

M/s Oswal Spinning & Weaving Mills Ltd

Vs

Collector of Customs and Another

Civil Appeal No. 4102 of 1984

(CJI R.S. Pathak, Ranganath Misra, B.C. Ray)

19.04.1988

JUDGMENT

RANGANATH MISRA, J.

1. (for himself and Pathak, C. J.) (concurring) - We have had the benefit of reading the judgment proposed by my learned Brother Ray, J. We agree with the conclusion that respondent 1 is liable for the loss or damage to the goods and would like to briefly indicate the reasons for such conclusion.

2. The appellants imported 58 bales of woollen rags through the State Trading Corporation from Canada. When the goods arrived at Calcutta, the Customs authorities called upon the appellants to show cause as to why the same may not be confiscated under the provisions of the Customs Act (hereafter referred to as 'the Act'). After hearing the appellants, as also the State Trading Corporation, respondent 1, to which a notice was also issued, the Collector of Customs by his order of March 12, 1981 directed confiscation of the goods in exercise of power under Section 111(d) and (m) of the Customs Act but in lieu of confiscation, the appellants were given the option under Section 125 of the Act to clear the goods on payment of redemption fine of Rs. 50,000. The appellants appealed to the Central Board of Excise and Customs which sustained the order of confiscation but reduced the redemption fine to Rs. 20,000 and directed :

...after the goods are mutilated to the satisfaction of Collector of Customs, Calcutta, by the importers at their cost and under customs supervision so as to render them unfit for use except as rags and after payment of appropriate duty, the goods be released on payment of a fine of Rs. 20,000 within three months hereof.

The appellants then moved the Central Government in revision against the Board's order and in due course the revision was transferred to the Customs, Excise and Gold (Control) Appellate Tribunal. The Tribunal by its order dated July 31, 1984 gave the following direction while disposing of the appeal :

...the goods be released on payment of customs and other related duties, under T. I. 63.02, with countervailing duty as livable under corresponding entry in the Central Excise Tariff. This is subject to Board's order about payment of redemption fine of Rs. 20,000 and mutilation of the goods to the satisfaction of the Collector, at the cost of the appellants and under the supervision of the customs authorities.

3. The appellants then moved this Court by way of appeal under Section 130-E of the Customs Act. On December 17, 1986 this Court directed waiver of the redemption fine. Mr Salve for the

appellants agreed to pay the duty, as directed, when delivery was to be taken of the goods. When appellants complained that a part of the goods was not traceable, notice was issued to the Calcutta Port Trust authorities and it has been joined as respondent 2 to this appeal.

4. In view of the order waiving the demand of redemption fine and the appellants' agreeing to pay the demand of appropriate duty as directed by the Tribunal, the only question that survives for examination is as to the availability of the goods return whereof has to be made to the appellants and in case the whole or part of the goods is not traceable, in what way the direction of the Tribunal for return of the goods has to be worked out. It is not disputed that 58 bales of the goods in question had been received, nor is there any dispute that the entire goods had been confiscated under the Act. Section 45 of the Act provides :

45. Restrictions on custody and removal of imported good. - (1) Save as otherwise provided in any law for the time being in force, all imported goods unloaded in a customs area shall remain in the custody of such person as may be approved by the Collector of Customs until they are cleared for home consumption or are warehoused or are transshipped in accordance with the provisions of Chapter VIII.

(2) The person having custody of any imported goods in a customs area, whether under the provisions of sub-section (1) or under any law for the time being in force, -

(a) shall keep a record of such goods and send a copy thereof to the proper officer;

(b) shall not permit such goods to be removed from the customs area or otherwise dealt with, except under and in accordance with the permission in writing of the proper officer.

Under Section 47, provision for clearance of the goods for home consumption is made. Section 49 marks provision for storage of imported goods in warehouse pending clearance but such storage is permissible only when the importer applies for it. Section 125 provides that :

Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods an option to pay in lieu of confiscation such fine as the said officer thinks fit....

Where such option is not given or even if such option is given it is not availed of, under Section 126, the goods are confiscated and upon confiscation they vest in the Central Government.

5. In view of these provisions in the Act, there can be little scope to dispute that until the goods are cleared for home consumption, the scheme of the Act requires the goods to remain in the hands of the customs authorities and obviously the statutory liability to account for the goods would be of the authorities under the Act charged with the responsibility of keeping the goods.

