

Union of India and Others

Vs

Jain Shudh Vanaspati Ltd. and Another

Civil Appeal No. 2360 of 1980

(S. P. Bharucha, S. B. Majmudar JJ)

08.08.1996

ORDER

1. The first respondents imported RBD palm oil during the period November 1978 to March 1979, and cleared the same in the quantity of 13,500 metric tonnes. Import of the said oil was permissible. On 11-10-1979 the first respondents were served with show-cause notices under Section 28 of the Customs Act, 1962 and, on 21-1-1980, with show-cause notices under Section 124 thereof. The show-cause notices stated that the said oil had been imported in containers made of stainless steel, which was a banned item, but which had been painted over to give the impression that they were made of mild steel. Thus, customs duty had not been levied and the stainless steel containers were liable to be confiscated. The respondents were required to show cause thereagainst. The respondents filed a writ petition in the Delhi High Court on 8-2-1980, impugning the issuance of the Section 28 and Section 124 show-cause notices. On 22-8-1980 the High Court allowed the writ petition.

2. This appeal is directed against the judgment and order of the High Court. When special leave was granted on 9-10-1980, this Court ordered that the stainless steel containers which had been seized by the appellants would continue to remain under seizure and be kept in the factory premises of the first respondents under the supervision of a Customs Officer. We are told that they so remain.

3. For completeness, it is necessary to mention that the appeal was dismissed on 28-11-1991, but, on the review petition of the appellants, that judgment and order was set aside and the appeal was directed to be heard afresh, which is how we come to hear it.

4. The High Court based its judgment on material produced by the respondents before it to show that modern marketing practice required the movement of refined oil only in stainless steel or epoxy-coated tanks. It found the material acceptable, particularly because one of the letters that the respondents produced had been written by the State Trading Corporation. The High Court held that the stainless steel containers that were used by the first respondents to import the said oil could not be treated as separate or independent items of importation. What had been imported was only the said oil and not the stainless steel containers. The High Court looked to the law and stressed Section 47, whereunder clearance for home consumption had been given. It took the view that no show-cause notices under Section 28 or Section 124 could have been issued unless and until the order under Section 47 had been revised under the provisions of Section 130.

5. Section 47 reads thus :

"47. Clearance of goods for home consumption. - Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and

the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption."

6. Section 28 reads thus :

"28. Notice for payment of duties not levied, short-levied or erroneously refunded. -
(1) When any duty has not been levied or has been short-levied or erroneously refunded, the proper officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or which has been so short-levied or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

Provided that where any duty has not been levied or has been short-levied or has been 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, the provisions of this sub-section shall have effect as if for the words 'six months' the words 'five years' were substituted.

(2) The Assistant Collector of Customs, after considering the representation, if any, made by the person on whom notice is served under sub-section (1) shall determine the amount of duty due from such person (not being in excess of the amount specified in the notice), and thereupon such person shall pay the amount so determined.

(3) For the purposes of sub-section (1), the expression 'relevant date' means -

(a) in a case where duty is not levied, the date on which the proper officer makes an order for the clearance of the goods;

(b) in a case where duty is provisionally assessed under Section 18, the date of adjustment of duty after the final assessment thereof;

(c) in a case where duty has been erroneously refunded, the date of refund;

(d) in any other case, the date of payment of duty."

7. It is patent that a show-cause notice under the provisions of Section 28 for payment of customs duties not levied or short-levied or erroneously refunded can be issued only subsequent to the clearance under Section 47 of the goods concerned. Further, Section 28 provides time-limits for the issuance of the show-cause notice thereunder commencing from the "relevant date"; "relevant date" is defined by sub-section (3) of Section 28 for the purpose of Section 28 to be the date on which the order for clearance of the goods has been made in a case where duty has not been levied; which is to say that the date upon which the permissible period begins to run is the date of the order under Section 47. The High Court was, therefore, in error in coming to the conclusion that no show-cause notice under Section 28 could have been issued until and unless the order under Section 47 had been first revised under Section 130.

8. Section 124 read thus :

"124. Issue of show-cause notice before confiscation of goods, etc. - No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person -

(a) is given a notice in writing informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and

(c) is given a reasonable opportunity of being heard in the matter :

Provided that the notice referred to in clause (a) and the representation referred to in clause (b) may, at the request of the person concerned, be oral."

9. The case of the appellants in the show-cause notices is that the stainless steel containers in which the said oil was imported were banned, that the stainless steel containers were deliberately camouflaged by painting them to resemble mild steel containers, and that this was done with a view to enabling their clearance. A clearance order under Section 47 obtained by fraudulent means such as this (if it, in fact, be so) cannot debar the issuance of a show-cause notice for confiscation of goods under Section 124. Fraud, if established, unravels all. An order under Section 47 obtained by the employment of fraudulent methods does not have to be set aside by the exercise of revisional powers under Section 130 before the ill effects of the fraud can be set right by initiation of the process of confiscation of the fraudulently cleared goods under Section 124.

10. It is relevant to bear in mind that the issuance of the show-cause notice under Section 124 contemplates that the respondents' response shall be considered and only thereafter will the matter be decided. The respondents shall, therefore, have full opportunity to satisfy the authorities that there was no importation of banned goods which makes them liable to confiscation.

11. The High Court noticed that the appellants' allegation was that the stainless steel containers were painted over to suppress their true nature, but it took the view that the respondents were not required to disclose the nature or price of the containers. We do think that the High Court ought to have taken some note of the significance of painting of stainless steel. If the stainless steel containers were painted, and so painted as to resemble mild steel containers, there can be little doubt that the intention was to slip them through the Customs.

12. Certainly, the High Court ought not to have entered into the thicket of evidence. Evidence was something for the authorities hearing the parties under Sections 28 and 124 to accept and weigh. We do not approve of stultifying, in exercise of powers under Article 226, an investigation, still at the show-cause stage, by going into facts.

13. We are also of the view that the High Court in any event, ought not to have allowed the writ petition without reserving liberty to the appellants to proceed against the respondents under Section 130 which, as the High Court looked at it, was the appropriate course of action.

14. We have refrained from expressing ourselves, so far as we could, upon the merits of the controversy between the parties. In deciding upon the show-cause notices under Sections 28 and 124, the authorities shall not take into account our observations or those of the High Court in the

order under appeal.

15. The appeal is allowed. The judgment and order of the High Court is set aside. The writ petition filed by the respondents is dismissed. Proceedings pursuant to the show-cause notices under Sections 28 and 124 shall continue. The respondents shall have the opportunity therein to place such evidence as they may deem appropriate.

16. Pending the adjudications, the stainless steel containers shall remain under seizure, but in the premises of the first respondents under the supervision of a Customs Officer.

17. There shall be no order as to costs.