. From time to time, the petitioner also submitted to the respondents the detailed particulars of the bonds executed for imported consignments for the relevant period, the consignments exported under bond shipping bills, the net loss of gold taken place in the process of manufacture, the percentage of the loss and the allotment of the loss to the different bonds.

4. In July 1972, the petitioner stopped his gold import and jewellery manufacturing business in Bond. Thereupon the petitioner sent his final statement dated 12th July 1972 to the Assistant Collector of Customs and also to the Assistant Exchange Controller, Reserve Bank of India, wherein all the checked and verified details were reported and which showed that no imported gold had remained with the petitioner. On the same day, viz. 12th July 1972, the petitioner addressed a letter to the Assistant Collector of Customs, enclosing his licence dated 16th June 1972 for cancellation. By his letter dated 28th February 1973 addressed by the Assistant Collector of Customs to the petitioner, it was stated that on scrutiny of the office records, it was noticed that the petitioner

had not paid the duty on shortages and was directed to pay the same, whereafter the petitioner's request for cancellation of his licence would be considered. By his letter dated 9th August 1973 addressed to the Assistant Collector of Customs, the petitioner state that the petitioner had submitted all his accounts of imports, manufacture and utilisation in re-exports duly certified by the Officers who were in-charge of the petitioner's Bond from time to time, that the petitioner's accounts were also duly filed with the Reserve Bank, the Central Excise authorities and the Customs authorities and were accepted accordingly, that the alleged shortages had not been brought to the petitioner's notice at any time earlier and that the petitioner was not liable to pay any duty on the alleged shortages. By that letter, the petitioner once again requested the Assistant Collector of Customs to cancel his licence at an early date.

5. By his undated letter of September 1975 (received by the petitioner on 26th September 1975), the Additional Collector of Customs stated that in terms of statements received from the Superintendent of Central Excise, Gold Control, Bombay, the petitioner was called upon to pay duty on or to account for 47600.35 grms. of gold, being the difference between the imported gold and the manufactured quantity of gold ornaments. The petitioner was called upon to show cause why penal action should not be taken against him for failure to account for the imported quantity of gold within one month from the date of receipt of that letter. Apparently at this time the petitioner was out of India By his letter dated 24th November 1975, the Assistant Collector of Customs once again called upon the petitioner to pay the amount of duty chargeable at the present rate of duty on the said 47600.305 grms. of gold imported during the period 22nd July 1963 to 8th May 1972 and bonded in the petitioner's bonded warehouse from time to time. In reply, by his advocate's letter dated 1st December 1975, the petitioner denied his liability to pay any duty as stated in detail in that letter. On 6th January 1976, the Assistant Collector of Customs addressed a demand notice to the petitioner stating that the quantity of unaccounted gold from that imported during the period 1st April 1970 to 8th May 1972 worked out to be 14311.499 grms. The petitioner was called upon to pay the amount of duty thereon (being the difference between the quantity of gold imported and exported in the form of jewellery), as chargeable at the present rate of Customs duty at the rate of 100% plus 20% amounting to Rs. 46,591.03, in default whereof the Bond executed by the petitioner would be enforced without further reference. By his advocate's letter dated 15th January 1976, the petitioner once again denied his liability and on 27th January 1976 the petitioner filed the present petition for an appropriate writ for setting aside the impugned notices dated 28th February 1973, September 1975, 24th November 1975 and 6th January 1976

