

Union of India and another

Vs

Sampat Raj Dugar and another

Civil Appeal No. 223 (NM) of 1992

(S. Ranganathan, V. Ramaswami, B.P. Jeevan Reddy JJ)

21.01.1992

JUDGEMENT

B. P. JEEVAN REDDY, J. :-

1. Leave granted. This appeal is directed against the Judgment and Order of a Division Bench of the Bombay High Court dismissing the Letters Patent Appeal No. 807 of 1987 preferred by Union of India and the Collector of Customs. The said appeal was preferred against the judgment and order of a learned single Judge allowing the Writ Petition (85 of 1987) filed by the first respondent herein. The learned single Judge had, by his judgment, quashed the order dated 15-9-1986 passed by the Collector of Customs, Bombay confiscating the goods in question under Section 111(d) of the Customs Act, 1962, and directed the Collector of Customs and the Union of India to hand over the said goods (four consignments of raw silk yarn) to the first respondent or his clearing agent, for reshipment to Hong Kong in terms solicited by him. The learned Judge granted a further direction to the effect that for the period the goods were detained, rendering the first respondent liable to pay demurrage to Bombay Port Trust, the Collector of Customs and the Union of India shall issue a detention certificate in his favour.

2. The second respondent Ms. Renu Pahilaj is doing business at Delhi in the name and style of "Acquarius". The first respondent is an Indian national resident abroad doing business at Hong Kong in the name and style of UNISILK. The second respondent obtained an advance import licence on 20-5-1985 for importing raw silk valid for a period of 18 months from the date of its issue. The import licence was granted subject to the condition that raw silk imported should be utilised for manufacturing garments which ought to be exported by the second respondent. Some time prior to October 1985, the second respondent received three consignments but she did not fulfil the aforesaid condition. During October.-November, 1985, the first respondent exported certain quantities of raw silk in four lots, deliverable to the second respondent. The requisite documents were sent to the first respondent's bankers with instructions to deliver the same to the second respondent on receiving the payment. When the said four consignments arrived at Bombay, the second respondent appeared before the customs authorities and claimed the right to take delivery of the goods. By this time, however, the customs authorities had come to know of the non-compliance of the aforesaid condition with respect to the three earlier consignments and also of the alleged misrepresentation made by her while obtaining the Advance import licence. Proceedings were accordingly initiated against her and two other persons by the Collector of Customs, Bombay. The first respondent appeared in the said proceedings on his own and was heard. Probably in view of the proceedings taken against her - or otherwise - the second respondent failed to make the payment and receive the documents. She took no steps whatever to clear the goods. In effect, she abandoned them.

3. The first respondent submitted before the Collector that title to the goods has not passed to the second respondent, that he is still the owner of the goods and that therefore the said goods cannot be confiscated or proceeded against for the violations, if any, committed by the second respondent. He submitted that he was not a party to the misuse of the earlier imports nor was he aware of the alleged fraud practiced by the second respondent in obtaining the advance import licence. He requested that he may be permitted to re-export the said goods to Hong Kong.

4. While the said proceedings were pending before the Collector of Customs, the advance import licence granted to second respondent was cancelled by the Competent Authority on May 12, 1986. No orders were passed with respect to the said goods.

5. The Collector of Customs, Bombay passed orders on September 9, 1986, whereunder he imposed a penalty of rupees five lacs on the second respondent. Penalties were also levied upon two other persons, said to be associates of the second respondent. So far as the first respondent's claims were concerned, they were rejected on the following ground: the advance import licence against which the said four consignments were imported has since been cancelled by the appropriate authority which means that there is no valid import licence for clearance of those goods; since, for re-exporting the said goods, a valid import licence is necessary and because it is not there - and also because the second respondent has abandoned the goods-permission for re-export cannot be granted.

