Jacsons Thevara

Vs

Collector of Customs and Central Excise

Civil Appeal No. 4092 of 1986

(S. C. Agarwal, N. M. Kasliwal JJ)

05.02.1991

JUDGEMENT

S. C. AGRAWAL, J.:-

1.This appeal has been filed under Section 130 E(b) of the Customs Act, 1962 (hereinafter referred to as 'the Act) against the order dated July 29, 1986 gassed by the Customs, Excise & Gold (Control) Appellate Tribunal (hereinafter referred to as 'the Appellate Tribunal) whereby the Appellate Tribunal dismissed the appeal of the appellant against the order dated February 24, 1983 passed by the Collector of Customs & Central Excise, -Cochin (hereinafter referred to as 'the 'Collector).

2. M/s. Jacsons Thevara, the appellant herein, is a partnership firm. It was originally constituted on January 1, 1973, with two partners, Jacob Punnoose and K. 0.Thomas.It was registered as a Small Scale Industrial Unit with the Department of Industries & Commerce of the Government of Kerala, and was manufacturing wooden furniture and flush doors. The firm was reconstituted on January 1, 1974, and two minors, Thomman Jacob and Phili Jacob, were admitted to the benefits of the partnership. The reconstituted firm started ' manufacturing decorative Veneers of 3 mm thick by manual sawing operations. In July 1978,the appellant decided to diversify its business by manufacturing sophisticated decorative Veneers of thinner varieties and they decided to import a Horizontal Veneers Slicer and spares from Japan. The appellant obtained an import licence dated February 14, 1979, for the CIF value of Rupees 8,70,413 / - bearing a specific endorsement 1 "Project Import" from the Deputy Chief Controller of Imports & Exports, Cochin. After obtaining the, said licence, the appellant placed orders with the foreign supplier in Japan and opened a Letter of Credit on April 12, 1979. Since the financial resources of the appellant were not quite adequate to meet the financial commitments required for importation of the machinery as well as for purchase of raw materials, the appellant consulted Mr. T. K. Jacob and his wife Mrs. Sally Jacob, the parents of the two minor partners who had financial interests in the appellant and as a result of the said deliberations a private limited company M/s. Jacsons Veneers & Panels Private Limited (hereinafter referred to as 'the Company) was incorporated under the Cornpiknies Act, 1956 on June 6, 1979. The said Company was also registered as a Small Scale Industry with the Directorate of Industries & Commerce, the Government of Kerala. On July 14, 1979, the partners of the appellant passed a resolutionl where by it was mutually agreed and resolved that the business herein to run under the name of the appellant be transferred with all its assets and liabilities together with import licences, permits, quotas, factory licences, leasehold rights, telephone connections etc., and for this purpose to enter into an agreement with the appellant. These resolutions were followed by an agreement dated July 31, 1979 executed by Mrs. Sally Jacob, Managing Director of the Company and Jacob Punnoose and K. 0. Thomas, partners of the appellant. Under the said agreement the Company