6. Nineteen bales, as alleged, appear to be missing and 39 bales are said to be available. The appellants have contended that the goods has not been properly preserved and parts of some of the bales have been taken out to be made into independent bales. these allegations have not been accepted by respondent 1. Respondent 2 has totally denied any liability in the matter. In case it is ultimately found that the customs authorities by themselves have the total liability to account for the

goods or in case their liability in that behalf has to be shared by the Calcutta Port Trust and even though one or both are liable to account for the goods and they fail to do so, in what manner the appellants would in such eventuality be compensated are matters which require factual consideration and would warrant reception of evidence. This proceeding before us is thus not appropriate for looking into this part of the grievance. A situation has now arisen where the order of the Tribunal as modified by this Court for the return of the goods cannot be fully given effect to. We think it appropriate to require the Tribunal to finally dispose of this question Appellants' counsel has relied upon a decision of this Court in State of Bombay (now Gujarat) v. Memon Mahomed Haji Hasam [(1967) 3 SCR 938 : AIR 1967 SC 1885]. As the matter is being left open to be dealt with by the Tribunal, we do not propose to refer to this decision at any length. The Tribunal would give reasonable opportunity to the appellants as also the two respondents in the matter of adjudication of this aspect of the dispute. In case the goods are not finally traceable and the liability to account for the goods is fixed in the hands of one or both of the respondents, the Tribunal would do well to examine and decide what amount of compensation in lieu of the goods should be payable to the appellants. This should be done within three months from today. Costs to be in the discretion of the Tribunal.

B. C. Ray, J. -

This appeal under Section 130-E of the Customs Act, 1962 is against the judgment and order No. 434/84-D dated July 31, 1984 of the Customs Excise and Gold (Control) Appellate Tribunal, New Delhi whereby the Appellate Tribunal directed the release of the imported woollen rags to the appellant on payment of customs and other related duties, under T. I. 63.02, with countervailing duty as leviable under corresponding entry in the Central Excise Tariff. It was also directed by the said order that the appellant will have to comply with the order of the Board about payment of redemption fine of Rs. 20,000 and mutilation of the goods to the satisfaction of the Collector at the cost of appellant and under the supervision of the customs authorities.

8. The matrix of the case is that in accordance with the import policy of 1979-80 which provided for import of certain items including woollen rags through canalised agency, the appellant company placed order to the State Trading Corporation, the canalised agency, for import of mutilated woollen rags in which the contents of wool would be minimum 80 per cent under the order of allocation issued by the Textile Commissioner, Bombay in the name of the appellant. On April 4, 1979 the foreign suppliers namely M/s Gorodensky Regd., 8, Queen Street, Montreal, Canada entered into a contract for the supply of old rags of woollen textile fabrics (including knitted and crocheted fabrics) which are required for manufacture of shoddy yarn and not consist of articles of furnishing or clothing or other clothing so worn out, soiled or torn as to be beyond cleaning or repair. Fumigation Certificate from government or municipal health authorities was to be provided by suppliers at their cost with the State Trading Corporation. The specification of the goods was stated to be "CM-old original mutilated woollen hosiery, 60 per cent dark, 40 per cent fancy-minimum, 80 per cent wool contents", @ 65 Us cents per kg. CIF quantity 20,000 kg. The suppliers sent the goods comprising of 58 bales of woollen rags through the State Trading Corporation on May 1, 1979 to be delivered at Calcutta Port and the invoice was drawn in favour of State Trading Corporation (allocation to the appellant herein). Along with it there was a certificate from the suppliers to the effect that "goods shipped are in conformity with contract No. STC/CI/247/WR/239/78-79 dated April 4, 1979". It further certified that "the minimum wool content is 80 per cent in each bale". These documents were transferred to the appellant by the State Trading Corporation (in short STC) on High Sea Sales basis. The appellant imported 58 bales of woollen rags through the STC and in order to have the same released filed the bill of entry stating