6. The first respondent did not prefer an appeal against the said order. He directly challenged the same in the Bombay High Court by way of a Writ Petition. He reiterated his contention viz., since the second respondent has failed to pay and receive the documents regarding the said four consignments, he himself continues to be the owner thereof; if so, the said goods cannot be confiscated or proceeded against in any manner for any act or default of the second respondent. He claimed to be entitled to re-export the same to Hong Kong. The case of the Collector of Customs and the Union of India was that the second respondent must be deemed to be the owner of the said four consignments by virtue of the definition of 'importer' in S. 2(26) of the Customs Act read with Clause 5(3)(ii) of the Imports (Control) Order 1955. Reliance was also placed upon para 26(iv) of the Import and Export Policy issued for the year 1985-86. It was accordingly submitted that the said goods are liable to be confiscated for the acts and defaults of the second respondent. It was also submitted that by virtue of the noncompliance with the condition (relating to export of garments manufactured out of the imported raw silk yarn) the second respondent has rendered all the goods covered by the import licence liable to confiscation.

7. The learned single Judge allowed the Writ petition on the following findings: On the date the goods were imported, they were covered by a valid import licence. The subsequent cancellation thereof is of no consequence inasmuch as S. 11(d) of the Customs Act provided for confiscation of the imported goods only where they are imported contrary to law. Even if the second respondent was guilty of any misuse or of noncompliance with any of the conditions of licences, it only furnishes a ground for cancellation/suspension of licence so long as the licence was not suspended or cancelled, it was valid and effective. The importing of the goods was thus under a valid licence and was not contrary to law. Since the second respondent has failed to pay and receive the documents of title, the title to the goods did not pass to her. The provisions in Clause 5(3) (ii) of the Imports (Control) Order is of limited effect. Where the clearance of goods through customs is not even attempted but abandoned, such importer cannot be treated as the owner. The definition of 'importer' in S.2(26) of the Customs Act also does not avail the authorities. Since the first respondent continued to be the owner of the goods, he is entitled to re-export the same.

8. The Letters Patent Appeal preferred by the Collector of Customs and the Union of India was dismissed by the Division Bench affirming the reasoning of the learned single Judge in its entirety.

9. In this appeal, it is contended by the learned counsel appearing for the Union of India that the learned Judges of the Bombay High Court have not correctly appreciated the meaning and effect of the provisions contained in Clause 5(3)(ii) of the Imports (Control) Order and Section 111 of the Customs Act. He submitted that by virtue of the definition of the expression 'importer' contained in Section 2(26) of the Customs Act read with Clause 5(3)(ii) of the Imports (Control) Order, the second respondent must be deemed to be the owner of the goods and the first respondent cannot be heard to say that he is the owner of the goods. Whatever may be the position under the Sale of Goods Act and/ or the Contract Act, so far as the authorities under the Customs Act and Imports (Control) Order are concerned, the second respondent is the owner of the said goods -and no one else. For the acts and defaults of the second respondent, therefore, the said goods are liable to be confiscated. The first respondent's remedy is to sue the second respondent for damages and/ or such other reliefs as he may be entitled to in law but he cannot claim title to said goods once they are imported into this country. It is also submitted that because of misuse of earlier consignments by the second respondent, the authorities were entitled to confiscate the said four consignments, covered as they were by the same Import Licence. In any event, once the import licence was cancelled, the goods could not have been cleared by anyone from the customs. On the other hand, Sri Salve, learned counsel for the first respondent submitted that confiscation of the said consignments has been ordered by the Collector of Customs only under the provisions of the Customs Act i.e., under Section 111 (d) thereof. The said confiscation is wholly unsustainable for the reason that on the date of import, there was a valid licence. The subsequent cancellation of the import licence does not render the said import illegal. The provisions contained in clause 5(3)(ii) of the Imports (Control) Order are of limited application. They are designed only to prevent the licensee from trading in the said licence in any manner whatsoever, but it cannot have the effect of conferring title to the said goods upon the importer even before he makes the payment and obtains the documents of title. Similarly, the definition of the importer under Section 2(26) of Customs Act is for a limited purpose. Since the title to the goods continues to vest in the first respondent, he is entitled to re-export the same. The learned counsel emphasised the fact that the first respondent is not a party nor was he aware of the alleged misuse of earlier consignments or of the alleged fraud practised by the second respondent in obtaining the import licence.

10. For a proper appreciation of the controversy arising herein, it is necessary to notice certain provisions of the Customs Act as well as of the Imports and Exports (Control) Act, 1947 and the Imports (Control) Order, 1955.

11. The definition of 'importer' in clause 26 of Section 2 of the Customs Act reads as follows:

"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,"

12. Section 111 which provides for confiscation of improperly imported goods, in so far as it is relevant reads thus:

"Section 111. Confiscation of improperly imported goods, etc. - The following goods brought from a place outside India shall be liable to confiscation-

(d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force?

