SUPREME COURT OF INDIA

D.R.Enterprises Ltd.

Vs.

Assistant Collector of Customs & Ors.

C.A.No.4417 of 2003

(A.K.Sikri and R.V.Ramana,JJ.,)

12.08.2015

JUDGMENT

A.K.Sikri,J.,

1. The appellant herein is aggrieved by the impugned judgment of the High Court whereby the High Court has refused to allow the appellant import of Web Printing Machine on concessional rate of custom duty. The appellant had endeavored to avail the concessional rate of custom duty on the import of the aforesaid machine under Open General Allowance (for short, 'OGL') with the aid of Notification No. 114/80-CUS, dated 19.06.1980. The High Court has held that the said Notification is not applicable in the instant case as the appellant has not been able to satisfy one particular eligibility condition contained therein. To put it pithily, one of the conditions needs to be satisfied to avail the concessional rate of duty @ 35% ad valorem under the aforesaid Notification is that the machine is having output of 30,000 or more copies per hour. Whereas the appellant contends that the machine in question churned out 36,000 copies per hour, the High Court has found it otherwise. As per the High Court the output of the machine was 25,000 copies per hour, which was reflected in the leaflet of the manufacturer of the machine, which leaflet was filed along with Bill of Entry.

2. In order to find out the details of the factual background under which the aforesaid issue has cropped up, let us traverse through the facts in some more details.

3. The appellant herein had imported one printing machine of make 'Harris Graphic V-15H Model' which arrived at Mumbai airport on 24.10.1987. Custom house agent of the appellant filed Bill of Entry for Home Consumption under OGL on 13.11.1987 and claimed concessional rate of duty under Notification No. 114/80-CUS.

4. On 26.11.1987, the Appraiser of Customs House, Bombay issued a query memo with regard to the printing capacity of the imported machine which had been shown in the import invoice as 36,000 copies per hour, but was shown as 25,000 in the leaflet furnished along with the Bill of Entry. Some other queries were also raised. The appellant answered the issue on 21.01.1988.

5. Having not been satisfied with the reply furnished by the appellant, the customs authorities directed it to warehouse the goods under Section 49 of the Customs Act, 1962 (hereinafter referred to as the 'Act'), after depositing the admitted customs duty. Accordingly, the imported machine was warehoused.

6. Thereafter, some queries regarding the output of the machine were raised and the appellant tried to meet them. It also filed communications received from the manufacturer explaining that the machine was custom-made for Indian purposes, i.e, for the appellant enhancing its capacity to 36,000 copies per hour as against normal capacity of 25,000 copies, which is the normal product manufactured by the said manufacturer. On that basis, the appellant wrote to the customs authorities for arranging physical examination of the consignment to satisfy themselves that the machine in question was capable of giving output of 36,000 copies per hour. However, no action was taken by the customs authorities thereafter.

7. Taking note of the inaction of the customs authorities to get the imported consignment physically inspected and proceeding with the clearance of the same, on 24.04.1988, the appellant filed a writ petition before the Bombay High Court (being Civil Writ No. 2229/1988) praying for a declaration that the imported machine was covered by OGL and was entitled to the concessional rate of customs duty under Notification No. 114/80-CUS and for directing the respondents to permit clearance of the same. Interim relief of release of the machinery was also prayed for.

8. The Assistant Commissioner of Customs (S.I.I.B.), Bombay, filed an affidavit opposing the admission of the petition and grant of interim relief.

9. On 10.08.1988, the High Court passed an order directing the respondents to submit a list of relevant material required by them to the appellant on or before 17.08.1988 and directed the appellant to comply with those requirements on or before 26.08.1988 and further directed the customs authorities to pass appropriate orders within one week thereafter. The matter was adjourned to 31.08.1988. On 02.09.1988, when the matter was again heard by the High Court, taking note of the fact that no list of materials was served by the customs authorities on the appellant and no adjudication order was passed, the learned Single Judge of the Bombay High Court passed an order directing the parties to inspect and test the consignment under the supervision of the Court Appointed Officer within 5 days from 02.09.1988 and directing the Adjudicating Authority to pass an order within 7 days from the inspection and testing. It was not done and further time was sought. However, when the needful was not done even after getting time extension, on 03.10.1988, the Bombay High Court passed an order allowing clearance of the imported machine in question in terms of prayer clause (c)(i) of the writ petition.

