SUPREME COURT OF INDIA

Commissioner of Central Excise and Customs, Andhra Pradesh

Vs

Suresh Jhunjhunwala and Others

Appeal (Civil) 1372 of 2006

(S. B. Sinha and Dalveer Bhandari, JJ)

19.10.2006

JUDGMENT

S. B. SINHA, J.

M/s Ganesh Yarntex Export Private Limited filed six shipping bills under the Duty Entitlement Pass Book Scheme (DEPB Scheme) bearing Nos. 136 to 141 dated 06.01.2001. M/s Aadee Exports & Imports, Secunderabad filed five shipping bills bearing Nos. 142 to 147 dated 06.01.200. They declared their address as 'c/o ABC, II Floor, YMCA Complex, Sardar Patel Road, Secunderabad. All the said shipping bills were filed for post export benefit under the DEPB Scheme claiming credit rate @ 15% vide Sl. No. 20(iii) of the DEPB Credit List, Product Group No.89 read with EXIM Policy. The goods were declared as "Dyed Printed Night Wears (Maxis)" in various sizes/colours. The value of the goods was claimed to be Rs. 41 lakhs @ US$ 6.40 per piece. The total FOB value of the consignment was declared to be US$ 5, 84, 064/- (Rs.2.72 crores) approximately. The consignment was made in the name of M/s Reemj Al Maha Trading Est., Dubai, UAE.

2. It was allegedly found that cheap garments were being exported by grossly misdeclaring the description and heavily over-invoicing the value under the said Scheme by the aforementioned two firms. The goods were intercepted at Chennai. Upon examination, it was found that all the goods were ladies nightwear shaped garments and were found to be small, uneven and unshaped which could not be worn by any person of any age including children. The goods were purchased from Bombay and sent to Hyderabad to be loaded in a vessel at Chennai for export to Dubai. They were

seized.

3. A show cause notice was issued on 18.07.2001 directing Respondents to show as to why:

"i) the goods sought to be exported in the name of M/s Ganesh Yarntex Exports (P) Ltd. and M/s Aadee Exports (P) Limited and M/s Aadee Exports & Imports vide shipping bill nos. 136 to 146 all dated 6.1.2001 through ICD Hyderbad with a declared FOB value of Rs.2.72 crores should not be denied to be exported under DEPB Scheme and the DEPB credit totally amounting to Rs.41, 06, 700/- should not be denied;

ii) The declared value of US$ 6.40 per piece in the above said shipping bills should not be rejected;

iii) The goods covered under the said Shipping Bills seized at Chennai port on 24.1.2001 should not be confiscated under section 113(d), 113(h) & 113(i) of the Customs Act, 1962;

iv) The goods seized vide panchnama dt. 24.2.2001 at Plot No. 18, Paigah Colony, S.P. Road, Secunderabad should not be confiscated under Section 113(d) of the Customs Act ibid; and

v) A penalty should not be imposed on each of them under section 114(i) of the Customs Act, 1962."

4. The Commissioner of Customs and Central Excise, in its order dated 31.03.2004 opined:

"(1) The impugned goods sought to be exported vide S.B. nos.136 to 146 all dated 6.1.2001 with a declared value of Rs.2.7 crores is denied to be exported under DEPB scheme and DEPB credit amounting to Rs.41, 06, 700/- is denied as the declared value of US $ 6.4 per piece is also rejected.

(2) The impugned goods as mentioned above are confiscated under section 113(d), (h) & (i) of the Customs Act, 1962 and in terms of Section 125 ibid they are ordered to be released on payment of Redemption fine of Rs.5, 00, 000/- (Five lakhs only). The option to redeem the goods should be exercised within one month from the date of receipt of this order.

(3) The goods seized vide panchnama dt. 24.2.2001 at Plot No.18, Paigah Colony, Secunderabad are confiscated under Section 113(d) of the Customs Act, 1962 and in terms of Section 125 ibid I order release of the same on payment of redemption fine of Rs.5, 00, 000/- (Rs. Five lakhs only). The option to redeem the goods should be exercised within one month from the date of receipt of this order.

(4) In terms of Section 114(i) of the Customs Act, 1962, I impose penalties on Noticees as follows :

a) Mr. Suresh Jhunjhunwala Rs.40, 00, 000/- (Rs. Forty lakhs only);

b) Mr. Deepak Jhunjhunwala Rs.30, 00, 000/- (Rs.Thirty lakhs only);

c) Mr. Sachin Jhunjhunwala Rs.25, 00, 000/- (Rs. Twenty five lakhs only)

e) C. Satyyapal Reddy Rs.5, 00, 000/- (Rs. Five lakhs only);"

5. While arriving at the said findings, the Commissioner relied upon the statements of various witnesses and other documents. The materials relied upon by him to determine acquisition, financial dealings, the low quality of the garments and the intent to obtain undue benefit of DEPB Credit Facility fraudulently were said to be based on physical examination of goods, statements of suppliers, customs house agents, staff employed by Respondents and Respondents themselves. It was found that Respondents have committed a fraud.

