

**Rajendra Agarwal and ors. Vs. Cc(P)**

**Rajendra Agarwal and ors. Vs. Cc(P)**

**SooperKanoon Citation :** [sooperkanoon.com/11335](http://sooperkanoon.com/11335)

**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

**Decided On :** Jun-06-1997

**Reported in :** (1997)(71)LC812Tri(Mum.)bai

**Judge :** V T K.S., J S Murthy

**Appellant :** Rajendra Agarwal and ors.

**Respondent :** Cc(P)

**Judgement :**

1. These three appeals are filed M/s. Metec Asia Private Ltd. and Shri Rajendra Agarwal and M/s. Pawan Enterprises against the orders No.VIII(b) 10 (53)/Cus/95/637 dated 8.12.1995 passed by the Commissioner of Customs (Preventive) Mumbai, praying for setting aside the same, and for proper reliefs.

2. The facts of the case are there was a search of the Godown Premises are 101-A Sakharam Patil, Dalmill Compound, Bhiwandi on 18.3.1995 by the Officers of Marine & Preventive Wing, Customs (Preventive) on the information. It belonged to M/s. Pawan Enterprises. Nothing incriminating was found. Godown keeper Shri Anil Mishra, informed one more small godown across the road belongs to them. On search of it the copper wire bars, Antimony Ingots, and Metal Sheets were found. Both Anil Mishra and Dau Dayal Agarwal informed, that it was used always to store imported goods. They did not possess any licit documents covering the goods stored in the said Godown. The goods were detained and Godown was sealed for further investigations. In the course of investigation the statements of

M/s. Anil Mishra, Shri Surajmal Sunil Agarwal, Pawan Kumar Agarwal & Shri Rajendra Agarwal were recorded under Section 108 of the Customs Act. It transpired that Anil Mishra was a godown Supervisor and he received telephonic instructions from Shri Pawan Kumar Agarwal for storage and removal of goods. They have two godowns out of which one is always locked, where goods without Bills, DC's, Bills of Entry's were always stored and the goods detained on 18.3.1995 were of foreign origin including Antimony and no records are maintained for this purpose. He has written on a loose paper that the Antimony was received from one Rajendrababu around one and half months ago.

Surajbhai Sunil Agarwal looks after the accounts of M/s. Pawan Enterprises and M/s. Anand Enterprises, and for this purpose he meets Pawan Kumar Agarwal every Saturday, but had not met him between 12.3.1995 and 20.3.1995, and he was asked to meet him in the evening of 20th March, 1995. When so met he was handed over five loose papers to be handed over to Customs authorities, and asked to state that they were with him for accounting purpose. Shri Rajendra Agarwal of M/s.

Metec Asia Pvt. Ltd. owned Antimony Ingots which are received on 15.3.1995 without any delivery challan. Rajendra Kumar Agarwal was engaged in trading and importing of various non-ferrous metals, and has own godown, and some times stores in other godown. He had stored 1124 pcs. of Antimony in the godown of M/s, Pawan Enterprises, which is of Deshi remelted origin and not of foreign origin, and they were purchased legally against cash payments. The purity of imported Antimony should be 99.65% and purity of indigenous Antimony metal varies from 92 to 97%, Imported Antimony never contains Arsenic.

Antimony is not manufactured in India in organised sector, but manufactured in Calcutta, Rajasthan and Delhi in unorganised sector.

Lead batteries scrap contain Antimony. It is extracted by crude method of simple heating and melting. Nobody uses electrolytic process in India to achieve 99.6% purity. He has never imported nor purchased imported Antimony locally. Goods stored in the godown of M/s. Pawan Enterprises was legally purchased on 16.3.1995 and related documents will be produced.

3. Enquiries were made with M/s. The Standard Batteries Ltd., M/s.

Chloride Industries Ltd. and M/s. Indian Lead Ltd. They confirmed that the Antimony was not manufactured in India and whatever available is imported from China and Thailand. Since the metal is brittle, no makings would be available. Various samples of Antimony were tested.