10. Pursuant to the aforesaid interim order of the High Court, the appellant was allowed to clear the consignment in question. However, the main writ petition was kept pending thereafter which came up for final hearing in the year 2002, i.e. 14 years after the filing of

the writ petition. By that time the imported printing machine had been in use by the appellant for all these years. The learned counsel appearing for the appellant, in these circumstances, impressed upon the High Court to decide itself the issue involved, namely, whether imported machine could print 36,000 copies per hour or its speed was less than 30,000 copies per hour and whether the appellant was not entitled to the benefit of the concerned Notification. The High Court went into the issue and by its detailed judgment it has decided this issue against the appellant. The basis for arriving at such conclusion shall be stated by us in some details at the later stage.

11. Mr. L. Nageshwar Rao, learned senior counsel who appeared for the appellant, challenged the very approach of the High Court in deciding the issue on merits as well as the finding arrived at by the High Court in the following manner:

> "(i) In the first place, it was argued that the High Court was not competent to go into this issue when the Act provides for complete adjudication machinery to adjudicate this issue. Learned senior counsel referred to the provisions of Section 28 of the Act, as per which the authorities are supposed to issue show cause notice to the importer and after giving opportunity to the importer to meet the allegations contained in show cause notice, the Adjudicating Officer is to pass an Order-in-Original deciding the case stated in the show cause notice. He pointed out that against the order of the Adjudicating Authority there is a provision for appeal before the Customs, Excise and Service Tax Appellate Tribunal (for short, 'CESTAT'). Against the order of the CESTAT, appeal is provided to the Supreme Court. He further submitted that the Authority and Tribunal are the fact finding authorities, which are supposed to take evidence/material on record and arrive at a finding on that basis. Mr. Rao, in this backdrop, submitted that not only this procedure was sidelined thereby causing great prejudice to the appellant, even otherwise, the High Court, while exercising its extraordinary writ jurisdiction under Article 226 of the Constitution, was not competent to decide the disputed questions of facts.
>
> (ii) Mr. Rao also impressed upon the fact that it was not open to the Department now to contend that the machine in question was incapable of producing 36,000 copies per hour and have the matter adjudicated when by this time the matter had become time barred. In this behalf, it was pointed out that in the writ petition filed by the appellant, there was no order restraining the respondents from issuing show cause notice under Section 28 of the Act and to proceed with the process of adjudication. Therefore, it was open to the customs authorities to invoke the said machinery under the Act. However, it was not done, which resulted in accruing valuable right in favour of the appellant. The learned counsel, thus, insisted that when the customs authorities were precluded from taking any action against the appellant because of embargo of limitation coming in their way, the High Court was equally incompetent to decide the said issue on merit and passing the liability upon the appellant in respect of time barred claim.

(iii) Another submission of Mr. Rao was that the writ petition was filed I The year 1988 in which interim order was granted in favour of the appellant. The High Court was forced to pass such an order directing release of the machine to the appellant when the authorities failed to get the machine inspected to find out the potential output of the said machine. Therefore, the Department allowed the chance to be slipped away to verify this fact on which the entire decision depended, and benefit thereof should have been given to the appellant as it was not possible to ascertain this fact after 14 years. In any case, it was argued that even the High Court before deciding the issue did not go into this aspect.