6. He, therefore, directed confiscation of the goods in terms of Section 113 of the Customs Act. An appeal thereagainst was preferred by Respondents before the Customs, Excise & Service Tax Appellate Tribunal. By reason of the impugned judgment and order dated 17.09.2004, the Tribunal concluded that the goods being not prohibited ones were not liable to be confiscated under the said provision. It was further held that over- valuation had not been established as no expert evidence was led and no cross-examination of the witnesses had been permitted.

7. Mr. K. Swami, learned counsel appearing on behalf of Appellants, would contend that the Tribunal committed a serious error in relying upon the decision of this Court in Commissioner of Customs (EP), Mumbai v. Prayag Exporters Pvt. Ltd. 7 (SC)], although the matter is squarely covered by another decision of this Court in Om Prakash Bhatia v. Commissioner of Customs, Delhi .

8. Mr. M. Chandrasekharan, learned Senior Counsel appearing on behalf of Respondents, on the other hand, would submit that the decision of this Court in Om Prakash Bhatia (supra) was rendered in a case involving drawback, whereas in the instant case involves a case of DEPB Scheme and, thus, the decision in Prayag Exporters (supra) is applicable to the facts of the present case.

9. It is stated at the bar that a review application was filed in Prayag Exporters (supra) drawing the court's attention to the subsequent decision of this Court in Om Prakash Bhatia (supra), but the same had been dismissed, as would appear from 2003 Indlaw CESTAT 460.

10. Drawing our attention to a decision of this Court in Union of India and Others v. M/s Rai

Bahadur Shreeram Durga Prasad (P) Ltd. and Others, learned counsel would contend that in view of the fact that such export was permissible in terms of contract and Respondents had received the amount in question, the provisions of any law far less the provisions of the Foreign Exchange Regulation Act and the rules framed thereunder were not required to be followed.

"Prohibited goods" have been defined in Section 2(33) of the Customs Act (for short "the Act") to mean:

""Prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with."

11. Section 50 of the Act provides for entry of goods in the following terms:

"50. Entry of goods for exportation.-(1) The exporter of any goods shall make entry thereof by presenting to the proper officer in the case of goods to be exported in a vessel or aircraft, a shipping bill, and in the case of goods to be exported by land, a bill of export in the prescribed form.

(2) The exporter of any goods, while presenting a shipping bill or bill of export, shall at the foot thereof make and subscribe to a declaration as to the truth of its contents."

12. Section 113 of the Act refers to confiscation of goods in certain circumstances, clause (d) whereof reads as under:

"(d) any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;"

13. The definition of prohibited goods is a broad one. The said provision not only brings within its sweep an import or export of goods which is subject to any prohibition under the said Act; but also any other law for the time being in force.

14. The Tribunal does not appear to have considered the matter from this angle. Power to confiscate, thus, would arise under both the situations.

15. In Prayag Exporters Pvt. Ltd. v. Commissioner of Customs, Mumbai, 2000 Indlaw CEGAT 996 the Tribunal proceeded on the basis that clause (d) of Section 113 of the Customs Act would not apply to cases where the export of goods is prohibited. The Tribunal in arriving at the said conclusion referred to two of its earlier decision in Badriprasad Pvt. Ltd. v. CCE 1995 Indlaw CEGAT 246 and Shilp Export v. CCE 1995 Indlaw CEGAT 172.

16. This Court in Prayag Exporters (supra), dismissed the appeal of the Commissioner of Customs, stating:

"This appeal is filed against the judgment and order dated 18th August, 2000 passed by the Customs, Excise & Gold (Control) Appellate Tribunal, Western Zonal Bench at Mumbai in Appeal No.C/195/V/2000-Bom., whereby the Tribunal has arrived at the conclusion that it has taken consistent view that Clause (d) of Section 113 of the Customs Act would apply in cases of prohibited goods and would not apply to the facts of the present case. Admittedly, goods in question are not prohibited for export and no export duty is leviable on the said goods. In this view of the matter, no interference is called for with the impugned judgment and order. Hence, this appeal is dismissed."

