

Jagmohan Jindal Vs. Collector of Customs

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Calcutta

Decided On : Sep-25-1988

Reported in : (1991)LC233Tri(Kol.)kata

Appellant : Jagmohan Jindal

Respondent : Collector of Customs

Advocate for Pet/Ap. : Shri. S.K. Bagaria

Judgement :

1. This is an appeal filed by the appellant being aggrieved of the above-mentioned order of the Additional Collector of Customs, Gorakhpur. Briefly stated the facts of the case are that the Truck bearing No. JKQ-9171 was intercepted by the officers of Varanasi Division of Customs & Central Excise at Naubatpur Bagachi Check Post.

The driver Shri Shailendra Singh produced documents viz. photocopy or bill of entry No. 3120 dt. 22-12-1987 and 155 dt. 4-1-1988. Invoices, Challans and bill of entries covering two wooden cases of type of V.R.Bushing, and 30 cartoons of paper mat electronic mosquito killers along with the challan of M/s. Lok Nath Shipping and Clearing Agency, and G.Rs. of M/s. Agarwal Transport Pvt. Ltd. and certain bill of M/s. Lok Nath Shipping & Clearing Agency covering plastic moulded components, electronic components with G. Rs, and a challan of M.M.T.C., Calcutta covering 105 pcs. of copper bars etc. These, however, do not include any bill of entry covering the articles namely plastic moulded components, electronic

components, Tape Decks etc. and only challans of the Customs Clearing agent viz. Lok Nath Shipping & Clearing Agency was available with the driver, which created a suspicion regarding illegal importation of these goods to India without valid documents. The Truck was brought to the Varanasi Customs & C.E. office for thorough checking. On interrogation the driver stated that the aforementioned documents were given to him by the transporter. The Truck was then unloaded and checked in the presence of two independent witnesses. The officers examined the goods and a list was prepared in respect of each goods separately which are summarised in Annexures to the seizure list containing 1000 pcs. of electronic bicycle horns, A.M. Radios, 3-in-1, 1080 pcs. of Radio Circuits semi-finished with speaker, 2004 pcs. of bodies of portable radio cassette players, 2000 pcs. of speakers, 2 cartoons of plastic moulded components in loose, 50 cartoons containing 2000 pcs. of Radio circuits semi-finished, 34 cartoons containing 2040 pcs. of tape decks, 30 cartoons containing 6 lcs pcs. of paper mats electric mosquito killers made in Japan, two wooden cases containing 50 cartoons of type V.R. die casting upper body wrapped in 25 gunny bags, 105 pcs. of copper bars etc. On examination it was found by the Customs Officers that body of 3-in-1 two tone electronic bicycle horns in 20 cartoons are made in Hong Kong and they are not covered with any document. The goods mentioned in Annexure-H, I and J were being used to conceal the goods listed in A,B,C,D,E,F, & G loaded in the Truck and the goods listed in Annexures H & I though were having respective photocopy of bills of entries, the genuineness of the same had to be verified. The Customs Officers seized the said goods under Section 110 of Customs Act, 1962 under reasonable belief that they are liable to confiscation under Section 111 of Customs Act. The said Truck was seized and the value of the goods and the Truck were estimated to Rs. 13,82,7987- and Rs. 2,50,000/- respectively. The Copper bars (105 pes) were not seized and kept in the Customs Office as per request of the driver for safe custody.

2. On going through the challans of M/s Loknath Shipping & Clearing Agency and invoices it has been found that the goods mentioned in Annexures 'A' to 'H' belongs to the appellant M/s. Jogmohan Jindal.

Thereafter, a Show Cause Notice and been issued on 6-4-1988 to Sri Shailendra Singh (Driver), Sri Ramesh Chandra (Khalasi), M/s. Jagmohan Jindal, M/s. Agarwal Transport, M/s. Greysham & Co. and M/s. Loknath Shipping & Clearing Agency asking them to show cause to Additional Collector of Customs, Gorakhpur as to why goods mentioned in Annexures 'A', 'B', 'C', 'D' 'E' & T" and 'G' should not be confiscated under Section 111 of Customs Act, and goods mentioned in Annexures 'H' and 'J', should not be confiscated under Section 119 and Truck No. JKQ 9171 should not be confiscated under Section 115(2) and why penalty should not be imposed upon them under Section 112 for contravention of the provisions and restrictions imposed under Section 3(1) of Import & Export (Control) Act, 1947 and Import (Control) Order 1955 as amended, read with Section 11, Customs Act, 1962.