(iv) The last submission of Mr. Rao was on merits of the case emphasising that the High Court was merely influenced by the leaflets containing the literature about the machine and did not appreciate other material produced by the appellant, including the clarifications furnished by the manufacturer itself stating that advance version of the machine, with modification, was manufactured and supplied to the appellant and insofar as machine in question is concerned it had the printing capacity of 36,000 copies per hour. He, thus, submitted that even on merits, the findings of the High Court were coerced."

12. Mr. A.K. Panda, learned senior counsel appearing for the Revenue, per contra, refuted the aforesaid submissions forcefully. He put it emphatically that it did not behove well on the part of the appellant to now question the jurisdiction and competence of the High Court to go into the issue when the High Court was requested and persuaded by the appellant itself to decide the issue, as is reflected in the impugned judgment itself. He, thus, argued that the appellant was estopped from raising such an issue when the appellant itself invited the judgment on merits. According to Mr. Panda, this fact would also negate the contention of the appellant predicated on limitation. His submission in this behalf was that the appellant had itself raised this issue in the High Court in its petition which was pending adjudication. That was a reason that the Revenue authorities did not initiate any action as per the adjudicatory mechanism provided in the Act. Therefore, the appellant was not entitled to rake up the issue of limitation as well. On merits, the learned senior counsel submitted that once the High Court was invited to decide the issue on the basis of material that was placed on record by both the sides, the High Court had looked into the said material in its entirety and has found that the machine in question imported by the appellant does not meet the requirement of Notification No. 114/80-CUS as its output is only 25,000 copies per hour which is less than 30,000 copies that is needed to avail the benefit of the Notification. He, therefore, pleaded for the dismissal of the appeal.

13. We have considered the respective submissions of the learned counsel for the parties on either side with reference to the record. In a matter like this, it is necessary in the first instance to take note of the scope of the writ petition that was filed by the appellant in the High Court which is dismissed by the judgment impugned. A copy of the said judgment is placed on record and a perusal thereof would show that the appellant contested and disputed the position taken by the Department that the imported machine did not fulfill the aforesaid

requirement of exemption Notification No. 114/80-SC. The appellant enclosed copies of various documents procured from the manufacturer and others in support of its submission on the basis of which it was claimed that the appellant was able to establish that the speed of the imported printing machine was 36,000 copies per hour. On that basis, contention raised in the writ petition was that action of the Department in not allowing the appellant to clear the machine was illegal. The appellant also alleged failure and refusal on the part of the customs authorities in not permitting the appellant to effect clearance for an inordinately long period of time after the machine was landed. On the basis of these pleadings, following main relief was claimed in the prayer clause:

> "The petitioner, therefore, prays:
>
> (a) For a declaration that the petitioner is in law entitled to import and clear the said printing machine covered by the said Bill of Entry for Home Consumption (Exhibit 'A' hereto) as an Actual User under the Open General Licence;"

14. Another prayer was made to permit the appellant to clear the said imported Harris Web Printing Machine and to issue a detention certificate to the appellant in respect of the said machine, covering the entire period from importation thereof upto the time the same is cleared by the appellant. In addition, interim prayer for immediate clearance of the machine by the appellant and issuance of detention certificate were also made pending the hearing and final disposal of the writ petition.

15. As mentioned above, this interim prayer was allowed by the High Court. However, the writ petition was still kept pending for the obvious reason that the appellant had sought the main relief of declaration that it was, in law, entitled to import and clear the said machine as the same was covered by the Bill of Entry for Home Consumption, as filed, as an actual user under OGL. Thus, the appellant had raised the dispute in the said writ petition on merits as well.

16. No doubt, when the High Court passed the interim order in favour of the appellant, the High Court could dispose of the writ petition with the observation that the aforesaid issue involved on merit can be gone into by the appropriate authority by putting the machinery of adjudication in motion via Section 28 route. For some reason, that was not done and it was more so as the appellant had itself prayed for declaration to this effect in the writ petition, which means it called upon the High Court to decide this issue.