6. The Assistant Collector of Customs has filed an affidavit-in-reply wherein it is stated that shortly after the beginning of the operation of manufacture in Bond, the supervisory control over the manufacture of jewellery was shifted to the Central Excise and that the licensing and escorting of imported gold and the

export of ornaments remained with the Customs authorities. The Custom House had allowed persons to store the imported gold in Bonded Warehouse after executing the requisite bond in respect of each consignment. When the petitioner made his request for the cancellation of his licence, a reference was made to the Central Excise, which in turn forwarded to the Customs authorities a tabulated statement of imports from 22nd July 1963 to 8th May 1972 and exports from 16th August 1963 till 7th July 1972. According to that statement, there was no balance of gold in the Bonded Warehouse. On calculation, it was found that there was wastage of gold to the extent of 47600.305 grms. which resulted in the demand notice dated 28th February 1973 being issued to the petitioner. After the petitioner replied that his accounts were fully filed with the Reserve Bank and the Central Excise and that no intimation regarding shortage was received from the Central Excise and that the petitioner was not liable to pay any duty, reference was made to the Central Excise regarding the amount of wastage by their department. Thereupon Central Excise replied that only the supervision over the manufacture was exercised by the Central Excise and endorsements regarding the number and weight of the ornaments were made by it and that it was for the Customs to take suitable action. Thereupon as ordered by the Collector by his order dated 7th November 1975, demands were made against the petitioner for the recovery of duty on the entire unaccounted quantity of imported gold

21st November 1979.

7. In the affidavit-in-reply, it is further stated that by a letter dated 3rd July 1963 addressed to the Ministry of Finance, Custom House informed the Ministry that after consultation with the National Refinery, Bombay, it was proposed to provisionally allow a maximum of 3% by way of overall loss attributed to melting and manufacturing of gold. Ultimately in consultation with the Gold Control authorities, the percentage of waste was fixed at 4.5% and was approved by the Collector on 19th April 1972.

8. In the affidavit-in-reply, it is further stated that the Custom House had not accepted or certified the wastage shown by the petitioner as permissible wastage and that the difference in the quantity of gold imported and ornaments exported was not accounted for and therefore under the terms of the bond, the petitioner became liable to pay Customs duty. It is further stated that the petitioner is bound to account for the warehoused gold to the satisfaction of the Proper Officer after which only, the bond executed by the petitioner can be cancelled and that the percentage of wastage claimed by the petitioner not having been accepted by Custom House, the question of remission of Customs duty did not arise.

9. This is the sum and substance of the affidavit-in-reply filed by the Assistant Collector of Customs.

10. At this stage, reference to the report dated 12th July 1972 furnished by the petitioner to the Assistant Collector of Customs is pertinent. It is the last of the

numerous reports submitted by the petitioner right from 1963. That report sets out the total number of grammes of gold imported between December 1971 and 8th May 1972 as also the total number of grammes of the jewellery exported between 6th April 1972 and 7th July 1972. The report states that there has been a certain loss of gold in the manufacture of the jewellery of the total jewellery exported from 20th January 1972 to 11th July 1972 of 12321 154 grammes, the net loss incurred after recovery from refuse comes to 714.387 grammes, equivalent to 5.79805% per 100 grammes and that the loss of 714.387 grammes may be allocated and credited to different Bonds according to the percentage detailed in that report. The penultimate para of the report reads thus:

The total loss incurred in Gms: 714.387 is to be deducted from Bond No YSF/1 dated 8.5.1972 and the balance then under the Bond No. YSF/1 dated 8.5.1972 and the balance then under the Bond No. YSF/1 would be 1.698 gms.

The report concludes as under:

The balance of Gms: 1.698 is not actual balance, remaining with us, or in the books of accounts but only a difference in minute calculations which are carried on in submitting the loss account since 1963. So now there does not remain any balance to be exported by us.

This report has been signed by the petitioner. Against the petitioner's denature there appears on the left-hand side of the report, the signature of the In-charge Inspector, Customs & Central Excise together with the date, viz. "12.7.1972." Earlier reports have also been countersigned by the Inspector incharge at the time.

11. This report discloses in no uncertain terms that the balance of grammes 1.698 was not even the actual balance remaining with the petitioner or shown in the petitioner's books of accounts but was only the result of a difference arising as a result of minute calculations which were done in submitting the loss account since 1963. Thus at best the balance of even 1.698 was notional. This is corroborated by the admission in the affidavit-in-reply that there was no balance of gold in the warehouse.