---

(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 in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer;"

13. Section 112 provides for levy of penalty for improper importation of goods. For the purpose of this case, it is not necessary to set out Section 112. Section 120 provides that the smuggled goods may be confiscated notwithstanding any change in their form. Section 124 provides for the issuance of a show cause notice before the goods are confiscated and for affording a reasonable opportunity of being heard in the matter to the person affected.

14. The Imports and Exports (Control) Act, 1947 empowers the Central Government to prohibit, restrict or otherwise control import and export of goods, by an order published in the Official Gazette Act (Section 3). Section 4G provides for confiscation of goods in certain situations. The Section reads thus :

"Section 4G, Confiscation - Any imported goods or materials in respect of which-

(a) any condition of the licence or letter of authority under which they were imported, relating to the utilisation or distribution of such goods or materials, or

(b) any condition relating to the utilisation or distribution of such goods or materials subject to which they were received from, or through, a recognised agency, or

(c) any direction given under a control Order with regard to the sale of such goods or material,

has been, is being, or is attempted to be, contravened, shall together with any package, covering or receptacle in which such goods are found, be liable to confiscation, and, where such goods or materials are so mixed with any other goods or materials that they cannot be readily separated from such other goods or materials shall also be liable to confiscation:

Provided that where it is established to the satisfaction of the adjudicating authority that any goods or materials, which are liable to confiscation under this Act, had been imported for personal use, and not for any trade or industry, and that they belong to a person other than the person who has, by any act of omission, rendered them liable to confiscation, and such act of omission was without the knowledge or connivance of the person to whom they belong such goods or materials shall not be ordered to be confiscated; but such other action as authorised by this Act may be taken against the person who has by such act of omission, rendered such goods or materials liable to confiscation. "

15. The Imports (Control) Order 1955 has been issued by the Central Government , rider the 1947 Act. Clause 3(1) provides that:

"Save as otherwise provided in this Order, no person shall import any goods of the description specified in Schedule 1, except under and in accordance, with a licence or a customs clearance permit granted by the Central Government or by any Officer specified in Schedule II."

16. Clause 5 which is crucial for our Purposes may be set out in its entirety. It reads thus :

"5. Conditions of Licences.- (1) The licensing authority issuing a licence under this Order may issue the same subject to one or more of the conditions stated below:-

(i) that the goods covered by the licence shall not be disposed of except in the manner 'bed by the licensing authority or otherwise, dealt with without the written permission of the licensing authority or otherwise, dealt with without the written permission of the licensing authority or any person duly authorised by it;

(ii) that the goods covered by the licence on importation shall not be sold or distributed at a price exceeding that which may be specified in any direction attached to the licence;

(iii) that the applicant for a licence shall execute a bond for complying with the terms subject to which a licence may be granted.

(2)(A) licence granted under this order shall also be subject to the conditions contained in Schedule V.

(3) It shall be deemed to be a condition of every such licence that:-

(i) no person shall transfer and no person shall acquire by transfer any licence issued by the licensing authority except under and in accordance with the written permission of the authority which granted the licence or of any other person empowered in this behalf by such authority.

(ii) that the goods for the import of which a licence is granted shall be the property of the licensee at the time of import and thereafter up to the time of clearance through Customs.

Provided that the conditions under items (i) and (ii) of this sub-clause shall not apply in relation to licences issued to the State Trading Corporation of India, the Minerals and Metals Trading Corporation of India and other similar institutions or agencies owned or controlled by the Central Government and which are entrusted with canalisation of imports.

Provided further that the conditions under items (i) and (ii) of this sub-clause shall also not apply in relation to (a) licences issued to be eligible export houses or trading houses for import of goods meant for disposal to actual users under the import policy for registered exporters, and (b) licences issued to Public Sector agencies owned or controlled by Government, Central or State for disposal of goods to Actual Users

under the import policy in force.

(iii) the goods for the import of which a licence is granted shall be new goods, other than disposal goods unless otherwise stated in the licence.

(4) A licence granted under this order may contain such other conditions, not inconsistent with the Act or this Order, as the licensing authority may deem fit.

(5) The licensee shall comply with all conditions imposed or deemed to be imposed under this clause."

