

# SUPREME COURT OF INDIA

Union of India

Vs.

R. C. Fabrics (P) Ltd.

C.A.No.767-768 of 1995

(S. P. Bharucha CJI., Y. K. Sabharwal and Brijesh Kumar JJ.)

06.11.2001

## JUDGEMENT

### **Y. K. Sabharwal, J.**

1. In Civil Appeal Nos. 767-768 of 1995, the challenge of Union of India is to the judgment and order of the High Court whereby allowing the writ petition, the Collector of Customs has been directed to release the imported goods of the writ petitioner (respondent No. 1 herein) lying with the Central Warehousing Corporation Limited (for short 'the Corporation'). It has been further directed that the first respondent will pay demurrage, container charges and ground rent to the Corporation from the date of storage of the goods till January, 15, 1991 whereas the Collector of Customs will pay the said charges on account of storage of these goods from January 16, 1991 till the date of release of the goods.

2. In Special Leave Petition (C) No. 1663 of 2000, the challenge of the Government is to the order of the Customs, Excise and Gold (Control) Appellate Tribunal which upheld the order of Collector of Customs dated 22nd October, 1993. By the said order, the Collector of Customs directed the discharge of show cause notice dated 18th February, 1991 and had directed that the proceedings be dropped. We grant leave in the special leave petition.

3. Civil Appeal No. 7931 of 1995 has been filed by the original writ petitioner. The limited challenge therein is to the direction for payment of demurrage, container charge and ground rent by the said petitioner till January 15, 1991. The contention urged in this appeal is that the said charges are payable by the appellant only upto 21st September, 1990 and not thereafter.

4. This judgment will dispose of all four appeals.

5. We have heard learned Attorney General and also learned counsel for the Corporation. None, however, appeared for the importer who is respondent in Civil Appeal Nos. 767-768 of 1995 and Civil Appeal arising out of SLP (C) No. 1663 of 2000 and appellant in Civil Appeal No. 7931 of 1995.

6. The importer filed Bill of Entry dated 16th August, 1990 for clearance of consignment declared as 100% Polyester Fabric. On 3rd September, 1990, Customs Authorities conducted examination of 10% of the goods and found some discrepancies with regard to the declared length and weight of the fabric. The importer by its letter dated 4th September, 1990 agreed with that examination and findings and requested the custom authorities not to go in for 100% examination of the goods. The Customs Authorities examined another 10% of the goods; on the basis whereof, it calculated average excess in length and weight. It found that total of 843.85 mts. (weight= 206.30 kg.) fabric was excess in length. The CIF value of the excess fabric was found to be Rs. 17,003/- (Assessable value Rs. 17,173/-). The importer requested the Assistant Collector of Customs for waiver of show cause notice and personal hearing. On 21st September, 1990, the Assistant Collector passed an order on note-sheet whereby the importer was allowed the release of the excess goods after payment of fine of Rs. 25,000/- and personal penalty of Rs. 5,000/-. The amounts were deposited on 22nd September, 1990 as also customs duty amounting to Rs. 43,657/- on the excess goods. On that day itself, i.e. 22nd September, 1990, DRI Officers visited the CFS Patparganj and detained the consignment on the basis of information available with them. On November 15, 1990, the DRI seized the detained goods.

7. A writ petition was filed in the Delhi High Court by the importer seeking directions against the custom authorities for release of consignment of Polyester Fabric imported by it against duty free advance import licence urging that the consignment had been illegally and unauthorisedly detained by the custom authorities. The import was effected by the importer under Duty Exemption Entitlement Certificate (DEEC) and duty free advance import licence. Under that licence, the importer was allowed to import 80,000 mts. of 100% Polyester fabric of CIF value of Rs. 16,16,000/- One of the conditions of import was that the importer would export 1,60,000 pieces of shorts made out of the imported 100% Polyester fabric of the desired denier of value of Rs. 24,48,000/-. In accordance with the DEEC policy, all imports under export obligation were duty free. The importer claimed that it had exported the required quantity of 1,60,000/- pieces of shorts of the required fabric and the buyer had remitted requisite foreign exchange and, thus, it had fulfilled the export obligation. The importer further claimed that the order imposing penalty and redemption fine as aforesaid was made on 21st September, 1990 which amount along with the customs duty were deposited on the very next date and since the goods were not released despite the said deposits, the writ petition was being filed.