3. The appellant and the other parties sent their respective replies and thereafter personal hearing was granted to all of them and the goods mentioned in Annexures 'B to 'H' were ordered to be released in favour of the appellant. But the goods mentioned in Annexure 'A' to the Panchnama viz. Body of 3-in-l, two tone electronic bicycle horns in 20 cartoons were confiscated and a penalty of Rs. 5,000/- was also imposed on the appellant under Section 1.12 of Customs Act. It is against that order this appeal is filed.

4. The learned Advocate Shri S.K. Bagaria appearing for the appellant contended that there was no scope whatsoever to raise any dispute as regards the identity of the goods. It was his contention that the said goods were shipped by the foreign suppliers under their invoice No.M.N. 139/87 dt. 27-10-1987 wherein the description thereof was mention as "20 cartoons of plastic moulded components - Plastic Body of A.M.Radio". It was also stated in the said invoice that the said goods were packed in 20 cartoons bearing shipping marks "J.J. Calcutta C/No. 1-20" which is mentioned in the Bill of Lading, and Bill of Entry and that the seizure list also shows that the seized goods were the same 1000 pcs. of Plastic Moulded components - Plastic Body of A.M. Radio packed in 20 cartoons and bearing Marks 1-20.

5. It was also contended that simply because as the said 20 cartoons the description was given as "Plastic body of 3-in-1 two tone electronic bicycle horns/ A.M. Radio" there was or there could be no question of alleging that the goods were not the same which were imported by the appellant. It was their contention that admittedly on all the packets the words "Plastic body of A.M. Radio" were duly mentioned. But in addition to these words "3-in-1 two tone electronic bicycle horns" were also mentioned which was due to the facts that the said plastic bodies could be used for manufacture of A.M. Radio consisting of electronic bicycle horns also.

6. In so far as the engraving of the words "Made in Hong Kong" on the said goods is concerned it was his contention that the said manufacturers were earlier having their factory in Hong Kong which was later shifted to China. But as the moulds from Hong Kong factory were also shifted to China factory the words "Made in Hong Kong" continued to be engraved, though the goods are manufactured in China. He also relied on the two communications received in this behalf, which are marked as Annexure 'G'. It was also his contention that since these goods were cleared by the Customs Authorities of Calcutta the Customs officers of Varanasi Division has no justification to seize these goods and in support of this contention he relied on the following decisions : He further contended that Section 123 of Customs Act is not attracted in this case as the goods are not notified items and the department has not proved the smuggled character of the goods and confiscation is bad.

It was his further contention that at any rate of confiscation of the goods without giving an option to redeem is not justified and the imposition of penalty is not in accordance with the law.

7. But the learned SDR Shri M.N. Biswas contended that the appellant has admitted before the adjudicating authority that the goods mentioned in Annexure 'A' are actually made in Hong Kong whereas in the bill of entry submitted by him the country of origin was mentioned as 'China' and that this fact is mentioned in internal page 5 of the order of adjudication. It was his contention that in Annexure 'A' of the Panchnama the country of origin of the goods in the bill of entry, invoice, has been shown as 'China' whereas on actual verification, the goods are found to

be made in 'Hong Kong'. He further contended that the description of the goods as per Bill of Entry and invoice and Packing list has been shown as Plastic body of A.M. Radio, whereas on actual verification the goods are found to be "Plastic body of three-in-one two tone electronic bicycle and A.M. Radio". Hence, he contended that the confiscated goods are not those which are claimed to have been imported by the appellant vide Bill of Entry No. 1-1123 dated 17-12-1987.

8. It was also his contention that though the goods are not notified and though Section 123 of the Customs Act is not attracted, the circumstances in this case has shifted the burden on the appellant to prove that the goods are licitly imported and in this connection he relied on a decision of the Tribunal reported in 1986 (25) ELT 811 (Jain Industries v. Collector). He also contended that under Section 106 of the Evidence Act it was for the appellant to disclose the facts of legal acquisition which is within the personal knowledge of the appellant..