12. The question that next arises is what reliance can be placed upon this report According to Mr. Talyarkhan, the learned Counsel appearing on behalf of the respondents, this report, like the petitioner's earlier reports, is useless as the correctness thereof had not been accepted by the Customs authorities This submission does not take into account that, as stated earlier in this judgment, from the very minute the imported gold was brought into the Bonded Warehouse until the exports were actually made by the petitioner, everything that was done by the petitioner was under the control and supervision of the Proper Officer who was not only in-charge of the gold but was also in-charge of the Bonded Warehouse where the gold was kept for being manufactured into various forms of jewellery. Furthermore, all the documents, forms and Registers including the Gold Register were maintained by the petitioner under the control and

supervision of the Proper Officer. These aspects, though emphasised in the petition, are not controverted in the affidavit-in-reply. In these circumstances, it is but natural that the reports including the last report dated 12th July 1972 filed by the petitioner with the Assistant Collector of Customs have been countersigned by the concerned In-charge Officer, not merely as a matter of course or merely by way of an acknowledgment of the receipt by him of the petitioner's report for the purpose of forwarding it to the Assistant Collector of Customs as suggested by Mr. Talyarkhan. Why this report and the earlier ones should have been countersigned by the concerned In-charge Officer merely as a matter of course, was something which Mr. Talyarkhan was unable to clarify. There is also nothing even remotely to indicate that the report was countersigned by the In-charge Officer merely in token of acknowledgement of his having received it for being forwarded to the Assistant Collector of Customs. Mr. Talyarkhan was even unable to produce the original report but that makes no difference for the copy annexed to the petition has not been disputed as being incorrect and which reveals that the only reason why the In-charge Officer subscribed his signature and counter-signed the report was not for the reasons suggested by Mr. Talyarkhan but in authentication of the correctness of its contents. Mr. Talyarkhan was unable to show any provision which required such reports to be forwarded to the Assistant Collector only through the In-charge Officer. His duties, functions and responsibilities were certainly more than to act merely as a glorified carrier of reports. These suggestions of Mr. Talyarkhan are clearly in the nature of conjecture and surmises not warranted by the record and are not even reflected in the affidavit-in-reply. Significantly also, the concerned In-charge Officer has also not chosen to make any affidavit and no explanation has been forthcoming for this lapse. If this explanation, such as it is, could be given by Mr. Talyarkhan across the Bar by way of an ipse dixit on the strength of instructions given to him in Court by the department's Officers, surely there was nothing to prevent the Assistant Collector himself to have so stated in the affidavit-in-reply made by him or the In-charge Officer making the necessary affidavit. Nothing of the kind has been done. In this state of affairs, there emerges in bold relief that the various reports furnished by the petitioner periodically from 1963 and ending with the last report dated 12th July 1972, were countersigned by the concerned In-charge Officer in confirmation of the correctness of the contents of those reports. In these circumstances, it does not behave the respondents to say that the reports had not been accepted after a period of over 12 years after the first report was filed and on that ground seek to penalise the petitioner. It is futile for the respondents to urge that the reports countersigned by the concerned In-charge Officer had not been accepted by the Customs authorities and that it was only when the petitioner applied for the cancellation of his licence that this matter was gone into by the authorities. One may legitimately ask whether the Customs authorities would have kept on slumbering even more, if the petitioner had not applied or had applied for cancellation of his licence, say 20 years hence. Would the Customs authorities have been justified in then purporting to wake up and query the reports

periodically sent by the petitioner and countersigned by the In-charge Officer himself? Therefore, in the facts and circumstances of this case, the version of the respondents that the reports had not been accepted by the authority is incredible and appears, to be an after-thought, "

13. This then brings me to the provisions of Section 65 of the Customs Act, 1962. That section as pertains to the manufactured and other operations in relation to goods in a warehouse. Sub-section (1) provides that with the sanction of the Assistant Collector of Customs and subject to such conditions and on payment of such fees as may be prescribed, the owner of any warehoused goods may carry on any manufacturing process or other operations in the warehouse in relation to such goods. Sub-section (2)(a) reads as under:-

(2) Where in the course of any operations permissible in relation to any warehoused goods under Sub-section (1), there is any waste or refuse, the following provisions shall apply?