17. However, it appears, the same Bench considered the matter at some length in Om Prakash Bhatia (supra) and opined that the exporters were obliged to declare the value of the goods. In a detailed judgment, this Court not only took into consideration the provisions of the Customs Act, but also the provisions of Section 15 of the Foreign Exchange Regulation Act and the rules framed thereunder, as also the notifications issued by the Central Government from time to time. The Court opined that for determining the export value of the goods, it is necessary to refer to the meaning of the word "value" as defined in Section 2(41) of the Act, and the same must be determined in accordance with the provision of sub-section (1) of Section 14, stating:

".. .. ..Section 14 specifically provides that in case of assessing the value for the purpose of export, value is to be determined at the price at which such or like goods are ordinarily sold or offered for sale at the place of exportation in the course of international trade, where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for sale. No doubt, Section 14 would be applicable for determining the value of the goods for the purpose of tariff or duty of customs chargeable on the goods. In addition, by reference it is to be resorted to and applied for determining the export value of the goods as provided under sub-section (41) of Section 2. This is independent of any question of assessability of the goods sought to be exported to duty. Hence, for finding out whether the export value is truly stated in the shipping bill, even if no duty is leviable, it can be referred to for determining the true export value of the goods sought to be exported."

18. The ingredients of the aforementioned provision read with Section 18 of the Foreign Exchange Regulation Act were analyzed and the law was laid down stating:

"(a) The exporter has to declare the full export value of the goods (sale consideration for the goods exported).

(b) The exporter has to affirm that the full export value of the goods will be received in the prescribed manner.

(c) If the full export value of the goods is not ascertainable, the value which the exporter expects to receive on the sale of the goods in the overseas market.

(d) The exporter has to declare the true or correct export value of the goods, that is to say, the correct sale consideration of the goods. Criterion under Section 14 of the Act is the price at which such or other goods are ordinarily sold or offered for sale in the course of international trade where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for sale or offer for sale."

19. This Court did not stop there, but also took into consideration the provision of Rule 11 of the Foreign Trade (Development and Regulation) Rules, 1993, holding:

"Hence, in cases where the export value is not correctly stated, but there is an intentional overinvoicing for some other purpose, that is to say, not mentioning the true sale consideration of the goods, then it would amount to violation of the conditions for import/export of the goods. The purpose may be money-laundering or some other purpose, but it would certainly amount to illegal/unauthorised money transaction. In any case, overinvoicing of the export goods would result in illegal/irregular transactions in foreign currency."

20. It may be true that the said decision related to a matter concerning a drawback scheme, but a decision of this Court interpreting a different section by itself cannot, in our opinion, be brushed aside, only on the ground that the decision of the same bench in Prayag Exporters (supra) is applicable being related to DEPB Scheme. The question, in our opinion, has to be considered having regard to the provisions of the definition of the 'prohibited goods', 'entry of goods' together with the provisions of the Foreign Exchange Regulation Act.

21. In Rai Bahadur Shreeram Durga Prasad (supra) relied upon by Mr. Chandrasekharan, the question which came up for consideration was as to whether Respondents therein could be said to have made any false declaration in contravention of Section 12(1) of the Foreign Exchange Regulation Act, as he had declared the full export value, although he did not furnish all the particulars. Hegde, J, speaking for the majority opined:

"The contravention of the above provisions is punishable under Section 23. Hence the respondents' failure to repatriate any part of the foreign exchange earned by them by the sale of the manganese ore exported can be penalised by imposing on them a penalty not exceeding three times the value of the foreign exchange in respect of which the contravention had taken place or Rs 5000 - whichever is more as may be adjudged by the Director of Enforcement in the manner provided in the Act. Hence it is open to the Director of Enforcement to levy on such of the respondents as have contravened Section 12(2), penalty not exceeding three times the value of the foreign exchange not repatriated which in the present case can be about nine crores of rupees. They may also be punished under Section 23(1)(b). This position is conceded by the counsel appearing for the appellants. But it is urged on behalf of the appellants that for the offences committed by the respondents they are not only liable to be punished under Section 23 but also under Section 23(A). The Appellate Bench of the Madras High Court negatived that contention. Section 23(A) as it stood at the relevant time provided that&#65533;

"without prejudice to the provisions of Section 23 or any other provision contained in this Act, the restrictions imposed by... sub-section (1) of Section 12 ... shall be deemed to have been imposed under Section 19 of the Sea Customs Act, 1878, and all provisions of that Act shall have effect accordingly, except that Section 183 thereof shall have effect as if for the word 'shall' therein the word 'may' were substituted""