agreed to take over and the appellant agreed to hand over the business run by the appellant. as a going concern with the assets and liabilities described in Schedule-A to the agreement and it was also agreed that the appellant shall transfer the import licences, permits, quotas, factory licences, leasehold rights, telephone connections etc. described in Schedule-B to the agreement to the Company and the Company agreed to pay to the appellant a net consideration of Rs. 38,587.52 paise. After the execution of the said agreement a joint application dated August 31, 1979 was submitted by the appellant as well as the Company before the Deputy Chief Controller of Imports & Exports, Ernakulam for approval for transfer of business of the appellant to the Company and for transfer of import licence dated Feb. 14, 1979 issued in favour of the ' appellant. The said application was based on the agreement dated July 31, 1979. In the meanwhile, on July 31, 1979, the goods had been shipped by the foreign supplier from Japan. By his letter dated November 26, 1979, the Deputy Chief Controller of Imports & Exports informed the appellant that since the shipment of the capital goods covered by the import licence dated Dec. 14, 1979, had already been effected the question of transfer of the licence does not arise. On the arrival of the goods the appellant filed the Bill of Entry on November 12, 1979, which contained a declaration signed by the partner of the appellant. The appellant also submitted an application dated November 21, 1979, for registration under Project Import (Registration of Contracts) Regulations 1965, wherein it was stated that the goods to be imported are for the substantial expansion of an existing plant and that the existing installed capacity was 25,000 sq. mtr. per annum and after expansion the said capacity would be 10.98,000 sq. mtr. Decorative Veneers per annum. On the basis of the aforesaid declaration in the Bill of Ent as well as the statement contained in theryapplication for Registry old under Project Import (Registration of Contracts) Regulations, 1965 submitted by the appellant that goods had been imported for the purpose of substantial expansion of an existing unit, the customs duty payable on the goods was assessed at a concessional rate under Heading No. 84.66 in Chapter 84 of Schedule 1 to the Customs Tariff Act, 1975 and the appellant cleared the goods on December 7, 1979, on payment of Rs. 2,90,436.93 as customs duty. Thereafter the appellant, by letter dated February 4, 1980, informed the Deputy Chief Controller of Imports & Exports, Cochin, that the machinery imported by it was being transferred to the Company and that the said transfer is in pursuance of the provisions contained in paragraphs 351 to 354 of the Hand Book of Import & Export Procedures 1979-80. The Deputy Chief Controller of Imports & Exports, Cochin, by his letter dated February 26, 1980, replied that the transfer of imported machinery by the appellant to the Company, as already recommended by the General Manager, District Indus-, tries Centre, Ernakulam, had been noted by his office. Thereafter two of the partners in the appellant, K. 0. Thomis and Jacob Punnoose were formally associated as share holders of the Company on March 12, 1980, and the other two minor partners, Thomman Jacob and Dilip Jacob were formally associated as share holders of the Company on March 23, 198 1. The consideration amount of Rs. 38,587.52 paise payable to the appellant in terms of the agreement dated July 31, 1979 was satisfied by allotment of 400 Equity Shares of Rs. 100/- each of the Company to the partners of the. appellant on October 5, 1985. Jacob Punnoose and K. 0. Thomas were allotted 50 shares each whereas Thomman Jacob and Dilip Jacob were allotted 150 shares each.

3. The Assistant Collector of Customs issued a show cause notice dated June 4, 1982,' wherein it was stated that the machinery imported by the appellant under import licence dated Feb. 14, 1979, by paying concessional rate of customs duty applicable to Project Imports had not been installed by the appellant at its premises and the same was never utilised for the substantial expansion of their factory and that the declaration made in the application for registration of contract and in the Bill of Entry filed for clearance of goods in question was not correct and appellant had misdeclared and suppressed the actual facts for claiming the benefit of concessional assessment available to project

imports and that the said wilful misstatement and suppression of facts by the appellant had resulted in the incorrect levy of the customs duty on the goods imported and therefore it was proposed to invoke the provisions of sub_ section (1) of Section 28 of the Act. In the sa' d show cause notice it was also stated that the 1 suppression and wilful misstatement of facts and the attempt made by the appellant to claim clearance of the goods in question at the concessional rate applicable to project imports when the goods were not actually meant for the said purpose make the goods liable to confiscation under Clauses (m) and (o) of Section 111 of the Act and the appellant was liable to penalty under Section 112 of the Act. The appellant was called upon to submit its written representation in the matter to show cause as to why the assessment made earlier should not be revised and why the goods in question should not be treated as liable to confiscation and why penalty should not be imposed on it. By another show cause notice dated June 17, 1982, the Assistant Collector of Customs (Import) Department informed the appellant that the customs duty amounting to Rupees 2,00,000/- was short levied in respect of the consignment imported by it and the appellant was required to show cause why the said amount should not be paid by it. The appellant submitted its replies dated July 7, 1982, and July 12, 1982, to the said show cause notices.

