

# **BOMBAY HIGH COURT**

M.S. Shawhney

Vs.

Sylvania

O.C.J. Appeal No. 60 of 1970

(R.M. Kantawala, CJ and Tulzapurkar, J.)

14/15.01.1975

## **JUDGMENT**

### **R.M. Kantawala, C.J.**

1. The Asstt. Collector of Customs and the Union of India have filed this appeal against the judgment and order of Kania J. whereby he set aside the order passed by the Asstt. Collector of Customs, Bombay on December 8, 1967 requiring the respondents to pay a sum of ₹ 1,40,558.75 by way of duty for import of certain goods. The respondents are a company inter alia carrying on business as manufacturers, importers and dealers in electrical goods, including fluorescent lamps and tubing. By a notification dated September 3, 1966 issued by the Government of India (Ministry of Finance) Department of Revenue and Insurance, in exercise of the powers conferred by Section 25(1) of the Customs Act, 1962 (Act 52 of 1962) (hereinafter referred to as "the Act") the Central Government exempted glass tubes used in the manufacture of fluorescent lamps, when imported into India, from the whole of that portion of duty of customs leviable thereon which is specified in the first schedule to the Indian Tariff Act, 1932. The exemption granted by this notification was to remain in force upto and inclusive of March 31, 1967.

2. Pursuant to an import license obtained by the respondents for import of glass tubing on or about February 2, 1967 the respondents placed an order with Sylvania International of New York, U.S.A. for the import of glass tubing of three different varieties. viz., (1) end formed fluorescent tubes, (2) flare tubing and (3) exhaust tubing. The said goods were shipped per s.s. Steel Fabricator which arrived at the port of Bombay on March 29, 1967. On the same date an import manifest of the said vessel was duly filed with the Customs Authorities and the Customs authorities issued an order granting entry inward for the said vessel. A bill of entry in connection with the clearance of the said goods was presented by the respondents on April 27, 1967 and the goods were actually cleared on June 6, 1967. At the time when the goods were cleared the Customs authorities accepted the contention of the respondents that in view of the exemption

granted by the said notification no duty of customs was livable on the said goods. Later on, on September 23, 1967 the Assistant Collector of Customs, issued a show cause notice to the respondents stating that customs duty amounting to ₹ 1,40,558.75 was due from them as the said duty was not levied at the time of clearance of the consignment. By the said notice the respondents were called upon to explain why the amount specified therein should not be recovered from them. Reply to the show cause notice was given by the respondents by their letters, dated October 14, 1967 and November 24, 1967. Even a personal hearing was granted to them on November 4, 1967. Ultimately by an order passed by the Asstt. Collector of Customs, Bombay on December 8, 1967 the respondents were called upon to pay the sum of ₹ 1,40,558.75 as and by way of duty in respect of clearance of the said goods. By the said order the Asstt. Collector of Customs stated that under Section 15 of the Act customs duty at the rate leviable on April 27, 1967 being the date when the bill of entry was presented, was leviable on the said goods. The respondents did not prefer any appeal against the said order to the Appellate Collector of Customs, Bombay, but by their attorney's letter, dated December 19, 1967 called upon the Asstt. Collector of Customs to withdraw and/or cancel the said order and/or the said demand for payment of duty. On December 20, 1967 the respondents filed a petition under Article 226 of the Constitution inter alia for a writ of certiorari to quash the said order dated December 8, 1967.

3. When the petition came up for hearing before the trial Court the Appellants urged a preliminary contention that as an alternative efficacious remedy by way of an appeal was provided under the Act, the Court in exercise of its discretion ought not to entertain the petition under Article 226 of the Constitution. On merits it was sought to be contended on behalf of the appellants that the taxable event occurred not when the goods entered the territorial waters of India but only when the bill of entry was presented or later. It was submitted on behalf of the Appellants that Section 12 of the Act was not the only charging section but it has to be read along with Section 15 which was also a part of the charging section. These contentions were rejected, the preliminary contention urged on behalf of the appellants was rejected by the Learned Judge, on the ground that when a fundamental right of a party is infringed a preliminary objection as to existence of an adequate alternative remedy cannot be accepted. He also further held that even though under Section 129 of the Act power was given to the appellate authority to dispense with deposit of duty demanded either wholly or in part such provision was not equally efficacious or adequate alternative remedy available to the respondents. So far as the merits of the controversy were concerned, he held that the taxable event is the import of goods within the customs barriers; that the customs duties are charged on the goods on their being imported into the country; that the liability to pay customs duty is attracted when the goods are brought into the territorial waters of India and as the goods entered the territorial waters of India before March 31, 1967, they were exempt from payment of the customs duty. In view of these findings, the impugned order passed by the Asstt. Collector of Customs, Bombay was quashed by the learned Judge. The appellants have filed this appeal against this order of the learned Judge. 3. Mr. Setalwad, on behalf of the