Sample drawn from detained Antimony was also tested. It showed the purity of 93.4% and that of imported Antimony is 97.5%. So from the above, it appears that the say of Rajendra Agarwal regarding the purity of imported Antimony and indigenous Antimony is not correct. He failed to disclose the source of purchase of Antimony. The detained goods are seized on 2.6.1995 on the reasonable belief that it is illegally imported and as such is liable for confiscation. Show Cause Notice was issued on 14.6.1995 to the appellants to show cause as to why 1094 pcs.

of Antimony Ingots should be confiscated under Section 111(d), and penalty should not be imposed under Section 112 of the Customs Act, 1962. It was replied on 16.6.1995 by the Counsel, calling upon to produce the witnesses whose statements are recorded under Section 108 of the Customs Act, for Cross Examination. It is also contended that the cause of action and allegation against the appellants are very vague and cannot be replied, and there is lack of proper opportunity.

Section 111(d) is not applicable to the case where the goods are licensable and import is subject to it, and it should be in the negative list as per April, 1992 to March, 1997 Policy. Antimony can be imported freely under OGL. Section 123 to the Customs Act is not applicable. The Customs Authority has to prove the smuggled nature of goods. Burden will not shift to the party. Show Cause Notice is issued only to create and justify the adjudication proceedings and it has to be withdrawn. When once goods enter Indian territory and merge with the landmass, it ceases to be imported goods Antimony cannot be called as smuggled goods. The enquiry at Pawan Enterprises is a fishing one.

Other goods were also stored which are covered under the adjudication proceedings. Show Cause Notice is issued to the owners of those goods.

Seizure of those goods is illegal. There was no reasonable apprehension that they are smuggled goods under Section 110 of the Customs Act.

Proceedings were bad in law as seizure was illegal. The expert opinion of three Independent agency shows percentage of purity of imported Antimony Metal is minimum 99.65% and maximum 99.85%. As per para 10 of the Show Cause Notice the test report of Dy. Chief Chemist shows seized Antimony is 93.45% Pure. It is not smuggled goods at all under Section 111(d) of the Customs Act. It cannot be invoked. The seized Antimony was purchased from the local market, retrieved/recovered by the small operators, and deal with it. Small operators buy useless storage car batteries and follow normal melting procedure and recover Antimony metal. They also buy other such metal and successfully extract Antimony metal and ingots are made. Purity of it is below minimum required for virgin Antimony metal, usually imported without any bill and regular place of trade and documents. Show Cause Notice is vague. It is full of suppositions, surmises and conjectors. The goods were chemically proved to be of Indian origin. Consequently contending that the Arsenic content makes any difference for deciphering for that matter comparing seized goods with imported goods. It is a Town seizure and the goods are of Indian origin. Customs Department fails to show that it is a imported one. Onus cannot be shifted, under Section 106 of the Indian Evidence Act, it does not lay down any such Principle. Section 123 of the Customs Act prevails over it. The goods are not liable for confiscation and no penalty can be imposed and seizure has to be withdrawn. After the personal hearing on 13.7.1995 and 8.12.1995 attended by the parties and Counsel, the impugned order was passed on 8.12.1995. Hence these appeals.

4. The Ld. Counsel for the appellant has contended that there is no dispute that Antimony is in OGL. It is free under ITC of 1992-97.

Absolute confiscation cannot be resorted to. It is not notified under Section 123 of the Customs Act, Section 106 of the Indian Evidence Act cannot be invoked. Onus is on the Department to prove the illicit nature, when goods are not covered under

Section 123 of Customs Act; Bon-Ton Sight v. Collector of Customs, and 5. The Ld. DR Shri Gurdeep Singh has contended that Antimony is in the form of ingots. There is no documentary evidence regarding the source of acquisition. In the course of the enquiry, appellant have not given any single instance of purchase and source and acquisition. 1983 ELT 1486 (SC) : 1974 Dec Cen-Cus 10 C (SC) : ECR C Cus 902 SC is cited.