17. In the aforesaid scenario, when the writ petition was pending, wherein this issue was raised, probably for this reason the Department also stayed its hands off. No doubt, there was no stay of adjudication proceedings and the competent authority could go ahead with the adjudication proceedings. However, if there was a show cause notice in the year 2002, whether it would have been time barred or not is not even required to be gone into. Such a guess game is not needed because of one simple reason. When the writ petition came up for final hearing in the year 2002, it is the appellant who is responsible for inviting the decision on merits. Even at that stage, the appellant could have simply withdrawn the writ petition as

with the passing of interim order it had got the printing machine cleared from the customs authorities and was using the same. However, it did not choose to do so. Had it done so, and thereafter received show cause notice under Section 28 of the Act, it could have defended that notice raising the plea of limitation as well. Only then question would have arisen as to whether the period during which the writ petition remained pending had to be excluded or not, for the purpose of computing limitation period. However, for the reasons best known to the appellant, the appellant argued exactly the opposite of the submissions made before us by Mr. Rao. We point out, at the cost of repetition, that it was at the instance of the appellant that this issue was taken up for hearing. We reproduce below the following discussion in the impugned judgment touching upon this aspect:

> "The long pendency of this petition for 14 years and the peculiar stand taken by the petitioners prevented us from remitting this matter to the adjudicating authorities under the Act to determine the disputed questions of fact. Left with no other alternative, we are constrained to decide this matter on merits on appreciation of evidence for the following reasons:

18. Then, as many as seven reasons were given by the High Court which compelled the High Court to decide the issue on merits. After noting those reasons, the High Court recorded as follows:

"In the aforesaid circumstances, though we initially thought of getting the issue adjudicated through the adjudicating authority by directing the respondents to issue show cause notice under Section 11-A [(sic); Section 28] of the Act, so as to afford reasonable opportunity to both parties to place their case before the adjudicating authority leaving on merits all the rival contentions open, the petitioners vehemently opposed this approach and placed reliance on the judgment of the Apex Court in the case of *Gotak Patel Volkart Ltd. Vs. Collector of Central Excise, Belgaon reported in*[1] so as to contend that show cause notice cannot be issued beyond six months under Section 11-A [(sic); Section 28] of the Act, and that after 14 years petitions cannot be asked to face the adjudication process. This is how the petitioners pressed for the decision on merits."

19. It shows that High Court was not oblivious of Section 28 of the Act and that determination of such an issue is to be more appropriately in the hands of Adjudicating Authority. It also appears that High Court might have disposed of the writ petition with liberty to the Adjudicating Authority to initiate proceedings under Section 28 of the Act. Curiously, such an action was not taken at the instance of the appellant which contended otherwise, as is clear from the following narration:

> "The learned counsel for the petitioners contended that this Court would not be justified in dismissing the petition as not maintainable on the grounds of availability of alternate remedy especially when the petition was entertained, kept pending for 14 years and when it is being heard on merits. He also raised a contention that the availability of alternate remedy does not affect the jurisdiction of the Court to issue writ. He also brought to our notice judgment of this Court in the case of *Nehawas*

Steel Traders Vs. Union of India[2] The petitioners therein were permitted to clear the assignment on certain terms under interim order which specifically provided that the respondents would be at liberty to serve show cause notice and pass appropriate adjudication order. The respondents having failed to take any follow up action for more than 10 years, this Court in that case had observed that no fruitful purpose would be served by permitting the respondents to commence adjudication proceedings hereinafter. In this view of the matter, submission was made to decide this petition on its own merits on the available material."

20. After inviting the High Court to decide the matter on merits and finding that the decision has gone against the appellant, contrary argument is nothing but a desperate attempt to chicken out of the situation which is appellant's own creation. This kind of somersault, taking completely reverse stand before us, cannot be countenanced. We, therefore, reject the contention of the appellant that High Court was not competent to decide the issue in exercise of its writ jurisdiction.