17. The Order provides for cancellation/ suspension of licences issued thereunder for reasons specified therein. Schedule to the order mentions several goods. It is not disputed that raw silk yarn is one of the goods included in the Schedule.

18. We may first consider the question of title to the said goods. If we keep aside the provisions of the law relied upon by the appellants viz., definition of 'importer' in S. 2(26) of the Customs Act, Clause 5(3)(ii) of the Imports (Control) Order as well as para 26(iv) of the Import-Export Policy, the position is quite simple. Since the second respondent did not pay for and receive the documents of the title she did not become the owner of the said goods, which means that the first respondent continued to be the owner. How do the aforesaid provisions make any difference to this position? The definition of 'importer' in Section 2(26) of the Customs Act is not really relevant to the question of title. It only defines the expression 'importer'. The first respondent does not claim to be the importer. The provisions upon which strong reliance is placed by the appellants in this behalf is the one contained in Clause 5(3)(ii) of the Imports (Control) Order. Sub-clause (1) of Clause 5 specifies conditions which can be attached to an import licence at the time of its grant. Sub-clause (2) says that a licence granted under the Order shall be subject to the conditions specified in Fifth Schedule to the Order. Sub-clause (3) sets out three other conditions mentioned as (i), (ii), and (iii) which shall attach to every import licence granted under the Order. First of these conditions says that the import licence shall be non-transferable except under the written permission of the Licensing Authority or other competent Authority. Condition (ii) which is the provision relevant herein - says that the goods for the import of which a licence is granted "shall be the property of the licensee at the time of import and thereafter up to the time of clearance through customs. 99 This condition, however, does not apply to STC, MMTC and other similar institutions entrusted with canalisation of imports. It also does not apply to certain eligible export houses, trading houses and public sector agencies mentioned in the second proviso. Condition (Iii) says that the goods for which the import licence is granted shall be new goods unless otherwise mentioned in the licence. Now coming back to Condition (ii), the question is what does it mean and what is the object underlying it when it says that the imported goods shall be the property of the licensee from the time of import till they are cleared through customs. It is necessary to notice the language of the sub-clause. It says "it shall be deemed to be a condition of every such licence that the goods for the import of which a licence is granted shall be the property of the licensee at the time of import and thereafter up to the time of clearance through Customs." The Rule-making authority (Central Government), which issued the order, must be presumed to be aware of the fact that in many cases, the importer is not the owner of the goods imported at the time of their import and that he becomes their owner only at a later stage, i.e., when he pays for and obtains the relevant documents. Why did the Central Govt. yet declare that such goods shall be the property of the licensee from the time of import? For appreciating this, one has to ascertain the object underlying the said provision. The interpretation to be placed upon the provision should be consistent with and should be designed to achieve such object. In this

context, it should also be remembered that expressions like 'Property of' and 'Vest' do not have a single universal meaning. Their content varies with the context. The aphorism that a word is not a crystal and that it takes its colour from the context is no less true in the case of these words. In our opinion the object underlying Condition (ii) in Clause 5(3) is to ensure a proper implementation of the Imports (Control) Order and the Imports and Exports (Control) Act 1947. The idea is to hold the licensee responsible for anything and everything that happens from the time of import till they are cleared through Customs. The exporter is outside the country, while the importer, i.e., the licensee is in India. It is at the instance of the licensee that the goods are imported into this country. Whether or not he is the owner of such goods in law, the Imports (Control) Order creates a fiction that he shall be deemed to be the owner of the such goods from the time of their import till they are cleared through Customs. This fiction is created for the proper and effective implementation of the said order and the Imports and Exports (Control) Act. The fiction however cannot be carried beyond that. It cannot be employed to attribute ownership of the imported goods to the importer even in a case where he abandons them, that is, in a situation where he does not pay for and receive the documents of title. It may be that for such act of abandonment, action may be taken against him for suspension/ cancellation of licence. May be, some other proceedings can also be taken against him. But certainly he cannot be treated as the owner of the goods even in such a case. Holding otherwise would place the exporter in a very difficult position; he loses the goods without receiving the payment and his only remedy is to sue the importer for the price of goods and for such damage as he may have suffered. This would not be conducive to international trade. We can well imagine situations where for one or other reason, an importer chooses or fails to pay for and take delivery of the imported goods. He just abandons them. (We may reiterate that we are speaking of a case where the import is not contrary to law). It is only with such a situation that we are concerned in this case and our decision is also confined only to such a situation. Condition (ii) in sub-clause (3) of Clause 5, in our opinion, does not operate to deprive the exporter of his title to said goods in such a situation.