4. The Collector, by order dated February 24. 1 found that the clearance of the good question was effected by the appellant , uppressing certain vital information from the customs and that the declaration made the appellant that the machinery as imported was for the substantial expansion of in existing unit was incorrect and wrong and in view of the said suppression and willful misstatement of facts and attempt made by the appellant to clear the goods at the lower rate of duty by getting the goods assessed under Heading 84.66 of the Customs Tariff Act, it was necessary to reassess the goods under Section 17(4) of the Act on merits without extending the benefit of assessment under Heading 84.66 of the Customs Tariff and that it is also necessary to invoke the provisions of the proviso to sub-section(l)of Section 28 of the Act to these goods. The Collector, therefore, ordered that the goods in question shall be reassessed to duty on imports under the appropriate heading of the Customs Tariff without giving the benefit of assessment under Heading 84.66 and to collect the short levy from the appellant. The Collector in his order aforesaid further ohserved that the suppression and the wilful misstatement of facts and attempts made by the appellant to misdeclare material particulars for claiming clearance of the goods at a lower rate of duty and the attempt to evade payment of the correct duty payable on the goods made the goods liable to confiscation under Clauses (m) and (o) of Section 111 of the Act, and the appellant was liable to penalty under Section 1 12 of the Act and since the goods were not available for confiscation, the Collector imposed a penalty of Rs. 50,000/-ontheappellant.Inpursuanceof the said order of the Collector of Customs, the customs duty payable on the goods imported was reassessed at Rs. 4,16,600.37 p. and after deducting the amount of Rs. 2,90,436.93/ paise paid by the appellant at the time of clearance of the goods, a demand for Rs. 1,26,163.45 p. was raised by the Assistant Collector of Customs, Special Investigation Branch, Cochin, by his letter dated July 27, 1983. By the order under appeal the Appellate Tribunal has affirmed the order dated February 24, 1983, passed by the Collector and has dismissed the appeal filed by the appellant.

5. Shri Avadh Bihari appearing for the appellant has submitted that there was no suppression or wilful misstatement on the part of the appellant and that soon after the execution of the agreement dated July 31, 1979 a joint application dated August 31, 1979, was submitted on behalf of the appellant and the Company whereby the Deputy Chief Controller of Imports & Exports was informed about the transfer of business of the appellant to the Company and it was requested that the import licence dated February 14, 1979, may be transferred in favour of the Company. Shri Avadh Bihari has also laid stress on the joint letter dated September 18, 1979, addressed by the appellant and the Company to the General Manager, District Industries Centre, Ernakulum,

informing him with regard to transfer of business by the appellant to the Company as well as the letter dated November 20, 1979, sent by the General Manager, District Industries, Centre, Ernakulam to the Deputy Chief Controller of Imports& Exports, Ernakulam, recommending that the project is eligible to avail concessional rate of import duty, if rules permit, since the machinery which is imported is for the substantial expansion of the unit. Shri Avadh Bihari has also placed reliance on the letter dated February 4, 1980, of the appellant addressed to the Deputy Chief Controller of Imports & Exports informing him about the transfer of the machinery imported by it under import licence dated February 14, 1979, to the Company and the reply dated February 26, 1980, sent by the Deputy Chief Controller of Imports & Exports to the said letter wherein the fact of transfer of the imported machinery by the appellant to the Company has been noted in the said office. The submission of Shri Avadh Bihari is that from the aforesaid documents, it is clear that the appellant has not committed any breach of any condition of the import licence dated February 14, 1979, and that the import authorities have also not found that the appellant has contravened the conditions on the basis of .which the import licence was granted to the appellant and that in those circumstances it was not open to the authorities under the Act to proceed against the appellant. Shri Avadh Blhari has in this regard placed reliance on the decision of this Court in East India Commercial Co. Ltd., Calcutta v. The Collector of Customs, Calcutta, (1963) 3 SCR 338: (AIR 1962 SC 1893), wherein it had been laid down that the customs authorities have no power to take action for breach of conditions of an Import licence.

6. These contentions, in our view, are Misconceived because here the customs authorities have not taken action against the appellant for breach of any condition of the import licence dated February 14, 1979. Action has been taken against the appellant under the provisions of the Act for obtaining clearance of the goods by paying customs duty on a concessional rate under Heading 84.66 of the Customs Tariff by suppression and wilful misstatement of facts. What is of relevance is whether before obtaining clearance of the machinery imported under import licence dated February 14, 1979, the appellant had informed the customs authorities that the said machinery had been transferred to the Company under agreement dated July 31, 1979. The office of the Deputy Chief Controller of Imports and Exports, Cochin, had no role in the matter of levy of customs duty on the imported machinery and, therefore, the conduct of the appellant in informing the Deputy Chief Controller of Imports & Exports about the agreement dated July 31, 1979, entered into by the appellant and the Company with regard to transfer of business can have no bearing on the action taken by the customs authorities for the contravention of the provisions of the Act. The decision of this Court in East India Commercial Co. Ltd., Calcutta, (AIR 1962 SC 1893) (supra) is not applicable because the action that has been taken by the customs authorities is not for breach of the conditions of the import licence but for the contravention of the provisions of the Act.

7. With regard to the contravention of the provisions of the Act, it would be necessary to refer to Heading No. 84.66 in Chapter 84 of the Schedule to the Customs Tariff Act, 1975 which reads as under:-

84.66	(i) All items of:	40%	◆	...