8. The formal order on the lines on which the order was made on the note-sheet on 21st September, 1990 was passed by the Assistant Collector on 15th January, 1991.

9. In the counter affidavit filed in the writ petition, the Assistant Collector, Directorate of Revenue (Intelligence) averred that the importer had violated the import control order and evaded duty amounting to over Rs. 16 lakhs. On receipt of information by the DRI that the export effected was fraudulent and no test report regarding the goods was filed, the statement of the 'Director of the' writ petitioner-company was recorded under Section 108 of the Customs Act. The statements of some other persons were also recorded under section 108.

The case of the Directorate of Revenue was that the exports were fraudulent. When the writ petition came up before the Division Bench of the High Court on 11th February, 1991, a request was made on behalf of the department that time be granted to it to further investigate the matter. The High Court allowed the investigation to be completed within one week and also permitted the department to issue a show cause notice to the writ petitioner/importer who was given time to file its reply within 48 hours on receipt of the show cause notice. The adjudication, if any, was required to be completed and concluded within one week after the completion of investigation.

10. On 18th February, 1991, a show cause notice was issued to the importer to explain as to why the goods be not confiscated and the company and its Directors be not proceeded with for penal action under Section 112 of the Customs Act, 1962. By order dated 25th February, 1991, the Additional Collector Custom ordered confiscation of the goods but allowed the goods to be redeemed on payment of redemption fine of Rs. 4,00,000/- and appropriate duty amounting to over Rs. 16,00,000/-. Besides it, penalty of Rs. 10,00,000/- each was imposed on the Directors and Rs. 5,00,000/- on the company.

11. The order dated 25th February, 1991 was set aside by the High Court as it was found that the principles of natural justice had not been complied with before passing the said order supposedly on account of time limit for decision fixed by the High Court and without waiting for reply of the importer, the order was passed by the Collector on 25th February, 1991. The High Court while setting aside that order directed the matter to be decided afresh after dealing with the points raised by the petitioner in the written submissions including the point of jurisdiction in view of the order dated 10/15th January, 1991. On remand the matter was dealt with by the Collector of Custom before whom two, submissions were made, namely, (1) In view of the order dated 10/15th January, 1991, another order of adjudication could not be made in respect of the same consignment and (2) On merits, confiscation of goods was not justified. Accepting the first contention, the Collector of Customs in terms of his order dated 22nd October, 1993 discharged the show cause notice dated 18th January, 1991 and dropped the proceedings. He was of the opinion that in view of the order of adjudication dated 10/15th January, 1991, there could not be another adjudication order in respect of the same consignment. In this view, the Collector refrained from going into the second contention which concerned the merits of the case. The order dated 22nd October, 1993 was upheld in appeal by the Tribunal and the appeal was dismissed on 13th September, 1999. That order is the subject matter of appeal arising out of SLP (C) No. 1663 of 2000. By the impugned judgment and order that High Court allowed the writ petition and directed release of the goods and issued directions for payment of demurrage etc. as noticed hereinbefore.

12. The Tribunal has dismissed the appeal against the order dated 22nd October, 1993 filed by the Government upholding the order of the Collector principally on the ground that the Collector had no jurisdiction to pass a fresh order of adjudication in vi ew of earlier order dated 10/15th January, 1991 covering the consignment in question and also for the reason that the High Court while deciding the writ petition upheld the finding that the Collector had no jurisdiction to pass a fresh adjudication order in view of the earlier order dated 10/15th January, 1991. Accordingly the Tribunal declined to interfere with the order of the Collector

and, thus, the appeal was dismissed. It deserves to be noticed that the Collector was of the view that the principles of constructive res judicata will fairly apply as the test report dated 26th November, 1990/4th December, 1990 which was the sole basis of the impugned show cause notice was available with the department during the adjudication proceedings by the Assistant Collector who passed the order on 15th January, 1991 and, therefore, the test report is deemed to have been taken into account by the Assistant Collector before concluding the adjudication proceedings leading to the order dated 10/15th January, 1991.