(a) if the whole or any part of the goods resulting from such operations are exported import duty shall be remitted on the quantity of the warehouse goods contained in so much of the waste or refuse as has arisen from the operations carried on in relation to the goods exported : "Provided that such waste or refuse is either destroyed or duty is paid on such waste or refuse as if it had been imported into India in that form;

14. There can be no doubt that in the light of the earlier discussion the petitioner's case would squarely fall within Clause (a) of Sub-section (2) of Section on 65. Reliance by the respondents on the proviso can avail them nothing as is brought out by a letter dated 26th August 1970 from the Central Board of Excise and Customs to the Collector of Customs wherein it is stated that the Board is of opinion that any waste arising out of the operations carried on in relation to goods imported which is not recoverable can be deemed to have been destroyed for the purpose of Section 65(2) of the Customs Act, 1962. This reveals that even the Central Board of Excise and Customs had the provisions of Section 65(2)(a) in mind when this direction was given to the Collector of Customs.

15. Mr. Talyarkhan next urged that the tabulated statements had been prepared from the petitioner's reports which the petitioner had periodically furnished from 1963 and from "other records". It is difficult to accept this contention in view of the contents of the report dated 12th July 1972 countersigned by the In-charge Officer himself and in particular the last paragraph thereof. Significantly no particulars of "other records" have been forthcoming despite the petitioner's requests.

16. It was next urged by Mr. Talyarkhan that the department would have revised its demand as was done in the case of other bonders but was prevented so doing in the case of the petitioner as he having filed the present petition, the matter had become sub-judice. Partial revision of the demand would have been little

consolation to the petitioner if he was entitled to a full remission.

17. Mr. Talyarkhan further contended that the petitioner had not we remedies under the Act and that hence no relief should be granted to him in this petition. The first leg of this contention of Mr Talyarkhan is correct But issue can legitimately be joined with him regarding the second leg his contention. Merely because a party does not exhaust the remedies available to him under a statute, is by itself no ground for refusing relief to him when the party can demonstrate that exhausting the remedies available would have been an idle formality, an exercise in futility and a waste of time.

18. Another ground of challenge urged on behalf of the petitioner was on the ground of mala fides inasmuch as (i) a limited remission was allowed to other parties but not to the petitioner, (ii) in the affidavit-in-reply, the respondents have not explained the lapse of time between the petitioner's reports and the respondents' show cause notice and (iii) the documents referred to in the affidavit-in-reply were not given inspection of. This ground of challenge is weak. It is sufficient that in issuing the impugned notices the respondents failed to take into consideration material factors which went to the root of the matter and which the department was bound to take into consideration.

19. It was also contended on behalf of the petitioner that the provisions of Section 28 of the Customs Act were attracted to this case. Section 28 provides for notice for payment of duties not levied, short-levied or erroneously refunded. Sub-section (1) states that when any duty has not been levied or has been short-levied or erroneously refunded, the proper officer may, within six months from the relevant date, serve notice on the person chargeable with the duty, which has not been levied or which has been so short levied or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice. Sub-section (3) states that the expression "relevant date" means in a case where duty is not levied, the date on which the proper officer makes an order for the clearance of the goods. It was urged on behalf of the petitioner that by reason of the provisions of Section 28, the demand notices dated 28th February 1973, September 1975, 24th November 1975 and 6th January 1976 were time-barred. This aspect of the matter has now become academic in view of my holding in favour of the petitioner on merits.

20. In the result, the impugned notices dated 28th February 1973, September 1975, 24th November 1975 and 6th January 1976 are set aside Regarding the bonds referred to in prayer (a) of the petition, the authority shall set aside the same in consonance with the provisions of the law. In the facts and circumstances of this case, there will be no order as to costs. Rule is made absolute accordingly.