9. It was further contended that these goods which are confiscated were cleared by the Calcutta Customs and therefore the question of jurisdiction of the Varanasi Customs officers could not be questioned and the decisions cited by the learned Advocate for the appellants are not applicable to the facts of this case. Alternatively, he contended that the department had filed appeal before the Supreme Court against one such decision passed by this Regional Bench which is pending, 10. But with respect to the confiscation of goods without option of redemption he stated that he leaves the matter to this Bench and in the event, if such orders are passed, he contended that besides the redemption fine, the appellant should also pay the duty on these goods as applicable and he also justified the imposition of penalty of Rs. 5,000/- on the appellant as he had concealed the goods and were carrying them illicitly without valid documents rendering them liable for confiscation under Section III(d) of the Customs Act, 1962.

11. We have heard both sides in detail. In the light of the above arguments, the points that arise for our determination are (1) Whether the confiscation of the goods in question are in accordance with law; (2) If so whether the confiscation without an option to redeem is to be interfered with and if so on what conditions;

12. Point No. 1:- As per the reasonings of learned Additional Collector, the appellant failed to correlate the confiscated goods with bill of entry and bill of lading for two reasons (i) the description of the said goods as mentioned in the documents of the foreign suppliers was "Plastic moulded components - Plastic body of A.M. Radio" whereas on all the 20 cartoons the description of the said goods was given as "Plastic body of 3-in-1 two electronic Bicycltone Horn/A.M.Radio" and (ii) as per the bill of entry the country of origin of the said goods was China whereas on the confiscated goods the words "Made in Hong Kong" were engraved.

13. In our opinion, there was not much scope to raise any dispute as regards the identity of the said goods for the discrepancy as stated above. The reasons are that the same goods were shipped by the foreign suppliers. Under their Invoice No. M.N. 139-87 dt. 27th October, 1987 wherein the description was mentioned as "20 cartoons of Plastic moulded components - Plastic body of A.M. Radio". It was further clearly stated in the said invoice that the said goods were packed in 20 cartoons bearing shipping marks "J.J.-Calcutta C. No. 1-20". The same description was also mentioned in the relevant Bill of Lading. In the Bill of Entry also the description of the said goods was mentioned on the basis of the said documents of the foreign suppliers. From the seizure list in question it would be clearly evident that the seized goods were also the same 1000 pcs. of Plastic moulded components - Plastic body of A.M. Radio packed in 20 cartoons and bearing marks 1-20. The description has been given as 3-in-1 two tone electronic bicycle horn - A.M. Radio. There was or there could be no question of alleging that the said goods were not the same which were imported by the appellant as aforesaid, or that the same were not covered by the Bill of Entry No. 1-1123 dt. 17-12-1987. The learned adjudicating authority even failed to appreciate that admittedly on all the packets the words "Plastic body of A.M. Radio" were duly mentioned. In addition to this the words "3-in-1 two tone electronic bicycle horn" were also mentioned. The learned Advocate for the appellant contended that this was so mentioned because the said Plastic bodies could be used for manufacture of A.M. Radio consisting to electronic bicycle horns also.

However, simply because the said full description was not mentioned in the relevant documents of the foreign suppliers there is or there could be no question whatsoever for alleging that the said goods were different from the goods imported by the appellant under the said documents. In this connection, we may mention that the learned Additional Collector failed to appreciate that the Import Policy as also the duty structure are same on the said Plastic body and A.M. Radio with or without electronic bicycle horn. It is not the case of the department that there were any other similar materials being carried in the lorry besides the aforementioned 20 cartoons containing 1000 pcs. In fact, these materials which are mentioned in the Annexure 'A' of the Panchnama are the only materials in dispute whereas the materials in Annexures 'B to H' completely tallies with the bill of entry and bill of lading. Along with these materials the materials under Annexure 'A' which are the subject matter were also imported and in this circumstances the probabilities of the case are to be taken into consideration. It is not the case of the department that similar materials bearing only the relevant marks were found in addition to the materials found in Annexure 'A', in the possession of the appellant. In such circumstances, taking into consideration the overall probabilities, the only conclusion is that there is no discrepancy of these materials as said to be made out by the learned adjudicating authority and in the circumstances we are unable to accept the contention of the learned SDR to this effect.

14. Coming to the second discrepancy which the learned adjudicating authority has relied upon, it is seen that as per the bill of entry the country of origin of the said goods were China whereas the confiscated goods bear the marking Made in Hong Kong. In this connection, the learned Advocate for the appellants contended that he had got clarification from the importer which is furnished along with the paperbook as per Annexure-G pages 30/31. Annexure-G reads as follows :- "The goods "Plastic Body of A.M. Radio" 1,000 sets which is engraved as Made in Hong Kong is actually Made in People's Rep. of China, because our all production are made in China factory and our mould which are use to use in Hong Kong, we are using the same mould in China factory. So the goods are engraved "Made in Hong Kong" and actually produced in our China factory. For your information most of Hong Kong factories has shifted their factories to China because of cheap labour.