appellants, has urged the very same contentions that were urged before that trial court. A preliminary contention was urged by him that the issue of a writ under Article 226 of the Constitution is a matter of discretion with the High Court; that such discretion ought not to be exercised in favour of the respondents in view of the fact that they have failed to avail themselves of the alternative remedy by way of an appeal as provided under Section 128 of the Act. On merits he contended that the taxable event for the purpose of levying customs duty occurs only when the bill of entry is presented or later but not when the goods enter the territorial waters of India.

4. It is well settled in view of more than one decision of the Supreme Court that when fundamental right of a party is infringed the High Court will not refuse to exercise its jurisdiction under Article 226 on the ground that an alternative adequate and efficacious remedy was available. See *Himatlal v. State of Madhya Pradesh*<sup>1</sup>, and *Customs Collector v. Shantilal and Co*<sup>2</sup>. As in the present case calling upon the respondents to pay the sum of ₹ 1,40,558.75 pursuant to the order passed by the Asstt. Collector of Customs is likely to affect the fundamental right of the respondents, this Court will not hesitate to exercise its jurisdiction under Article 226 if a proper case is made out.

5. The material questions that arise for consideration in this appeal are, when does a taxable event occur which will entitle the customs authorities to levy customs duty as provided in the Act ? Does this event occur when the goods enter the territorial waters of India or does it occur only when the bill of entry as provided in Section 46 of the Act is presented or thereafter ? In order to consider these questions it is necessary to see the scheme of the various provisions of the Act. Chapter V of the Act deals with levy of and exemption from customs duties. Section 12 deals with dutiable goods. Sub-section (1) thereof provides that excepts as otherwise provided in the Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Indian Tariff Act, 1934, or any other law for the time being in force, on goods imported into or exported from India. The learned Judge has taken the view that this is a charging section. The argument of Mr. Setalvad on behalf of the appellants is that this is not the only charging section but the chargeability is also contained in other provisions contained in Chapter V. Reference was made by him to the provisions of Section 15 which relate to the date for determination of rate of duty and tariff valuation of imported goods. The provisions of Section 115(1) are as under :-

"15(1) The rate of duty, rate of exchange and tariff valuation, if any, applicable to any imported goods, shall be rate of valuation in force :-

(a) in the case of goods entered for home consumption under Section 46 on the date of which a bill of entry in respect of such goods is presented under that section.

(b) in the case of the goods cleared from a warehouse under Section 68 on the date on which the goods are actually removed from the warehouse.

(c) in the case of any other goods, on the date of payment of duty :

Provided that if a bill of entry has been presented before the date of entry inwards of the vessel by which the goods are imported, the bill of entry shall be deemed to have been presented on the date of such entry inwards."

6. Relying upon this section the contention of Mr. Setalvad was that as in the present case the goods were imported for home consumption, the rate of duty has to be determined having regard to the rate prevailing, on the date on which a bill of entry in respect of such goods was presented under Section 46 of the Act. His submission was that as under this section the rate had to be determined having regard to the date on which the bill of entry was presented the chargeability would also arise only when such bill of entry was presented. Section 25 of the Act confers power upon the Central Government to grant exemption from duty. Sub-section (1) thereof provides that if the Central Government is

<sup>1</sup>1954 AIR. SC. 403

<sup>2</sup>1966 AIR. SC. 197

satisfied that it is necessary in the public interest so to do, if may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification goods of any specified description from the whole or any part of duty of customs leviable thereon. As the exemption notification is issued in exercise of the powers conferred by sub-section (1) of Section 25 it is unnecessary to refer to the provisions of sub-section (2) thereof.

7. In exercise of the powers conferred by Section 25(1) of the Act on September 3, 1966, the Government of India issued a notification whereby it is stated that the Central Government being satisfied that it is necessary in the public interests so to do, hereby exempts glass tubes used in the manufacture of fluorescent lamps, when imported into India, from the whole of that portion of duty of customs leviable thereon which is specified in the first schedule to the Indian Tariff Act, 1932 (XXXII of 1934). This notification was to be in force upto and inclusive of March 31, 1967. Section 25(1) of the Act empowers the Central Government to grant exemption generally either absolutely or subject to such conditions as may be specified in the notification. By this particular exemption notification, exemption is granted on respect of the whole of the portion of duty of customs leviable thereon which is specified in the first schedule to the Indian Tariff Act, 1932 and the only limitation prescribed is that glass tubes used in the manufacture of fluorescent lamps will be eligible for such exemption when imported into India. Thus the exemption in respect of glass tubes will be available only when they are imported into India. The word "import" is defined in Section 2(23) and under section unless the context otherwise requires "import" with its grammatical variations and cognate expressions means bringing into India from a place outside India. The word "India" is defined in Section 2(27). The definition is an inclusive definition and it states that "India" includes the territorial waters of India. Thus the combined effect of the words "import" and "India" in these two sub-sections of Section 2 is that import takes place when goods are brought into the territorial waters of India from a place outside India. As pointed out by the Supreme Court *In Re: The Sea Customs Act*<sup>3</sup> In the case of duties of customs including export duties though they are levied with reference to goods, the taxable event