When Customs authorities inform the result of the enquiry, which goes against the claim of the appellant, the burden is shifted by falsifying the claim of the party. The Bombay High Court decision should be seen in the light of the above. OGL ipso facto does not mean goods should not be confiscated under Section 111(d) of the Customs Act. Invoking of the said provisions covers number of prohibitions to the goods to be landed in approved Customs area, clearance as per the procedure and on payment of duty. In the precedent of decisions of the bench there was evidence of acquisition of goods and it's source. It is not so in this case, so factually distinguishable. Computer sheet, cash payment for purchasers are not substantiated. The Departmental enquiry under letters at pages 39 to 41, 44 shows the Existence of Cottage Industries. Section 123 may not apply. The Department has collected Evidence and produced it, appellants case in not correct. It is for the appellant to disclose truth and burden is on him. The Department has discharged its burden. Goods have to be duty paid or else the confiscation follows.

6. In the course of the reply, it is urged that the other prohibition under Section 111(d) of the Customs Act, is not invoked in the Show Cause Notice. No confiscation is permissible and the goods involved is free under ITC. The Department has not discharged the burden at the initial stage.

7. Points for consideration is whether the Antimony Metal seized in this case is a smuggled or imported goods, liable to absolute confiscation, and the owner of it is liable to penalty? Our finding thereon is in the negative.

8. Perused the reply to the Show Cause Notice, impugned order and letters and appeal memorandum and Sections 111, Section 112 and Section 123 of the Customs Act, 1962 and also the ruling cited, and Export and Import Policy for the

period from 1.4.1992 to 31.3.1997 and Chapter 78 of the Policy under the heading Lead and Articles thereof for the period under ITC (HS) classification of Import Terms, under 7801.91 - containing by weight Antimony as the Principal other element is shown as free, unwrought lead is shown under 78.01. It is not in the Negative List of Imports at pages 61 to 72 under Chapter-V of the Policy Book.

Under Rule 22, Capital goods, raw materials, intermediates, components, consumables, spares, accessories, instruments and other goods may be imported without any restrictions. Except to the extent such imports are regulated by the Negative List of imports or any other provisions of this Policy or any other law for the time being in force. So from the above material it is seen that Antimony Metal is a goods of free import. This supports the contention of the appellants.

9. The Customs Department has collected information under the local enquiry under the letters, (a) The reply dt. 31.3.1995 of the Indian Lead Ltd., with reference to the letter of the Assistant Collector of Customs discloses that Antimony is not produced in any form in India, and it is imported from China, Thailand, Russia and South America, and it does not contain any identification marks and is in the slab form, (b) On 8.6.1995 another reply is given informing that the company received a sample of imported Antimony Metal for analysis from M/s.

Amco Batteries Ltd. Bangalore on 25.5.1995 and it was carried out in the laboratory with the following result. As 0.36%, Po 2.86%, Ni 0.206%, Se less than 0.001%, Hg 0.10%, Sb 96.42% (c) The reply dated 25.5.1995 of Chloride Industries Ltd. with reference to the letter dt.

3.3.1995 of the Assistant Collector Customs shows that the company is one of the leading manufacturers of lead acid automatic storage batteries for which Antimony Metal is used, and they import from China and Thailand as it not available in India. It is usually in slab form.

They consume one container lead (20 MT) per Quarter in their Chinchawad factory, (d) The reply of the India Lead Zind Information Centre to the Assistant Collector of Customs shows that Antimony Metal in Ingots and slab are not produced in the country presently, earlier Star Metals in Bombay were producing

from imported concentrates. Now Antimony Metal is imported from Chipa, Bolivia and Thailand. It is usually imported in two purities of 99.65% minimum and 99.85% maximum. MMTC, New Delhi imports Antimony. Dr. Nag, Chief General Manager may be contacted. So from the above material it is clear that in 1995 Antimony Metal was imported from other countries and earlier it was produced in Bombay by Star Metals. The Godown is searched on 18.3.1995 where Antimony Ingots were found. Possession and ownership is not undisputed between the parties. Now it is to be seen when they were secured and from which source.

