

Aquarius Vs. Collector of Customs

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Dec-07-1990

Reported in : (1992)LC406Tri(Delhi)

Appellant : Aquarius

Respondent : Collector of Customs

Judgement :

1. This appeal arises out of is directed against the order-in-original No.2/Collr/1988 dated 21-1-1988 passed by the Collector of Customs & Central Excise, Rajkot.
2. The dispute relates to imposition of penalty of Rs. 2 lakhs upon the appellants under Section 112(a)(i) of the Customs Act, 1962. At the outset Shri S. Ganesh, learned Advocate appearing for the appellants submitted that he is not questioning the merits of the case, i.e., findings given by the Collector regarding confiscation of the goods for illicit importation and consequently imposition of redemption fine and penalty on Shri P.K. Mehta who is actual importer in the present case but he is questioning the legality of imposition of penalty under Section 112(a) of the Act upon the appellants.
3. The case of the Department is that one Shri Mehta had arranged importation of goods by filling Bill of Entry on behalf of the appellants (M/s. Acquarius) declared to be Photo-composing/photo type-setting machine for printing machinery and claimed clearance of the goods against Addl. Licence which was issued in the name of the appellants. It was held that the goods in question is not a complete

system of Photo-composing/photo type-setting and therefore would not be covered by Sr. No. 11(22) of Appendix-1, Part-B of Import Policy, 1985-88. The goods under import are personal computers and fell under Sr. No. 8 of Appendix-6 but the conditions as laid down under condition (5) and Para 58(2) are not fulfilled and therefore the same are not eligible to be imported under the aforesaid provisions of O.G.L.

Further, the Personal Computers are not imported for personal use of the importer but for stock and sale. The charge against the appellants is that they had transferred the said additional licence to Shri Mehta for his benefit as well as their. This is not permissible under Para 118(2) of the Hand Book of Import-Export Procedures, 1985-88. The contention of the appellants that they had executed special power of attorney in favour of Shri Mehta to operate for importation of permissible items under non-transferable additional licence and they were not liable for the act of Shri Mehta in contravening the provisions of Import Policy, were negated by the Adjudicating Authority. Accordingly, the goods were ordered for confiscation valued at Rs. 27,77,130/- by giving the option to the appellants to redeem on payment of redemption fine of Rs. 10,00,000/-. Further penalty of Rs. 2,00,000/- has been imposed on appellants in addition to imposition of penalty of Rs. 1,00,000/- on Shri Mehta under Section 112(a)(i) of the Customs Act, 1962. Hence this issue.

4. Shri S. Ganesh submitted that appellants are the recognised Export House and since they are always busy in executing export orders and they have very little knowledge regarding imports, they have executed a specific and special Power of Attorney in favour of one Shri Mehta for the importation of permissible items against their additional licence dated 24-9-1985 for Rs. 5,73,742/-. This Power of Attorney was not a simple letter of authority as it was held by the Collector. He said that the Collector was not consistent on this finding as per impugned order as the Collector has referred to the Power of Attorney as a simple letter of authority at some places and at other places he has held that the appellants have parted with, disposed of and transferred the Additional licence to Shri P.K. Mehta which is not permissible under Para 118(2) of the Hand Book of Imports & Exports Procedures, 1985-88. He contended that even in case of letter of authority, a principal can

never be guilty for wrongful acts of the Agent as it was held in the case of M. Shashikant and Co. and Ors v. Union of India [1987 (30) ELT 868 (Bom.)]. He also argued that it is evident from the findings that Shri Mehta as a Power of Attorney holder had arranged importation of goods and filed Bill of Entry for clearance. The person concerned with import of such goods is liable to penal action under Section 112 of the Act. He relied upon the decision in the case of M.C.Desai and Anr. v. Collector of Customs, Bombay [1988 (34) ELT 277], in support of his contention. He submitted that doubt arises in the present case whether imported items in view of detailed function of individual items and jointly as computerised Photo-composing/Photo setting systems covered under Serial No. 11(22) of Appendix-1 Part-B of Import Policy 85-88 or that Entry 11(22) strictly confined to 'Complete photo-composing/photo setting system. He said that though he is not questioning on the merits of the case but still for the purpose of imposition of fine and penalty if there was a doubt whether particular item was covered under Import Policy or not, benefit of doubt should be given to the importer and redemption fine and penalty were not sustainable, relying on the ratio of the decision in the case of Monica Electronics (P) Ltd. v. Collector of Customs 5. Next, he argued that penalty proceedings are quasi-criminal proceedings and such proceedings should be initiated in strict consonance with the provisions of the Statute. In the present case, there was mentioning of Section 112 only in the show cause notice without reference to either clause (a) or (b) of Section 112, the penalty under Section 112(a) was not sustainable in view of the decision in the case of B. Lakshmi Chand v. Govt. of India [1983 (11) ELT 322 (Mad.)], wherein it was held that if the penal action is proposed to be taken and proceedings initiated which are likely to culminate in the imposition of penalty, then the authorities must be clear in their mind as to whether clause (a) or clause (b) of Section 112 will apply or both failing which proceedings were liable to be quashed. Further he argued that there are no mala fides on the part of the appellants in arriving for the import of the goods in question and in the absence of mensrea penalty was unjustifiable. He relied on the decisions of this Tribunal in the following cases :- 1. Krishan Lai Bahrain v. Collector of Central Excise -1988 (37) ELT 309 and Junta Traders, Bombay v. Collector of Customs, Bombay -1988 (34) ELT 65.

