

All India Glass Manufacturer's Federation, New Delhi

Vs

Collector of Customs, Bombay

Civil Appeal No.1661 of 1990

(S. Ranganathan, Smt. M. S. Fathima Beevi, N.D. Ojha JJ)

13.08.1991

JUDGEMENT

FATHIMA BEEVI, J.:-

1. The appellant is a federation of glass manufacturers in India. The Federation entered into a contract with M/s. Magadi Soda Company Ltd., Kenya, for supply of 5000 metric tonnes of soda ash dense at the rate of US \$ 155 per metric tonne c.i.f. Bombay. The consignment arrived from Mombasa, Kenya on 28-12-1981. The goods were cleared on payment of customs duty of Rs. 32,15,904.21 from Bombay. The appellant on distribution of the goods to various members of the federation, received complaints that the soda ash which had been supplied was of sub-standard quality. The seller M/s. Crescent Dyes & Chemicals as well as their agents were approached. They sent a team of experts to examine the goods. The inspection confirmed that the goods were defective. As per agreement dated 9-2-1982, M/ s. Crescent Dyes & Chemical sent a credit note of US \$ 2,40,000/- as compensation on account of the defective goods sent by M/s. Magadi Soda Company Ltd. The amount remitted on account of the import made was only US \$ 5,35,000/-as against the earlier contracted amount of US \$ 7,75,000/-.
2. In view of such reduction, the appellant filed a refund application before the Customs Department to the tune of Rs. 9,95,892.65. The Assistant Collector was not satisfied as to the extent of deterioration of the goods before clearance as provided by S. 22 of the Customs Act and rejected the refund application vide order dated 19-7-1982.
3. The appeal preferred against the order dated 19-7-1982,was rejected by the Collector of Customs on 23-12-1982 on the reasoning that the damage was discovered after the goods were out of customs control. The further appeal to the Tribunal was also unsuccessful. The Tribunal by the order dated 26-10-1989 held that the alleged inferior nature of goods was discovered after clearance.
4. This appeal is filed under S. 130E of the Customs Act, 1969 against the order of the Tribunal dated 26-10-1989.
5. The question involved in the present appeal is whether the appellant is entitled to the refund of customs duty on account of the compensation given by the seller to the appellant on supply of goods. The appellant who imported the goods detected defects and the foreign supplier accepted the defects and damages and agreed for payment of compensation. According to the appellant, goods supplied were not in accordance with the contractual specification. The defects being inherent in nature resulted in diminution in the real value of the goods and what had been agreed upon by the foreign seller is reduction in price on account of these defects. The appellant claimed that it would

be entitled to refund of customs duty under S. 22 of the Act for reasons set out thus. The value to be assessed under S. 14 of the Act is the real price at which goods imported are ordinarily sold at the time and place of importation and not the price erroneously indicated by the seller at the time of filling the bill of entry. The buyer who successfully sets up diminution of price on account of breach of warranty, which claim is accepted by the seller, can seek refund or adjustment in the customs duty payable where the duty has been paid erroneously on the full price prior to such diminution. The claim under S. 22 of the Act would be maintainable where imported goods were defective and had deteriorated in quality even prior to the import when the assessment has to be on the basis of the real value of goods.

6. The contract dated 30-9-1981 is for the supply of 5000 metric tonnes of soda ash dense. The complaint was that the sodium carbonate content was less than the specified 97%, that there was moisture in the soda ash dense supplied and hence it had turned lumpy. M/s. Crescent Dyes & Chemicals Ltd. was the agent of the seller M/s. Magadi Soda Company Ltd. The consignment arrived in Bombay sometime in December, 1981. The appellants filed their bill of entry with the customs and the goods were cleared on payment of customs duty of Rs. 32,15,904.21, on 28-12-1981. The complaint about damage and deterioration was made long after clearance. The team of experts examined the goods and confirmed the defects. The customs authorities were not associated with such inspection.

7. It is maintained by the appellant that the credit received was recorded in the letter dated 15-3-1982 and the letter indicated that the amount remitted on account of the import made was only US \$ 5,35,000/-. The reduction in the amount remitted was to the extent of US \$ 2,40,000/-. The appellant claimed that on account of the reduction in the value of the consignment, the appellant is entitled to refund of customs duty proportionately.