10. 1094 pieces, weighing 25,162 kgs. worth Rs. 56,65,390/- Antimony ingots were found in the small godown of Pawan Enterprises. Anil Mishra and Dau Dayal Agarwal informs the officers that small godown is used always for storage of import goods. Antimony found therein is foreign goods no records are maintained, and small chit was written in loose paper that it was received around one and half months back from one Rajendrababu, as per the say of Anil Mishra. As per the statement of Surajbhan Suml Agarwal, Accountant of M/s, Pawan Enterprises on the evening of 20.3.1995, Pawankumar Agarwal handed over five loose papers to be given to customs authorities and to state that they were with him for accounting purpose, and from 12.3.1995 he had not met Pawankumar.

Statement of Pawan Kumar Agarwal discloses that Antimony Metal found belonged to Shri Rajendra Agarwal of M/s. Metec Asia P. Ltd. and it was received on 15.3.1995 without delivery challan. The statements of Rajendra Agarwal dated 21.3.1995, 24.3.1995, 7.4.1995 and 25.4.1995 disclose that they were engaged in the Trading and Importing of various non-ferrous metals and they stock them in their godown and also in the others godown and 1124 pcs of Antimony Ingots were stored in the Godown of Pawan Enterprises and it was of Deshi remelted origin, legally purchased against cash payments and Antimony is manufactured only in unorganised sector at Calcutta, Rajasthan and Delhi. His goods were not imported. Purity of indigenous Antimony Metal varies from 92% to 97% and that of imported Antimony should be 99.65% and it does not contain Arsenic. Lead Batteries scrap contain Antimony, and it is extracted by crude method of simple heating and melting. Nobody uses electrolytic process in India to achieve 99.65%. He has never imported nor purchased imported Antimony. He purchased

Antimony on 16.3.1995 and he would produce all the related documents. So from the above it is clear that definite case of appellants is that Antimony Ingots found in the small godown of Pawan Enterprises is not an imported one, but legally purchased by Rajendra Agarwal and he has neither imported the above goods, nor purchased an imported Antimony. The ownership of the same is admitted. So also the storing in the small godown. It is to be seen whether the said goods are imported or not.

11. In the absence of Antimony being notified under Section 123 or under Chapter IV-A of the Customs Act, it is for the Customs Department to prove that the Antimony Ingots are smuggled ones. This is admitted by the adjudicating authority in page 12 of the order that "Though the goods involved is not covered under Section 123 of the Customs Act, it is an acceptable proposition that as a wholesale dealer in metals the appellant should possess some proof to show the licit import made or the acquisition of the goods in India". In view of this position, it is to be seen whether the Respondent has discharged the burden of showing smuggled nature of the goods involved in this case that is goods are of foreign origin and imported from abroad. The information received by the customs Authorities is that "Agarwals are dealing in imported non-ferrous metal procured clandestinely". The impugned order in page 9 discloses an admission by Rajendra Agarwal that he purchased seized Antimony in Bombay through a seller on payment of Rs. 12.00 lacs. In page 8 it is observed that he has produced a Computer sheet dt.

16.3.1995 of cash Purchase Register Account No. 10501 duly signed by him. The say of the appellants is cross checked by local enquiries, and held to be false. So also regarding the percentage purity of Antimony in page 11 and 12 of the impugned order. As per the letter dt. 8.6.1995 of Indian Lead Ltd. sample of imported Antimony was analysed received from Amco Batteries Ltd. and S.B. is shown as 96.42%. In page 11 of the impugned order it is observed that Antimony involved in this case was tested by the Deputy Chief Chemist and its impurity was found to be 93.4%. In the IIT Laboratory, another sample was tested and found to be 67.6%. Further it is also observed that the Antimony imported from China, Russia, and South America manufactured by using electrolytic process purity percentage is above 96%, whereas Antimony of Thailand Origin has purity of 60%