(a) machinery including prime-movers

(b) instruments, apparatus and appliances,

(c) control: gear and transmission equipment,

(d) auxiliary equipment, as well as, all components (whether finished or not) or raw materials for the manufacture of the aforesaid items and their components, required for the initial setting up of a unit, or the substantial expansion of an existing unit, of a specified:

(1) industrial plant,

(2) irrigation project,

(3) power project,

(4) mining project

(5) project for the exploration for oil or other minerals, and

(6) such other projects as the Central Government may, having regard to the economic development of the country, notify in the Official Gazette in this behalf:

Provided these are imported (whether in one, or in more than one consignment) against one or more specific contracts, which have been registered with the appropriate Custom House in the manner prescribed by Regulations which Central Board of Excise and Customs may make: under Section 157 of the Customs Act, 1962 and such contract or contracts has or have been so registered before any order is made by the proper officer of customs permitting the clearance for home consurnption, or deposit in a warehouse of items, components or raw materials

(ii) all spare parts other raw materials (including semi-finished material), or consumable stores important as a part of a contract or contracts, registered in terms of sub-heading (i), provided the total value such spare parts, raw materials, and consumable stores does not exceed 10 percent of the value of the orders covered by subheading (i) and, further provided that spare parts, raw materials or consumable stores are essential for the maintenance of the plant or project mentioned in sub-heading (i) 40% .

8. It appears that under various other headings of the Customs Tariff Act a higher rate of customs duty was prescribed for the ovar ous items of machinery that were imported by the appellant. Under Heading No. 84.66 duty at a concessional rate was provided in respect of machinery etc. imported for substantial expansion of an existing unit of a specified industrial plant. In order to avail this concessional rate of customs duty it was necessary to have the contract registered with the appropriate Custom House in the manner prescribed by the Regulations made by the Central Board of Excise and Customs under Section 157 of the Act. The Project Import (Registration of Contracts) Regulations, 1965 were such regulations made by the Central Board of Excise and Customs.

9. In the instant case, the appellant had obtained the import licence dated February 14, 1979 for expansion of its business on the recommendation of the Director of industries, Kerala State and the said import licence contained specific endorsement of "Project Import". When the goods arrived at

the port in India the appellant filed the Bill of Entry on November 12, 1979, with the customs authorities which contained a declaration signed by a partner of the appellant. In addition, the appellant submitted an application form dated November 21, 1979, before the customs authorities for Registration under Project Import (Registration of Contracts) Regulations 1965, wherein it was stated that the goods to be imported were for substantial expansion of an existing plant and that the existing installed capacity of the plant of the appellant was 25,000 sq. mtr. per annum and that the capacity after expansion would be 10,98,000 sq. mtr. decorative Veneers per annum. In the said application form, it was also stated that no industrial licence for installation or substantial expansion was required by the appellant, since it is a Small Scale Unit. There is nothing on the record to show that the appellant had informed the customs authorities that the machinery to be imported would be transferred by the appellant to the Company and the Company would instal the same. On the other hand, the endorsement on the import licence submitted with the Bill of Entry which contained a declaration by a partner of the appellant and the statements contained in the application form for Registration dated November 21, 1979, indicated that the appellant would be using the imported machinery for substantial expansion of its existing unit and on that basis the appellant was assessed for duty at a concessional rate under Heading No. 84.66 of the Customs Tariff. Since the appellant did not instal the said machinery for the expansion of its existing unit, but transferred it to the Company after it had been cleared from the customs, the appellant cannot claim the benefit of the concessional rate of duty under Heading No. 84.66 of the Customs Tariff and is liable to pay such duty at the normal rates prescribed in the Customs Tariff. This was, therefore, a case of short levy of customs duty which is dealt with Section 28 of the Act. In sub-section (1) of Section 28 it is prescribed that a notice shall be served on the person chargeable with the duty requiring him to show cause why he should not pay the amount specified in the notice. The said notice has to be served within one year of the relevant date in cases when import is made by an individual for his personal use or by.Government or by an educational, research or charitable institution or hospital and the period for service of such notice is six months in other cases. The proviso to sub-section (1) of S. 28 enhances the aforementioned periods for service of the notice to five years in cases where any duty has not been levied or has been short levied or erroneously refunded by reason of collusion or any wilful misstatement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter. Here the relevant date was December 7, 1979, the date on which the duty 1, Vas paid and the enhanced period of five years prescribed under the proviso to sub(1) of Section 28 was invoked by the customs authorities to issue the show cause notice dated June 4, 1982, to the appellant. The present case falls within the ambit of the said proviso because the appellant had cleared the goods from the customs on payment of concessional rate of duty under. Heading No. 84.66 of the Customs Tariff by aking a misstatement In the application (o) any goods exempted, subject to any form dated November 21, 1979, for registration under the Project Import (Registration of Contracts) Regulations, 1965, that the machinery that had been imported was for substantial expansion of the existing industrial unit of the appellant and by suppressing the fact that under Agreement dated July 3 1, 1979, the appellant had aggeed to transfer the idas a machinery to the Company. In the circumstances the Collector was justified in directing that the goods in question should be re-assessed to duty on merits under the appropriate heading of the Customs Tariff without giving the benefit of the assessment under Heading 84.66 and to collect the short levv from the appellant. The demand for the additional amount of Rs. 26,163.45 paise made on the basis of such reassessment in pursuance of the aforesaid direction given by the Collector does not. therefore, suffer from any legal infirmity.