19. At this stage, it may be appropriate to clarify one aspect. There may be cases, where the importer opens a letter of credit and makes some other arrangement ensuring/ guaranteeing payment of price of imported goods. In such a case, it will be open to the exporter, in case of non-payment of price or abandonment by the importer, to collect the price by invoking such arrangement. In such a case, it is obvious, the exporter will not be allowed to claim title to and/ or to re-export the goods. (Indeed, it is unlikely that in such a case, the importer abandons the goods ordinarily speaking.) It is therefore necessary that in all such cases, the authority should issue a notice to the importer and/ or his agent before allowing the exporter to deal with or seek to re-export the goods. So far as this case is concerned, both the importer and exporter (RR 2 and 1 respectively) were present before the Collector (Customs) as well as before the High Court. R 2 did not plead any such arrangement.

20. The next question is whether the import of the said goods was contrary to law in any manner and whether the said goods are liable to be confiscated under the Customs Act. The only provisions relied upon by the appellants are clauses (d) and (o) in Section 111 of the Customs Act which we have set out hereinabove. In our opinion none of these clauses are attracted in the present case. Clause (d) contemplates an import which is contrary to any prohibition imposed either by the Customs Act or any other law for the time being in force. No such prohibition can be pleaded in this case since on the date of the import the said goods were covered by a valid import license. The subsequent cancellation of licence is of no relevance nor does it retrospectively render the import illegal. *East India Commercial Co. Ltd. v. Collector of Customs, Calcutta*, (1963) 3 SCR 338 at 372: (AIR 1962 SC 1893 at p. 1907). Clause (o) contemplates confiscation of goods which are exempted from duty subject to a condition, which condition is not observed by the importer. Occasion for

taking action under this clause arises only when the condition is not observed within the period prescribed, if any, or where the period is not so prescribed, within a reasonable period. It, therefore, cannot be said that the said goods were liable to be confiscated on the date of their import under Clause (o). Further, merely because the second respondent had not complied with the condition imposed with respect to three earlier consignments, it may not be possible to presume that it would not be observed even with respect to the four consignments in question. Be that as it may, it is sufficient for the present to notice that so far no action has been taken on that account either under the Customs Act or under S. 4-G of the Import-Export (Control) Act, 1947. Section 4-G of 1947 Act is also conceived to meet such a situation, as a reading thereof would disclose. It says that non-compliance with any condition of licence relating to utilisation of such goods renders the said goods liable to confiscation notwithstanding that such goods are mixed up with other goods or material. Even though a period of more than five years has passed by, no action has been taken either under the Customs Act or under Section 4-G of Imports-Exports (Control) Act, though the import licence of the second respondent has been cancelled. We must presume in the circumstances that no such action was or is contemplated. In these circumstances the title of the first respondent to the said goods remains free of any cloud.

21. Coming to para 26(iv) of the Import-Export Policy for the year 1985-86, it too, in our opinion, is of no material relevance herein. It reads:

"26. Import is valid if it fulfils, among other things the following conditions:-

(iv) The terms and conditions contained in the licence/ open General Licence/ Customs Clearance Permit and the Import-Export Policy and procedures in regard to the items (s) of the import and all other connected matters are fulfilled."

22. This provision, so to speak states the obvious. It says that an import is valid if it fulfils, inter alia, all the terms and conditions contained in the licence and all other connected matters. This para has indeed no relevance to the question of title to goods in a situation dealt with by us herein.

23. It is also significant to notice that it is not the case of the appellants that the first respondent was a party to any conspiracy or other fraudulent plan hatched or sought to be implemented by the second respondent. If that were the case, different considerations would have arisen.

24. So far as the direction for re-export is concerned, we see no reason to interfere. The same shall be permitted and allowed in accordance with law and subject to payment of such dues or other charges as may be leviable in that behalf. The other direction with respect to issuance of detention certificate has not been assailed before us and we need express no opinion thereon.

25. The appeal is accordingly dismissed but in the circumstances without costs. Appeal dismissed.

</html