We again confirm that the body of A.M. Radio (Made in Hong Kong) is People's Rep. of China Origin." 15. It is thus seen from the clarification that these goods were actually made in People's Republic of China. On this the learned SDR however contended that this is an afterthought. We feel that when the foreign exporter has given a confirmation there is no reason for us to doubt the veracity of this confirmation and there is no reason as to why the exporter should give a false certificate to this effect. There is also no reason to believe that this is a made-up document in collusion with the exporter. No doubt, at the time of adjudication, the appellant could not produce this document before the adjudicating authority but they undertook to obtain and produce a confirmation from their exporter if there is any doubt. The learned adjudicating authority did not wait or call for the same. In our opinion, taking into consideration the probabilities of the case, it cannot be said that there is discrepancy as is said to be made out by the learned Additional Collector and therefore, the arguments of the learned SDR cannot be accepted in this regard. Even otherwise, the Calcutta Customs authorities had examined these aspects and have cleared these goods.

This is another circumstance which strengthens the case of the appellant. There is no reason to doubt that these are the same goods which were released by the Calcutta Port Trust authorities. These goods are also found along with the other goods mentioned in Annexures 'B' to 'H' in the Panchnama and which were already released in favour of the appellant. In all such cases the overall probabilities should be taken into consideration and such strict scrutiny with respect to the non-mention of some of the goods will not make much difference for the identity of the goods unless there are some other circumstances to doubt the veracity of the appellant's case like finding some more materials of the same nature in the same transport or finding some other materials elsewhere in the factory of the appellant.

16. In view of the fact that these are the same materials which are released by the Calcutta Customs, seizure of the goods by the Varanasi Customs authorities cannot be in accordance with law in view of several rulings which are cited by the learned Advocate for the appellant which are mentioned as above. No doubt, the learned SDR has stated that there are similar matters pending before the Supreme

Court but there is nothing to show that these orders are stayed by the Supreme Court.

However, in view of the fact that the discrepancy as sought to be made out is not justified and since we are holding that these are the same goods which were released by the Calcutta Customs, the above said question of law does not have much significance on this case before us.

17. It has been contended by the learned SDR that in this case though the goods are not notified goods the burden of proof has shifted on the appellant to show that these are imported goods illicitly. In this connection, he relied on the decision reported in 1986 (25) ELT 811 (Jain Industries v. Collector), wherein it was held that the statement of the appellant along with the circumstances goes to show that the burden was discharged by the department. But that case is not applicable to the facts of this case as in this case there is no such statement of the appellant to the effect that these are contraband goods. There are also no circumstances in this case to show that such burden shifted on the appellant; on the contrary as we have already discussed, the identity of the goods have been established by the appellants on the basis of probabilities as those cleared by the Calcutta Customs. In such circumstances, there is no burden on the appellant to prove the licit importation. Even otherwise, assuming that the burden is on the appellant, the appellant has discharged it by clearly proving that these are the same materials which were cleared by Calcutta Port Trust after payment of due tax by the appellant.

Therefore, on consideration of both these counts, the arguments of learned SDR cannot be accepted. It was his contention that under Section 106 of the Evidence Act, it was for the appellant to disclose the facts of legal acquisition which is within the personal knowledge of the appellant. Even if it is so, the appellant had clearly explained the legal acquisition, as discussed by us above. However, we are of the opinion, that there is no duty cast on the appellant to explain the legal acquisition as no burden was cast on him in the circumstances of this case.

18. In this view of the matter narrated above, as per Point No. 1 is concerned we hold that the confiscation of the goods in question is not in accordance with the

law. In view of this finding on point No. 1, point No. 2 to the effect that the confiscation without option to redeem is to be interfered or not, does not arise. So also, with regard to point No. 3, we hold that the imposition of penalty on the appellant is not in accordance with the law. For the abovesaid reasons we hereby accept the appeal and order the release of the goods in question in favour of the appellant. We hereby set aside the order of the learned Additional Collector imposing the penalty of Rs. 5,000/- on the appellant.

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