8. The Collector of Customs pointed out that

"the duty is leviable on the basis of the value of the such or like goods at the time of clearance. It has not been proved that the alleged defect on account of which the price has been reduced was present in the goods at the time of clearance. At least some of the defects of the type pointed out, viz., the lumpy character, are such as could develop due to exposure to moisture etc. during the period the goods were out of customs. In any case, the customs were not associated even with the post-clearance examination. Any alleged reduction in value on the basis of a postclearance agreement between the buyer and the supplier on some alleged grounds which the customs had no chance to verify prior to clearance is fraught with great risks to revenue. (Emphasis supplied)

9. According to the appellant, this reasoning is wrong. The appellant stated that most of the defects were due to non-adherence to specification provided under the contract. The defects being inherent in character, the appellant could not have known about the same at the time of clearance of the consignment from customs. The ground of deterioration of goods was not relevant as the claim for refund was based on the ground of diminution in value of the goods as the same were not as per the standard contracted for. The assessable value of the goods under S. 14 of the Act is the price at which such goods were actually sold in the course of international trade. It is the real price of the goods actually imported which is ordinarily the basis for assessable value. Where goods do not conform to the description or stipulation as to quality or fitness, it is open to the buyer to treat the defect as a breach of warranty it is also open to the buyer to set up against the seller the breach of

warranty in diminution of the price. It is the diminished price which will be the real price of the goods and not the price claimed by the buyer initially which is reflected as c.i.f. value on the invoice. Customs duty paid on the c.i.f. value is a duty paid under mistake of fact. At the time of clearance of goods, the buyer did not have any knowledge of the defects in the goods. Where defect which constitutes a breach of warranty and which the buyer elects to treat as a breach of warranty became apparent and ultimately culminated in diminution of price, it would be open to the buyer to claim refund of the customs duty paid under mistake of fact. It is not relevant as to when the defect became apparent to the buyer. The fact that the documents proving the true and real value of the goods were not in existence at the time when the goods were cleared from the customs is wholly irrelevant. This in short, is the argument advanced on behalf of the appellant.

10. Duties of customs shall be levied under S.12 at such rate as may be specified under the Customs Tariff Act or any other law for the time being in force on goods imported into or exported from India. S.14 of the Customs Act provides that value of such goods shall be deemed to be the price at which such or like goods are ordinarily sold or offered for sale for delivery at the time and place of importation in the course of international trade. Such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under S.46. The duty is ordinarily chargeable with reference to the tariff value in the case of goods entered for home consumption on the date on which the bill of entry in respect of such goods is presented.

11. Section 22 provides for payment of duty on damaged or deteriorated goods. It reads thus:-

"22. Abatement of duty on damaged or deteriorated goods.

(1) Where it is shown to the satisfaction of the Assistant Collector of Customs-

(a) that any imported goods had been damaged or had deteriorated at any time before or during the unloading of the goods in India; or

(b) that any imported goods, other than warehoused goods, had been damaged at any time after the unloading thereof in India but before their examination under S.17, on account of any accident not due to any wilful act, negligence or default of the importer, his employee or agent; or

(c) that any warehoused goods had been damaged at any time before clearance for home consumption on account of any accident not due to any wilful act, negligence or default of the owner, his employee or agent, such goods shall be chargeable to duty in accordance with the provisions of sub-section (2).

(2) The duty to be charged on the goods referred to in sub-section (1) shall bear the same proportion to the duty chargeable on the goods before the damage or deterioration which the value of the damaged or deteriorated goods bears to the value of the goods before the damage or deterioration."

12. Where it is shown to the satisfaction of the Assistant Collector that any imported goods have been lost or destroyed at any time before clearance for home consumption, the Assistant Collector of Customs shall remit the duty on such goods. The period of six months has been prescribed under S. 27 to claim refund of duty paid with protest. Refund is allowed when the Assistant Collector of Customs is satisfied that the whole or any part of the duty paid should be refunded. No claim for refund of any duty shall be entertained except in accordance with the provisions of S. 27.

13. Chapter VII of the Customs Act deals with the clearance of imported goods. The imported goods unloaded in a customs area remain in the custody of the approved person until they are cleared for home consumption. Without permission in writing of the appropriate officer, such goods are not removed or otherwise dealt with. The importer shall give a declaration as to the truth of the contents of the bill of entry supported by the invoice. The order permitting clearance of the goods for home consumption is made on payment of the import duty, if any, assessed.

