

Trinity Electric Syndicate Pvt. Vs. Commissioner of Customs,

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Sep-10-2004

Reported in : (2004)(97)ECC717

Judge : S T S.S., T Anjaneyulu

Appellant : Trinity Electric Syndicate Pvt.

Respondent : Commissioner of Customs,

Judgement :

1. Appellant in C/174 is a company and in C/175/04 is its Managing Director. The Company is engaged in the import and sale of supply of certain machines called T-36, to M/s. Bharat Sanchar Nigam Ltd., (herein after regards to as BSNL). They imported such machines and cleared them for Custom Department during the period 1.6.99 to 18.02.99.

2. a) Certain enquiries were launched, on or around 18.07.01, pursuant to the company having filed BEs dated 31.03.2001, 18.06.2001 for clearance of 210 & 3 & 210 pcs of CD's declared to be containing "Installation Software" for the operation of the machines imported by them. During the enquires made, statements of various persons were recorded and questionnaires sent got answered and taken on record.

Based on these enquires, it was alleged in the Show Cause notice That appellant's company had imported T-36 splicing Machines, manufactured and supplied by

M/s. Sumitomo Electric Industries, Japan under two separate consignments and two separate invoices, raised by M/s. Sumitomo Electric International, Singapore. The description and value of one machine was artificially split into hardware (machine) and software (3 CDs per machine), showing major part of the value of the machine in software invoices. This was done to evade appropriate Customs Duty on the whole machine. By this act of misdeclaration of value, the importer had rendered all the machines mentioned in Annexure - I to the Show Cause Notice, liable for confiscation under Section 111(m) of the Customs Act, 1962 and also rendered themselves liable for penal action under Section 112(a)/114A *ibid*.

ii) Shri. Nitin Khambhati in his personal capacity as the Managing Director of M/s. Trinity Electric Syndicate Pvt. Ltd., Mumbai was the master mind behind this *modus operandi* of importation of the Splicing Machines by wilfully misdeclaring their description and value and suppressing the fact of actual value of the machines and in doing so, he had rendered himself liable for penal action under Section 112 (a) of the Custom Act, 1962.

b) The duty demands were confirmed, interest determined and penalties imposed after holding the machines imported earlier as liable to confiscation as also the CD's imported later. Hence these appeals.

a) Considering that a clear request was made by the importer, for cross-examination as follows: 1. The Show Cause Notice relies upon the statement of Mr. Ajit Pilai, partner of CHA firm, recorded under Section 108 of the Customs Act, 1962 ("the Act") who *inter-alia* stated that M/s.

Trinity Electric Syndicate Pvt. Ltd. was importing the machines using the *modus operandi* of artificially splitting of description and value.

2. The Show Cause Notice also relies upon the statement of various officials of Bharat Sanchar Nigam Limited viz. Mr. K.V. Jacob, Mr.

A.L. Ramkrishnan, Vidya Hebber who *inter alai* stated that the basic operations of splicing machines are pre programmed and no such CDs were shown to have been supplied with these machines.

3. The Show Cause Notice further relies upon the statement of Mr.

Shantibrata Chatterjee, Sales Manager of Sumitomo Electric Industries, New Delhi who inter-alia admitted that imported CDs seen by him and said to contain operation software were not needed to be imported for running of the splicing machines and therefore, the value shown in the invoices raised for these CDs should be merged with the invoices of the machines.

4. In the course of the investigation, statements of certain individuals including the aforesaid individuals were recorded which are referred to and relied on in the show cause notice, as to the said statements leave is sought to cross-examine any deponent who has referred to or mentioned in the Notice. We submit that in any event, the statements of such deponents as are co-accused cannot be referred to or relied on, as they are not corroborated by independent evidence as required in terms of the settled law.

b) This request for cross examination was rejected by the adjudicator as he came to the findings as follows -- "85 "I have gone through the records of the case and carefully considered the submissions made by the notices. At the outset, I must mention that in the reply to show cause notice M/s. Trinity had asked for cross examination of S/Shri. K.V. Jacob, A.L. Ramakrishnan and Ms. Vidya Heber, officials of B.S.N.L., and Shri. Shantibrata Chatterjee, Sales Manager of M/s. Sumitomo Electric Industries, New Delhi. Though this request was faintly repeated during the course of personal hearing, no specific reasons were cited in its report. I do not find that adequate justification has been furnished in support of the request for cross examination. Moreover, I find that this case does not rest solely on the statements of person whose cross examination was sought and there is in addition independent documentary evidence. It is settled law that the right of cross examination in such proceedings is not an absolute right and has to be decided on the facts and circumstances of each case [1990(48)E.L.T. 302(Tri), 1993 (64) ELT 31(Tri) and 2001 (138)ELT 556(Tri). Having regard to the circumstances, I do not find any justification in the request for cross examination and have, therefore, decided to proceed with the adjudication without permitting cross-examination.