is either the import of goods within the customs barriers or their export outside the customs barriers. In the *Gopal Mayaji v. T. C. Sheth*<sup>4</sup>, Desai J. points out :-

"It is apparent to me that the act of importation would be completed at the period of time when the goods cross the customs barriers. The act of importation contrary to restriction and prohibition would be complete once the customs barriers are crossed. It is at that moment of time that the restriction and prohibition is violated. Whatever is transacted with reference to the goods subsequent to that period of time would be dealing with smuggled goods and/or goods imported contrary to prohibition and restriction. That dealing cannot be an act of importation into India contrary to prohibition and restriction."

8. The ratio of this decision has been approved by the Supreme Court in *Radha Krishnan v. Union of India*<sup>5</sup> In view of this settled position in law the import of the glass tubes which are mentioned in the exemption notification was completed when those glass tubes crossed the customs barriers. It is disputed that the goods imported by

<sup>3</sup>(1878) Section 20(2) 1963 AIR. SC. 1760

<sup>5</sup>1965 AIR. SC. 1072

<sup>4</sup>(1959) 62 Bom. LR. 486

the respondents crossed the customs barriers prior to March 31, 1967, upto which date the exemption notification was to be operative. In that view of the matter, having regard to the provisions of Section 25(1) of the Act read with the exemption notification the goods imported by the respondent per s.s. "Steel Fabricator" were exempted from the duty of customs, from the payment of the whole of that portion of the duty of customs leviable thereon which is specified in the first schedule to the Indian Tariff Act, 1934. The respondents were, therefore, rightly entitled to exemption from payment of customs duty and the learned Judge was right in taking the view that the Asstt. Collector of Customs was in error when he made a demand calling upon the respondents to pay the duty amounting to ₹ 1,40,558.75.

9. It is necessary to examine the scheme of the Act as regards the chargeability in respect of customs duty. It is well settled that a clear distinction exists between the concept of chargeability and the concept of assessment or quantification of the amount payable by way of customs duty. It will be useful in this connection to refer to the observations of Their Lordships of the Privy Council in *Wallace Brothers and Co. Ltd. v. Commissioner of Income Tax*<sup>6</sup>, P.C. have been approved by the Supreme Court in *Kesoram Industries and Cotton Mills Ltd. v. Commissioner of Wealth Tax*<sup>7</sup> Those observations run as follows :-

"..... the rate of tax for the year of assessment may be fixed after the close of the previous year and the assessment will necessarily be made after the close of that year. But the liability to tax arises by virtue of the charging section along, and it arises not later than the close of the previous year, though quantification of the amount payable is postponed."

These observations fully justify the clear distinction that exists inter alia between chargeability in

respect of a tax or a duty and the quantification of the amount payable in respect thereof. The only charging section in respect of levy of customs duty is Section 12(1). As provided in that section duties of customs shall be levied at such rates as may be specified under the Indian Tariff Act, 1934, or any other law for the time being in force, on goods imported into, or exported from India. Thus the levy of customs duty either in respect of import or export of goods is under this section and such levy is subject to other provisions of the Act or any other law for the time being in force. The chargeability in respect of levy of customs duty arises when the goods are imported into India, i.e. when they cross the customs barriers as stated above. That event in the present case took place much prior to March 31, 1967 when the exemption notification was operative. Such chargeability in respect of levy of customs duty ought not to be confused with quantification of the amount or assessment thereof as provided under the scheme of the Act. Section 15 of the Act specifies the date for determination of rate of duty and tariff valuation of goods imported. In case of goods entered for home consumption under Section 46 the rate of duty applicable to any imported goods shall be the rate in force on the date on which a bill of entry in respect of such goods is presented under that section. The assessment has to be made as provided in Section 17 of the Act. What Sections 15 and 17 provide is to determine the rate at which duty is leviable and to quantify the amount payable by way of duty, but this is entirely different from 'chargeability' under the

<sup>6</sup>(1948) 16 ITR. 240, SC. 50 Bom. LR. 482

<sup>7</sup>(1965) 59 ITR. 767

Act. Chargeability arises simply by reason of Section 12(1) of the Act and that takes place only when the goods are imported into India i.e. into the territorial waters of India.