the goods as woollen rags on the basis of the aforesaid documents of the foreign suppliers. The goods however on testing the same drawn from the said consignment by the customs authorities were found to have wool content only 6 to 10 per cent and acrylic fibre contents in the rags were about 60 to 70 per cent besides other synthetic fibres. It appeared to the customs authorities that the imported rags were acrylic rags and not woollen rags. A show cause notice was issued to the appellant on January 2, 1980 that the goods imported were in contravention of Clause 3(1) of Imports (Control) Order, 1955 as amended read with Section 3 of the Imports and Exports (Control) Act, 1947 as amended and calling upon the appellant to show cause why the goods (58 bales of woollen rags) be not confiscated under Sections 111(d) and 111(m) read with Section 11 of the Customs Act, 1962 and why penalty be not imposed under Section 112 of the Customs Act, 1962. The Collector of Customs after considering the reply of the appellant and hearing both the appellant and the STC confiscated the aforesaid goods under Sections 111(d) and 111(m) of the Customs Act, 1962. In lieu of confiscation, the appellant was given the option under Section 125 to clear the goods on payment of redemption fine of Rs. 50,000 within one month from the date of receipt of the order or any other period that may be extended on sufficient cause being shown. The Collector further stated in his order : "I refrain from imposing any penalty under Section 112 of the Customs Act, 1962 as there was no force to show the complicity of either the STC or the appellant in arranging for import of goods which are different from what have been ordered."

9. Against this order an appeal was made to the Central Board of Excise and Customs. The Central Board of Excise and Customs came to the conclusion that the goods imported could not be described as woollen goods at all as the wool contents were found to be not exceeding 10 per cent. The Board however, considering the fact that the goods have been imported through the STC and there was no involvement of the importers in the importation or wrong goods took a lenient view and directed that after the goods are mutilated to the satisfaction of the Collector of Customs by the appellant at his cost and under customs supervision so as to render them unfit for use except rags and after payment of appropriate duty, the goods be released on payment of a fine of Rs. 20,000 within three months of the order.

10. Against this order the appellant filed an appeal before the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi. The Appellate Tribunal disposed of the appeal ordering that the goods be released on payment of customs and other related duties under T. I. 63.02 with countervailing duty as leviable under corresponding entry in the Central Excise Tariff. The Tribunal also stated that this is subject to Board's order about payment of redemption fine of Rs. 20,000 and mutilation of the goods to the satisfaction of the Collector, at the cost of the appellant, and under the supervision of the customs authorities.

11. It is against this order the instant appeal has been filed before this Court. This Court on hearing the learned counsels for both the parties made an order on December 17, 1986 to the following effect :

Two questions arise, one relating to the demand of duty and the other levy of penalty. On the facts, we are satisfied and the learned Additional Solicitor General having agreed that there is no scope for levying of penalty. The demand of penalty, is therefore, waived and so far as duty is concerned, Mr Salve agrees that the duty as demanded is payable and will be paid. The only difficulty is about delivery of the goods imported. Notice has been issued to the Port Trust Authorities and it is said to have been served, but there is no appearance on behalf of the Port Trust. Mr Salve suggests that steps should be taken first to trace the goods. The petitioner would pay

the duty as demanded and take delivery of the materials. The matter be listed on January 23, 1987, and the Port Trust may be again notified of this date, so that further orders may be passed. The Port Trust will disclose to the court the location of the goods.

12. In accordance with the directions contained in the said order the Port Trust Authorities in their counter-affidavit sworn by one Girindra Bhuson Chakraborty, the Commercial Supervisor, Calcutta Port Trust on March 18, 1987 specifically averred that out of 58 bales only 45 bales were landed and 13 bales were landed short. It was also further averred in the said affidavit that the appellant did not take steps to remove the goods from the port areas and according to the notification No. G. S. R. 32-F dated February 1, 1975 issued by the Government of India, Ministry of Shipping and Transport under Section 126 read with Sections 42 and 43 of the Major Port Trusts Act, 1963, no responsibility shall attach to the Board after expiry of a period of seven clear working days from the date of taking charge of the goods by the Board, in respect of such goods. It has been further stated that the Collector of Customs under his order No. S. 33/53/79-A(G-11) dated January 2, 1980 confiscated the entire consignment of the said imported goods and removed 6 bales only from 1 KPD to their confiscated godown at Clive Warehouse on August 8, 1981 by PTCG (Port Trust Covered Rly. Wagon) No. 1362, and the balance 39 bales have been lying since its landing at different points of docks in a very deteriorated condition. It was further stated that the entire consignment was confiscated by the Collector of Customs and only 6 bales were removed and the balance 39 bales had been lying in the port premises at the sole risk of customs and the Port Trust had no authority for the disposal of the goods which were confiscated by the customs authorities. It has been stated that the Port Trust has no liability for loss or damage of these confiscated goods which are in the custody of the customs authorities.