c) Thereafter the Commissioner proceeded to rely on the statement and record - "88..... It has also been admitted by Shri. Abhijit Sharma, an employee of Trinity, that when tried to load the software using memory cards in their warehouse at Bhiwandi, he failed in his efforts. And this was because the software could not be loaded from the memory cards unless the software already loaded in the machine was erased. This is clear from the e-mail received from M/s.

Sumitomo when Shri. Sharma queried them regarding the failure of his attempt to load the software....." "89..... The statements and replies given by the representatives of Sumitomo's India and Singapore offices also clearly show that the customary mode of supply the machines with in-built software.

Indeed, at the initial stage, Trinity themselves have imported six machines in the normal course and paid duty without splitting their value into hardware and software...." "90..... The claim of M/s. Sumitomo that the hardware and software was supplied separately in the case of Trinity, as per the latter's shipping instruction does not appear quite facile. These invoices, however, project the opposite picture - that the machines were supplied as per normal procedure, with in-built software - as they reflect the total value of the machines. There is no supply of any software separately to Trinity from Japan....." "The testimonies of the others also clearly corroborate the confession of Shri. Khambati that the machines were imported with pre-installed software, Shri. S. Chatterjee and Shri. Abhijit sharma have, in their statement, stated so. In fact, Shri. Sharma has mentioned that, on Shri. Khambati's directions, he attempted to erase the software installed on the machine in order to how that the machines had been imported without software, should the customs want to check this. However, he used, he failed in his attempt." This would indicate that the commissioner has relied upon the statements of the deponents, after concluding "I do not find any justification in the cross-examination". This is not only serious violation of principal of Natural Justice, which was stressed by the Ld. Advocate before us, but shows unfair bias on part of the Adjudicator. The Commissioner cannot arbitrate and shut out evidence which could be brought out by cross-examination of the witnesses, and decide to apply the recorded statements, which are in nature of examination in chief of the witness in these proceedings and such deponents were not presented

for cross-examination. The order suffers from the Vice of denial of Principal of Natural Justice. The decisions of the Tribunal as relied upon by the Commissioner, do not permit reliance of the statements exclusively by an Adjudicator, as arrived at and relied by the Commissioner in this case. On one hand and thereafter deny the opportunity to the defence to cross-examine the deponents of such statement relied upon. Reliance on the full bench decision of the Apex Court by the Ld. Advocate in the case of K.T. Shadulli (AIR 1977 Supreme Court 1627) to arrive at a finding that the impugned order cannot be upheld and is required to be set aside and remitted to the original authority with directions to summon the witness as per list to be given by the appellants permit cross examination and redetermine the issues thereafter.

b) The Commissioner is viewing adversely by relying upon and placing emphasis on the appellants claim to produce the documents, as made in the written reply to the notice, which was not effected. The appellant have been denied the right to cross examine; they possibly cannot be expected to place the documents without cross examination. Since they will have to make out a statement of Defence, only after the cross examination is effected. Therefore nothing much can be read into the non submission of the documents, in this case, which is a case of denial of effective opportunity for production of material by defence.

c) Perusal of paragraph 90 of the impugned order records "... the claim of M/s. Sumitomo that the hardware and software was supplied separately in the case of Trinity, as per the later shipping instruction does appear quite facile-----." Thereafter the Commissioner in paragraph 99 goes to record as regards conduct of Sumitomo and absolves them of all liabilities or penalties and places the entire burden on the shoulders of the Managing Director, appellant herein. When arguments made by a notice are facile, as held, penal consequences need not necessarily flow, however, this would support the claim of the Managing Director that the decision requires to be re-arrived after Cross examination has force.

d) Since we propose to remit the matter back to the adjudicator for Denovo adjudication. The question of liability of Penalty, interest as per Machine Mentall (I) Ltd. 2004 (62)RLT 709 (LB) is also to kept in mind during the readjudication

proceedings.

3. In view of the findings, the order is set aside and appeals allowed as remand with direction to grant cross examination of the witnesses as desired by the appellants and thereafter permit them to produce such evidence as they seek to produce, hear them on all aspects and redetermine the issues, involved herein.

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