13. Learned Attorney General contends that the Collector of Customs committed serious illegality in coming to the conclusion that the principles of res judicata or constructive res judicata have any applicability to the facts and circumstances of the present case. Further, the Tribunal erroneously dismissed the appeal, contends Attorney General, by holding that the matter stood concluded by the judgment of the High Court directing release of the goods. The test report is respect of which the Collector in his order dated 22nd October, 1993 that on application of principles of constructive res judicata, it is deemed to have been considered by the Assistant Collector when he passed the order on 15th January, 1991 Mr. Sorabjee submits that the conclusion is a result of manifest erroneous approach for the reason that the order dated 10/15th January, 1991 was only a formal order and in fact as a result of concession of the importer, an order on note-sheet had already been passed on 21st September, 1990 pursuant to which, as per the own case of the importer, it has deposited the redemption fine, personal fine and the customs duty on 22 nd September, 1990 and even the writ petition had been filed seeking release of the goods on 7th November, 1990. On these admitted facts, contends learned Attorney General that the question of deemed consideration of report dated 26th November/4th December, 1990 can never arise. The contention, therefore, is that the show cause notice could not be discharged on the ground that the test report dated 26th November/4th December, 1990 could not be taken into consideration as the same is deemed to have been taken into consideration while making the order dated 10/15th January, 1991. We agree. There is substance in the contention of the learned Attorney General. It is evident from the above facts that the test report was not and could not be taken into consideration by the Assistant Collector when the order was passed on 21st September, 1990 followed by a formal order dated 10/15th January, 1991. On the basis of the order for release passed on 21st September, 1990, the importer was claiming release of the goods for which purpose it had even filed the writ petition even prior to 15th January, 1991. The principles of res judicata or constructive res judicata have no application whatsoever. Further, it is evident that by order dated 11th February, 1991 the High Court had allowed the investigation. In its view, the case had to be examined on merits to find out whether it was a case of fraud or not, as contended by the department. The merits of the case were not gone into because the Collector accepted the first submission regarding the applicability of principles of constructive res judicata. Further, the High Court in the impugned judgment and order has observed that the order of the Collector dated 22nd October, 1993 was not the subject matter of challenge before it. It was in this light that the observations of the High Court that the Collector was right in holding that he had no jurisdiction to pass afresh order of adjudication in view of the earlier order dated 10/15th January, 1991 covering the consignment in question had to be seen. Those were only prima facie observations as at that stage the appeal against the order of the Collector dated 22nd October, 1993 was pending

before the Tribunal. Under these circumstances, the investigation permitted by the High Court could not be brushed aside and the matter had to be taken to its logical conclusion.

14. For the aforesaid reasons, it is not possible to uphold the impugned order of the Tribunal as also the order of the Collector dated 22nd October, 1993. For the same reasons, the impugned judgment and order of the High Court directing the release of the goods cannot be sustained till it is finally decided as to whether there is any substance or not in the allegations made against the importer in the show cause notice dated 18th February, 1991 on examination of the merits of the case. As already noticed, the merits were not examined by the Collector in view of his conclusion that the second order of adjudication could not be made.

15. Therefore, setting aside the impugned judgment and order of the High Court, the order dated 22nd October, 1993 of the Collector and order dated 13th September, 1999 of the Tribunal, we remand the matter to the Collector for fresh decision on the show cause notice after affording to the importer a reasonable opportunity to put forth its view point. While granting the leave, this Court had directed maintenance of status quo. The order of status quo will continue till the matter is examined afresh by the Collector in terms of this judgment.

16. The High Court has directed that the Custom Department would pay the demurrage, container charges and ground rent to the Corporation, from 16th January, 1991. The said direction is contrary to the decision of this Court in *International Airport Authority of India and others. v. Grand Slam International and Ors.*<sup>1</sup>. The Corporation is entitled to recover its charges from the importer. Therefore, the direction in the impugned judgment and order that the custom authorities shall pay those charges is set aside. Thus, the appeal filed by the importer (C.A. No . 7931/95) deserves to be dismissed. In any event, no one has appeared in support of that appeal.

17. For the foregoing reasons, Civil Appeal Nos. 767-768 of 1995 and civil appeal arising out of SLP (C) No. 1663 of 2000 are allowed. The case, as aforesaid, is remanded back to the Collector for fresh decision. Civil Appeal No. 7931 of 1995 is dismissed. No order as to costs.

Order accordingly.

<sup>1</sup>(1995) 3 SCC 151