22. We may, however, notice that Sikri J. in his minority opinion stated:

"Coming now to the construction of Section 12(1), it seems to me that what it requires is a declaration of some actual figure which according to the declarant represents "the full export value". Otherwise there is no point in requiring support of such evidence as may be prescribed. Further it is clear that some actual figure has to be mentioned when the exporter declares that he has received the amount representing the full export value. I apprehend that the same applies in the case where the amount has not yet been received. The rules make this clear. Rule 5(2)(ii) which requires the invoice value stated in the declaration to be the full export value of goods, is referrable to Section 12(1) of the Exchange Act and may be taken to indicate that an actual figure has to be mentioned. It may be an estimate if the goods have not been sold before the export, but a figure must be indicated.

27. Coming to the crux of the problem, does Section 12(1) by itself require absolutely correct particulars? It is said that Section 12(1) does not require it for Section 22 requires the exporter only to make a declaration "which he knows or has reasonable cause to be false or not true in any material particulars." How could it be that if Section 12(1) itself requires absolutely correct particulars. Section 22 limits the requirement? It seems to me that there is force in this contention but only to a limited extent. Section 12(1) and the notification, dated August 4, 1947, made under it, impose a conditional prohibition. The section confers a power on an exporter to lift the bar by a unilateral declaration. When such a power is conferred on an exporter by a statute, good faith on his part must at least be implied and be a condition pre-requisite. This construction is necessary in order to prevent abuse of the power given by the Act. (See Maxwell on Interpretation of Statutes, 11th Edn., p. 116). If the exporter makes a deliberately false declaration he contravenes Section 12(1) because he has not made the statutory declaration in good faith. It is not necessary to say that the declaration becomes a nullity because the breach of good faith, a condition prerequisite, is itself a contravention of the conditional prohibition or restriction, within Section 167(8) of the Sea Customs Act, read with Section 23-A and Section 12(1) of the Exchange Act. Clerical mistakes and mistakes made bona fide even in respect of material particulars are not within the mischief of Section 12(1), but a deliberate falsehood and a deliberate evasion of the provisions of Section 12(1) come within Section 12(1). Otherwise the ambit of Section 12(1), read with Section 23-A, would be narrowed to the point of extinction. An exporter and persons concerned in the export could with impunity give a deliberately false declaration but in apparent compliance with Section 12(1), and deprive this country of foreign exchange. I cannot give an interpretation which will make a mockery of the section. But it is said that other sections of the Exchange Act will take care of such an exporter. He can be prosecuted under Section 23(1-A), read with Section 22. He can be sentenced to imprisonment which may extend to two years. He can also be fined to an unlimited extent. The Foreign Exchange lost can be retrieved by a court acting under Section 23(1-B). This may be true that the exporter is liable as stated above. But what about persons concerned in the illegal export? It is the persons concerned in the export which in most cases enable the exporter to successfully evade

the provisions of the Exchange Act. These persons are taken care of only under the Customs Act. If they are covered by Section 167(8), there is no reason to exclude the exporter himself. It is not unusual to make persons liable both to penalties under the Sea Customs Act and the Exchange Act. It is indeed conceded that if no declaration is given under Section 12(1) and the goods are exported, the exporter and the persons concerned in the export would be liable to be proceeded both under Section 167(8) of the Sea Customs Act and the Exchange Control Act. I can draw no distinction between such an exporter and an exporter who gives a deliberately false declaration for the purpose of the applicability of Section 167 (8) of the Sea Customs Act."

23. It is interesting to note that in The Collector of Customs, Madras v. Nathella Sampathu Chetty and Another Court opined:

"We hold therefore that when a notification issued under s. 8(1) of the Foreign Exchange Regulation Act is deemed for all purposes to be a notification issued under s. 19 of the Sea Customs Act, the contravention of the notification attracts to it each and every provision of the Sea Customs Act which is in force at the date of the notification."

24. In view of the order proposed to be passed by us, we do not intend to enter into the factual controversy of this matter any further. The Tribunal, in our opinion, should have considered the matter from another angle, namely, as to whether Respondents have violated the provisions of the Foreign Exchange Regulation or not. As regards, the finding arrived at by the Tribunal that Respondents had not over-valued the goods, inter alia, on the ground that no expert opinion regarding thevalue of the export goods had been adduced, the Tribunal did not advert to the materials which had been brought on records during investigation, whereupon the Commissioner relied upon.

25. We are, therefore, of the opinion that the impugned judgment cannot be sustained, which is set aside accordingly. The appeal is allowed. The matter is remitted to the Tribunal for consideration thereof afresh. No costs.