21. The position would have been different if it was a case of inherent lack of jurisdiction. That is not so. The powers of the High Court under Article 226 of the Constitution, while issuing appropriate writs, are very wide. Even if there is an alternate remedy that may not preclude the High Court from exercising the jurisdiction in a particular case. In the face of alternate statutory remedies, when the High Court declines to exercise the jurisdiction under Article 226 of the Constitution, it is a self imposed restriction only. In the instant case, what is pertinent is that it is the appellant which not only made a prayer in the writ petition for deciding the issue in question, even at the time of hearing (as noted above), it is the appellant which pressed for the decision with the submission that existence of alternate remedy should not deter the Court to render the decision on merits. In such a situation, the objection, if any, to the maintainability of the writ petition could have been taken by the respondent and it does not behove the appellant to raise this objection in the present appeal after pleading in the High Court that the matter be decided on merits.

22. For the same reason, the argument that the issue involved disputed question of fact is also not available. Order of the High Court clearly records that the appellant had requested the High Court to decide the issue on the basis of material on record.

23. We are not impressed with the argument of the appellant that the matter had become time barred. In fact, reasons for rejecting this argument have already surfaced while discussing the preceding submission. However, we would like to recapitulate them with focus on the issue at hand which is being addressed now.

24. The issue as to whether the import of Web Printing Machine was covered by Notification No. 114/80-CUS dated 19.06.1980 was pending in the High Court in respect of which petition was filed by the appellant itself way back in the year 1988 raising this issue. The appellant even got the interim order in its favour. When the writ petition came up for final hearing, the appellant impressed the Court to decide the said issue. In such a situation, question of limitation does not arise inasmuch as it is not a case where proceedings under

Section 28 of the Act were taken out giving any show cause notice under the said section. The question of limitation would have arisen only in case the respondent had issued show cause notice under Section 28 of the Act. Further, it is not that the High Court was oblivious of the provisions of Section 28. That is categorically recorded in the impugned judgment. Curiously, it is the appellant who, pointing this very reason, invited the decision on merits. Now, therefore, issue of limitation is not even open for the appellant to urge before us.

25. Other argumentts of Mr. Rao were on the merits of the case. Now we shall advert to those submissions.

26. As pointed out above, the case of the appellant is that the High Court has given undue weightage to the two leaflets as against the other material, including the certificate of the manufacturer clearly stating that the machine in question which was supplied to the appellant was an upgraded version capable of producing 36,000 prints per hour. However, from the reading of the impugned judgment, it becomes clear that each and every document which was filed and relied upon by the appellant has been discussed. The High Court observed that insofar as the documents of the appellant are concerned, they can conveniently be divided into parts. One part of the document consists of two leaflets furnishing technical data and description of the printing machine in question along with Bill of Entry and certificate showing date 08.02.1987 issued by the manufacturer of the machine M/s. Harris Graphics Corporation, USA. The other part of the document is nothing but a correspondence made by the appellant, its Clearing and Holding Agent and one M/s. S.L. Kulkarni & Co., which deals in printing machinery, projecting themselves to be the Indian agent of M/s. Harris Graphics Corporation, USA. The said second part of the documents can well be described as self serving evidence. Likewise, documents produced by the respondent were also divided in two parts. One part represents the document in the nature of Inspection Report based on examination of the entire consignment which was completed on 28.09.1988, while complying with the part of the directions issued by the High Court by order dated 02.09.1988, and the other part of documents is basically the reproduction of documents supplied by the appellant itself.