10. The question then remains to be considered whether there is any merit in the contention urged by Mr. Setalvad that the taxable event occurs only when the bill of entry is presented or thereafter. In support of this contention our attention was invited to the various sections contained in Chapter VI, VII and VIII which deal with different topics. Chapter VI contains provisions relating to conveyances carrying imported or exported goods. Section 29(1) deals with arrival of vessels and air crafts in India and it provides that the person in charge of a vessel or an aircraft entering India from any place outside India shall not cause or permit the vessel or aircraft to call or land (a) for the first time after arrival in India or (b) at any time while it is carrying passengers or cargo brought in that vessel or aircraft, at any place other than a customs port or a customs airport as the case may be. The effect of these provisions is that a vessel or an aircraft carrying passengers or cargo cannot call or land at a place other than customs port or customs airport. Section 30(1) provides for delivery of import manifest. Under that section the person-in-charge of a conveyance carrying imported goods shall, within twenty-four hours after arrival thereof at a customs station, deliver to the proper officer, in the case of a vessel or aircraft, an import manifest, and in the case of a vehicle, an import report, in the prescribed form. Thus the provision lays down the things required to be done by the person-in-charge of a conveyance after its arrival when carrying imported goods. Section 31 lays down that imported goods shall not be unloaded from vessel until to entry inwards is granted. Such restriction is evident if regard be had to the provisions of sub-section (1) thereof. Under that sub-section the master of a vessel shall

not permit the unloading of any imported goods until an order has been given by the proper officer granting entry inwards of such vessel. These provisions merely relate to unloading of imported goods and the very expression "unloading of any imported goods" pre-supposes that the goods are already imported before they are unloaded. Chapter II of the Act deals with clearance of imported goods and export goods. In this Chapter reference is made to the provisions of Sections 45, 46 and 47. Section 45 imposes restrictions on custody and removal of imported goods. Under that section, save as otherwise provided in any law for the time being in force, all imported goods unloaded in a customs area shall remain in the custody of such person as may be approved by the Collector of Customs until they are cleared for home consumption or are warehoused or are transhipped in accordance with the provisions of Chapter III. Section 46 deals with entry of goods on importation. The very marginal note makes it clear that entry of goods can always take place after the importation is complete. Section 47 deals with the clearance of goods for home consumption. Clearance of imported goods can take place only after the importation is complete. Chapter VIII deals with goods in transit. There is nothing in any of the provisions to indicate that the chargeability in respect of levy of customs duty is postponed until a bill of entry is presented. On the contrary, if such were the correct effect of the scheme of the Act an importer of goods can escape from levy of customs duty by importing them at a place other than a customs port or a customs airport. That such a thing is not conceivable is quite clear if regard be had to the provisions of Section 125(2) of the Act. That section is contained in Chapter XIV which deals with confiscation of goods and conveyances and imposition of penalties. In the scheme of the various sections in this Chapter, Section 125 permits an option to be exercised by a party to pay fine in lieu of confiscation. The provisions of sub-section (2) of Section 125 provide that for the removal of doubts it is hereby declared that any fine in lieu of confiscation of goods imposed under sub-section (1) shall be in addition to any duty and charges payable in respect of such goods. Thus it is amply clear that a person who imports goods and lands them at a place other than a customs port or a customs airport in contravention of the provisions of the Section 29(1) will be liable to pay customs duty as provided in Section 12(1) even though he may neither present a bill of entry nor comply with the various provisions of the Act. Thus it is amply clear that it is impossible to accept the view that the taxable event in respect of levy of customs duty takes place only when a bill of entry is presented or thereafter. If such were the correct view in a large number of cases person may import goods into India contrary to the provisions of the Act and escape from levy and payment of customs duty.

11. In our opinion, the learned Judge was right in taking the view that as in the present case the goods imported by the respondents, which were admittedly covered by the exemption notification, entered the territorial waters of India or crossed the customs barriers before March 31, 1967 being last date upto which the notification was operative, the respondents were not under an obligation to pay any customs duty. Thus the demand made by the Assistant Collector of Customs, Bombay, was unjustified and the impugned order has been rightly quashed by the learned Judge.

In the result, the appeal fails and is dismissed, with costs.

Appeal dismissed.

Solicitor for the appellants : V.B. Shastri.

Solicitors for the respondents : B. Munim and Co.