13. An affidavit has been filed on behalf of the appellant sworn by one Dharam Paul Oswal, Managing Director of the appellant mill on March 31, 1987 stating inter alia that their Manager, Mr H. K. Goel visited the Calcutta Port Trust and Collector of Customs as well as its officers on March 30, 1987 for identification of 39 bales of rags out of consignment of 58 bales and for delivery of the said 39 bales on payment of duty. It has been further averred that the concerned officials supervising storage/delivery have failed to show/produce even a single bale against the alleged 39 bales admitted to be in their possession before this Court. It has also been stated that instead of 39 bales the Manager of the appellant mill, Mr H. K. Goel had been directed by CPT and Customs Department to take delivery of 300 kgs. approximately of useless sweep waste of nil market value.

14. It has strenuously been contended on behalf of the appellant that the appellant is prepared to pay the customs duty as demanded by the customs authorities in due compliance of the order of this Court and to take delivery of the goods imported but as the goods have already been lost and are not traceable from the control and custody of the customs authorities, the customs authorities are liable to pay the value of 39 bales of woollen rags on CIF basis. It was on the other hand submitted on behalf of the customs authorities that the value of the imported goods cannot be determined in this appeal by this Court as it requires consideration of facts and the only remedy for the appellant is to bring a suit for determination of such issue. It was also tried to be contended that since the goods imported were kept in the dock, it is the responsibility of the Port Trust to indemnify the appellant for the loss of the imported goods.

15. After considering the submissions of the learned counsels and also considering the facts and circumstances of the case there is no manner of doubt that the goods were confiscated by the Collector of Customs under Sections 111(d) and 111(m) of the Customs Act, 1962 and directions

were given for collection of redemption fine and for complying with certain directions contained in the order of the Collector before the release of goods. Section 126 of the Customs Act specifically provides that when any goods are confiscated under the Act such goods shall thereupon vest in the Central Government. It is also evident from the provisions of Section 141 of the said Act that goods in the customs area shall be subject to the control of the officers of customs. Undoubtedly, the imported goods were unloaded from the ship in the customs area. So these were under the control of the officers of customs. Moreover after confiscation of the entire consignment of imported goods i.e. 45 bales out of 58 bales of woollen rags, the same vested in the Central Government in accordance with the provisions of Section 126 of the said Act. It is also clear from the averments made on behalf of respondent 2, the Calcutta Port Trust, as stated hereinbefore that the imported goods remained in the customs area and these were subsequently confiscated by the Collector of Customs. The imported goods were not handed over to the custody of the Port Trust. Therefore it is the customs authorities who are in possession and control of the said imported bales of woollen rags and they cannot shirk their responsibility for the loss and damage of the said goods and they are liable to pay the value of the goods to the appellant as damages in order to re-compensate the appellant. It is pertinent to mention in this connection that under Sections 42 and 43 of the Major Port Trusts Act, 1963 it is only when the goods have been taken charge of and receipt given for them under Section 42(7) of the said Act liability for any loss or damages which may occur to the person to whom receipt has been given by the Board, arises. In other words, under the provisions of Sections 42 and 43 Board of Trustees under the said Act will be liable to recompense the loss or damages in respect of goods which have been taken charge of by the Board. In the instant case as not a single document has been produced before this Court by the customs authorities showing that the goods were handed over to the custody and possession of the Board of Trustees and that the Board issued any receipt for that as required under Section 42 read with Section 43 of the said Act. Therefore, under no circumstances can the Board of Trustees be held responsible for the loss or destruction of the said imported goods. As stated hereinbefore the imported goods were kept unloaded in the customs area and were confiscated and as such respondent 1 is liable for the loss or damages that has been caused to the appellant by the destruction of the imported goods from their custody and possession. It is not possible for this Court while hearing the appeal under Section 130-E of the Customs Act against the order of the Appellate Tribunal to ascertain and determine the money value of the imported goods which have been lost or destroyed from the possession and custody of the customs authorities. The appellant may take appropriate proceedings for determination of the damages and for recovery of the same in accordance with law.

16. In view of the above findings, this appeal is disposed of. Therefore will however, be no order as to costs.

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