to 70%, in view of the High Lead content in the metal. Metal Bulletin article shows that "Several Traders have noted that some Thailand Antimony are high lead content upto 20% to 40% as well as high arsenic of 1% of 2% and also can be contaminated with Copper despite the fact it has been sold as minimum 99.65% S.B. maximum 0.15%. The Two Test Reports produced by the appellant shows the purity of 79.99% and 77.01%, on the test by the Two Private Laboratories of identical metal. So from the above material it is seen that the percentage of purity in the Antimony Metal varies and cannot be the basis to decide the nature of the goods involved. The Customs Department has not shown that the seized Antimony is the smuggled one.

On the other hand the letter of Indian Lead Zinc Information Centre supports the case of the appellant that in Bombay some imported concentrates were produced by the Star Metals earlier. The appellant has produced the documents that is the Computer Sheet of the Register of Account No. 10501 showing the purchase of Antimony Ingots and payment of cash of Rs. 12.00 lacs in Bombay. On this, no further investigation appears to have been made regarding the source of acquisition. As against this, the Customs Department has not substantiated the information they had. The appellant has admitted the ownership and is supported by a document. The department has failed to substantiate that the Antimony in this case is definitely of foreign origin and imported unauthorisedly into India. The facts and circumstances of the case are such that the appellants is entitled to the benefit of doubt. The contentions of the appellant gains weight, and it is fit to be accepted.

12. Now coming to the rulings cited in this case, (a) 1997 (29) ETR 30 in the case of Pawan Enterprises and two others v. Commissioner of Customs (P) Mumbai, cannot be applied to this case as the facts are different.

(b) 1997 (91) ELT 63 (T) in the case of Commissioner of Central Excise, Allahabad v. Anupkumar Agarwal regarding the burden of proof it is held that smuggling goods namely olive oil not being notified under Section 123 of the Customs Act, it is for the Customs Department to prove smuggled nature of goods. In the absence of any corroboration to the statement of accused onus is not discharged.

Goods permissible under OGL for import and it is freely available in the market. It is held that the confiscation of goods is not sustainable (para 4). This decision is clearly applicable to the case on hand, as the goods involved is not notified under Section 123 of the Customs Act, and comes under the Free Import under OGL.

India, dealing with a burden of proof. It is held in (para 3) that Customs proceedings under the Customs Act, are penal in nature, and hence the burden of proof is on the department. Except where the goods covered by Section 123 of the Customs Act, Principle this ruling can be applied to this case.

Ors. The full Bench of the Supreme Court has held that even under Section 106 of the Indian Evidence Act, the burden will not shift from the Customs Department to the party, from whom foreign goods are seized. This supports the appellant challenging the observation made regarding Section 106 of the Indian Evidence Act, in the impugned order.

(e) 1983 ELT 1486 (SC) : 1974 Dec. Cencus 10 C (SC) : ECR C Cus 902 SC in the case of Kunungo & Co. v. Collector of Customs Calcutta and Ors. under Section 106(8) of the Sea Customs Act. The burden of proof is considered. According to this ruling when the Customs Authorities apprised the appellant of the result of investigation as also all the evidence on record which militates against the appellant version, the burden of proof shifts on to the appellant from the Customs, which does not get discharged if the appellants are not able to meet inference arising therefrom (para 13) Burden of proof on Customs Authorities, it is discharged, if the offender gives false evidence. The burden gets discharged from the Customs authorities by falsifying many particulars of the story put forward by the appellant, a false denial could be relied on for concluding that the goods had been illegally imported (paras 14 & 15). In the instant case the department has not shown, falsifying the case of the appellant that the Antimony is not a smuggled goods, nor succeeded in falsifying the case of the appellant regarding the purchase of the Antimony Metal in India. So the above ruling is not applicable to the case on hand.

13. For the reason discussed above we accept the case of the appellants and answer the points raised in the negative and pass the following order.