14. Thus, under the scheme of the Act, the importer is entitled to clear the goods on payment of duty assessed and such assessment is to be made with reference to the tariff value of the goods where tariff values are fixed. In other cases, the price at which the goods are ordinarily sold for delivery at the time and place of importation represents the tariff value for the purpose of the assessment. When the value is assessed on the basis of the invoice and the goods are cleared, the implication is that no remission is allowed and no abatement has been occasioned. There is no express provision which enables the proper officer to make a reassessment for the purpose of remission on the ground that the goods at the time of their importation or at the time of the clearance was substandard or damaged and the invoice price does not represent the real value. Even if it is assumed that in view of the provisions contained in S. 28(a) enabling the proper officer to determine the amount of duty due in cases where duty has not been levied or has been short levied or erroneously refunded after issuing show cause notice, there is a corresponding right on the importer to claim refund of the excess duty levied, it is necessary for the importer to prove to the satisfaction of the proper officer that the goods at the time of the clearance was chargeable to a lesser or lower duty for any one of the reasons contained in S.22 which alone provides for abatement of duty. Any error in the assessment of the value by itself does not enable the importer to claim reassessment or refund. It has necessarily to be shown that on account of the damaged or deteriorated condition of the imported goods before or during the unloading of the goods in India, the duty to be charged on the goods was proportionate to the value of the damaged or deteriorated goods. The question of redetermining the value of the imported goods can arise only in a case where such damage or deterioration before the clearance is proved to the satisfaction of the proper officer. When there had been no indication of any such condition and the duty has been assessed on the basis of the invoice value and duty is paid, the assessment would be binding. The importer on finding the goods cleared and distributed not to his entire satisfaction may have a claim in contract against the seller for providing substandard, damaged or deteriorated goods for the value in the invoice, and it may be open to the buyer to realize from the seller such damages as he would in law be entitled to. That claim for damages cannot have any bearing to the assessment at the time of the clearance. The price at which the goods had been sold is represented by the invoice price and whatever amount is realized on subsequent agreement is only by way of compensation as damages. It cannot be said that the damages thus received represents the difference in price that had been paid and that ought to have been paid. When the seller had agreed to compensate the buyer for the quality of the goods imported, the buyer does not get the right to claim abatement of duty on the assumption that the real price was something less than what has been indicated in the invoice.

15. Learned counsel for the appellant referred para 574 at page 121, Vol. 12, Halsbury's Laws of England:-

"574. Goods not in accordance with contract. Where it is shown to the satisfaction of the Commissioners of Customs and Excise that goods were imported in pursuance of a contract of sale and that their description, quality, state of condition was not in accordance with the contract, or that they were damaged in transit, and also that the importer, with the consent of the seller, either returned the goods to him or destroyed

them unused, the importer is entitled to obtain from the Commissioners repayment of any customs duty paid on their importation. The foregoing, however, does not apply to the goods imported on approval, or on sale or return, or on other similar terms."

It deals with the returning of goods or destroying the goods unused without acceptance and not where the goods have been accepted and used and the importer had been compensated for the reduction in standard. The learned counsel also referred to the decisions in *Biggin & Co. Ltd. v. Premanite, LD., Berry Wiggins & Co. LD.* (1951) 1 KB 422, *Cehave N. V. v. Bremer* (1975) 3 All ER 739, *Ford Motor Company of India v. Secretary of State for India* (1938) 65 Ind App 32: (AIR 1938 PC 15) and *Vacuum Oil Co. v. Secretary of State for India*(1932) 59 Ind App 258: (AIR 1932 PC 168).

16. On the basis of these decisions, the learned counsel for the appellant contended that when the seller has allowed the reduction, the real price of the goods is that which has been accepted by the seller and that the assessment made on a higher value on the basis of the invoice price is in excess and such excess is refundable to the appellant.

17. It is not necessary to elaborate on the principle stated in the decisions on the facts of the present case.

18. It is admitted case of the appellants that the alleged inferior nature of goods was discovered by the appellant after clearance. Until the refund application was made, no requisition appears to have been made to the customs authorities to have the value of the goods redetermined for the purpose of S.22. The correspondence between the appellants and the sellers and their agents could only reveal that the appellant put forward a claim for compensation on the ground that the goods imported had become lumpy and was also of inferior standard. Ultimately the sellers agreed to reimburse the appellants and pay compensation to the tune of US \$ 2,40,000. What appellants have received from the sellers is compensation for the damage for breach of warranty. It does not appear that the value was reduced or amount remitted by the appellant was the reduced value of the goods. The amount was the total compensation extended by the sellers to the, appellants. From the fact of payment of compensation or reimbursement by the sellers it cannot be taken that at the time and place of importation the goods imported was worth only the amount stated in the invoice less the compensation paid. In other words, there is no proof that the real value of the goods at the time and place of importation was less than what had been entered in the invoice and stated in the Bill of Entry. So long as examination of the goods had not been made or its value reassessed to the satisfaction of the assessing authorities, it cannot be said that duty was charged not on the real value of the goods but on a higher amount. The contention that the inherent defect in the supply of goods resulted in the diminution of the value of the goods cannot be countenanced when it is conceded that what had been paid by the seller is only compensation for the breach of warranty. Furthermore, there is no material on record to show that even by the team of experts there had been a reassessment of the value of the goods. What had been estimated is only quantum of damages sustained by the buyers and to that extent they had been compensated. That arrangement between the buyer and the seller cannot be linked with the assessment of duty and no claim for abatement of duty under the provisions of S.22 or a claim for refund under S.27 could be legitimately entertained.

19. For the reasons given above, the appeal must fail. The appeal is dismissed with no order as to costs.

Appeal dismissed.

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