27. Thereafter, the High Court formulated the question as to whether the appellant had discharged its burden to prove that the subject printing machine imported by it under OGL was having an output of more than 35,000 copies per hour so as to entitle it to claim exemption under Notification No. 114/80-CUS, as amended from time to time. On that touchstone, the High Court has examined, appreciated and analyzed all the documents produced by both the parties. This detailed analysis runs into several pages. It is not necessary for us to go through this evidence and discuss the same as we find that the ultimate conclusion drawn by the High Court in this behalf is correct and plausible. We would, however, like to reproduce the following observations of the High Court wherein the certificates of manufacturer produced by the appellant vis-a-vis the leaflets giving technical details of the machine which were found along with the machine, are discussed:

> "38. The bare reading of the above certificate gives a picture that Model-15-H is with JF-25, JF-4, JF-10. If this certificate is read in the light of leaflets referred to

hereinabove, the relevant portions of which are extracted in the above par, it would be clear that the manufacturer wants to suggest that the folder JF-25-B has been upgraded to JF-25, with additional folders JF-4 and JF-10. Firstly, as already stated, the leaflets do not support this picture sought to be projected through the above certificate dated 3rd June, 1986. Secondly, had it been so, the subsequent leaflet alleged to be a catalogue of modified model would not have been omitted to mention this special feature of the upgraded model. It does not support the assertion sought to be made in the certificate in question. No reference is to be found to the additional folders styled as JF-4 and JF-10 in the said literate. Thirdly, the inspection report of the machine furnished by the Customs based on the inspection completed before 28th September, 1988 shows that the folder base of the machine in question was found as JF-25-B model. Had the folder been upgraded from JF-125-Bto JF-25 then the machine in question ought to have been with modified folder JF-25 and could not have been with folder base JF-25-B. Fourthly, other modified folders JF-4 and JF-10 are not to be found in the inspection note, obviously, for want of such machine or model with such modified folders. This inspection note has not been objected to by the petitioners. Thus, it can be safely treated as undisputed document. One more shade of the same evidence needs further appreciation. The letter of M/s S.L. Kulkarni & Co. dated 21st January 1988 (Exh. J) makes out a case that the original model V-15-H exported to India has been modified to run at 36,000 speed. The modification pertains to design changes in folder of the machine to run at that speed and to take additional load due to higher speed, the horse power of the machine has also been suitably modified is the case sought to be made out. We have already observed and recorded our finding that no evidence is available on record to establish modifications of the folder base of the machine or model in question. If this be our finding, then the logical conclusion is that no modifications have been made in the folder base of the machine or model in question. If that be so, then in absence of modification of the folder base, machine cannot be said to be capable of taking additional load. Therefore, it cannot given higher speed so as to given higher production to the extent of more than 35,000 copies per hour. The certificate and the letter of M/s S.L. Kulkarni & Co., therefore, cannot be relied upon. The same cannot be given any credence. The said evidence, for the aforesaid reasons, is not acceptable to us.

39. One more aspect of the above certificate needs to be noticed. This certificate of the manufacturer is dated 3rd June 1986. The contract to purchase machine in question has been shown to be dated 24th March, 1987. The copy of the contract dated 24th March, 1987 as already observed hereinabove has not been produced on record. One more document styled as agreement dated 24th April 1986 (Exh. G) is produced on record. Both these documents are prior to the date of formation of contract i.e. 24th March, 1987. No evidence is on record to connect these documents with the subject contract dated 24th March, 1987 or with the machine in question. It is not known whether the same agreement culminated in the final contract dated 24th March, 1987 or the same was modified or a new contract has taken place. It is settled principle of law of contract that the document prior to formation of contract cannot be

taken into account to interpret or to understand the contract in question unless it is shown to be a part of the same contract or negotiation. Therefore, for want of material on record, the said documents cannot be treated as part of the same contract. Even otherwise the time gap between the alleged agreement dated 24th April 1986 (Exh. G) and contract (dated 24th March, 1987) is such that it was all the mere necessary to prove that the said document was the part of the subsequently concluded contract."

28. We are in agreement with the view taken by the High Court on merits, having regard to the fact that burden of proof was on the appellant to establish that the machine imported by it generates more than 35,000 composite impressions or copies per hour. The appellant has failed to do so.

29. As a result, the appeal fails and is hereby dismissed with no order as to costs.

Judgment Referred.

[1]*(1987) 28 ELT 0053 (SC)*
[2]*(1993) 68 ELT 721 (Bom.)*