10. We may now come to the penalty of Rs. 50,000/- which has been imposed by the Collector and which imposition has been upheld by the Appellate Tribunal. The penalty has been imposed under

Section 112 of the Act which provides for levy of penalty on a person who in relation to any goods does or omits to do any act which act or omission would render such goods liable to confiscation under Section 1 1 1 or abets the doing or omission of such an act. The Collector and the Appellate Tribunal have proceeded on the basis that the appellant has done an act which renders the goods imported by it liable to confiscation under Clauses (m) and (o) of Section 1 1 1 of the Act and for that reason the sal id penalty has been imposed on the appellant. Since we are of the view that the instant case is covered by Clause (o) of Section 1 1 1 we do not consider it necessary to go into the question whether Clause (m) of Section 1 1 1 would be applicable to the present case. Clause (o) of Section Ill provides as under:--

> "111. Confiscation of improperly imported goods, etc. - The following goods brought from a place outside India shall be liable to confiscation-
>
> xxxxxx xxxxxx xxxxxx
>
> (o)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 n force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer;"

11. Shri Avadh Bihari has urged that -iause(o) of Section 111 envisages that the goocisare exempted from payment of duty or any prohibition in respect of import thereof and that in the present case the goods that were imported by the appellant were not exempted.from duty but were chargeable to duty and, therefore, it cannot be said that the present case falls under the said Clause and the goods imported by the appellant were liable to be confiscated under it. We are unable to agree with this submission. The expression "exernpted" in Clause (o) does not mean full exemption from duty because under Section 25 of the Act power has been conferred to grant exemption from the whole or any part of the duty of customs leviable on the goods specified in the notification. This means that Clause (o) would also cover cases where partial exemption from duty has been granted in respect of the goods in question. This was a case where partial exemption from duty, in the form of concessional rate had been granted under Heading No. 84.66 of the Customs Tariff and the said exemption was available subject to the conditions laid down in the said Heading. The appellant obtained the benefit of the said concession and got the goods cleared from customs on payment of concessional rate of duty by making a declaration that the goods were required for substantial expansion of the existing industrial unit of the appellant. The said declaration of the appellant was not correct inasmuch as the goods were not to be used for substantial expansion of the unit of the appellant but were to be used for setting up a new unit by the Company. The appellant, after getting goods cleared from the customs transferred the same to the Company and thereby the appellant failed to observe the condition on the basis of which the benefit of concessional rate of duty under Heading 84.66 of the Customs Tariff was obtained. The goods were, therefore, liable to confiscation under Clause (o) of Section 111 of the Act and penalty could be imposed under Section 112 of the Act.

12. The maximum amount of penalty that can be levied under Section 112 in the case of dutiab e goods other than prohibited goods is five times the duty sought to be evaded on such goods or one thousand rupees, whichever is the greater. As mentioned earlier the difference between the duty payable and the duty actually paid by the appellant was Rs. 1,26,163.45 and the maximum amount of penalty that could be imposed was five times of that amount. Keeping in view the facts and circumstances of the case the Collector has irilposed ;a penalty of ks. 50,000/ -which imposition has

been upheld b the Appellate Tribunal. We find no ground for interfering with the said direction about imposition of penalty.

13. The appeal, therefore, fails and the same is accordingly dismissed. Taking into consideration the facts and circumstances there will be no order as to costs.

Appeal dismissed.

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