6. Shri G. Bhushan, learned SDR, for the Revenue while countering the arguments, submitted, that it was not just correct on the part of the appellants to confine to imposition of penalty when all along they defended their case on merits before the Adjudicating authority. He drew our attention to the findings given by the Collector that 'the so-called Power of Attorney is undated and bears no attestation of authorised Notary Public or the Magistrate. Thus the so-called Power of Attorney is nothing but simply a letter of authority'. He said that even this Power of Attorney was not produced at the time of importation but produced later. He contended that Additional licence was issued to the appellants which was not transferable; Letter of authority was not permissible. He said that licence continues to be in the name of the appellants, illegal importation took place under that licence and Bill of Entries were filed in the name of the appellants. The appellants cannot escape the penal action on the ground that goods were imported by Power of Attorney Holder. He argued that persons concerned with illegal importation are liable to penalty in respect of goods which were confiscated. He reiterated the grounds taken by the Addl. Collr.

in imposing the penalty under Section 112(a) of the Customs Act and justified the penalty for unauthorised transfer of licence.

7. In reply, Shri Ganeshan submitted that Power of Attorney does not cease to be a Power of Attorney for non-attestation and this was not required to be produced at the time of filing Bill of Entry. Power of Attorney was accepted by Shri Mehta and there is specific reference about execution of Power of Attorney in the correspondence/agreement between them before importation. He argued that Mr. Mehta had gone to Singapore for arranging shipment of goods at his own cost much prior to the execution of special Power of Attorney and agreement dated 19-9-1986 and therefore, the appellants are not liable to pay penalty in respect of the goods imported. He said that penalty imposed not on the basis of transfer of licence but for contravention of provisions of Import Policy. Penalty under Section 112(a) is nexus to the import and in view of the fact that the goods were not imported by the appellants, the imposition of penalty under Section 112(a) was not justified.

8. We have considered the arguments advanced on both sides and perused the record. We do not agree with the learned SDR that appellants were not correct in restricting to the limited issue of imposition of penalty. Nothing wrong in confining to the limited issues or issue only. Hence we are concerned with the involvement of the appellants in the importation to attract penalty under Section 112(a) of the Customs Act, 1962. We do not find any infirmity in the impugned order as regards charges initiated for the purpose of imposing penalty under Section 112(a) of the Act in view of the detailed allegations in the Show Cause Notice as well as in the subsequent proceedings by specifically mentioning Section 112(a) in the order. But it would have been more appropriate if the sub-clause of Section 112 was mentioned even in the Show Cause Notice. Further, Section 112(a) has nexus to the import or importation of goods, any person in relation to such goods does or omits to do any act or abets the doing or omission of such an act, is liable to penalty as it was rightly argued by the learned SDR. The contention of the appellants' counsel is that the appellants have executed a special Power of Attorney permitting him to import permissible items and whereas he exceeded the jurisdiction and for such excess illegal action the appellants cannot be held liable for penal action. Without going into the controversy whether the authorisation in the present case amounts to a Power of Attorney or letter of authority nevertheless the Power of Authority holder is also the recognised form of Agency. In a way Power of Attorney is clothed with more powers as compared to an ordinary agent and he binds the Principal through his acts as an Agent. According to Para 118(2) of the Hand Book of Import-Export Procedure, 1985-88 governing the provisions of import through agents, an Export House holding an additional licence is not permitted to appoint any kind of Agents or give a Letter of Authority to any person for operating on such additional licence or for importing goods against such licence unless it obtained prior permission from CCI & E, New Delhi. The relevant contents of Para 118(2) are reproduced below :- "118(2). The facility provided in sub-para (1) above will not be available to Export Houses and Trading Houses for import being made against Import licences marked 'Non-transferable', for example, Additional Licences or REP licences marked 'non-transferable' under the import policy in force. For such licences, the Export Houses/Trading Houses are not allowed to appoint agents or issue Letters of Authority, for operating on the licence

or for distribution of imported goods on their behalf. Such functions should be performed by the Export House/Trading House itself.

Where an Export House or Trading House is in need for appointing an agent for any valid reasons, in respect of any particular licence or item to be imported it should approach the Chief Controller of Imports & Exports, New Delhi for prior permission which CCI & E, New Delhi may consider, on merits, subject to such conditions as may be imposed." Accordingly, authorising someone to act based on non-transferable additional licence without obtaining permission is in clear contravention of the provisions of the Import Control Act and Policy and such person concerned is liable to penalty under Section 112(a) of the Customs Act as an abettor. If Power of Attorney holder is not construed as an agent still the executant placed himself in a worst position as if he himself acted through another and involving directly in such illegal importation. The penalty under Section 112 (a) was imposed upon the appellants for importation through unauthorised transfer of licence and this charge was sufficiently traversed through the impugned order. In the case of MC Desai and Anr. v. Collector of Customs (supra), it was concerned only with the liability of the Power of Attorney holder but not dealt with the liability of Executant. In the case of M. Shashikant & it was held that Principal was not responsible for the illegal acts of the agent. Permissibility of Letter of Authority or otherwise was not dealt with in that case as it was permissible. But in the present case, the authorisation itself is questionable and subject-matter of the dispute. According to Para 118(2) of Import Policy, 1985-88, the appointing any type of agent is not allowed unless obtained prior permission by the Competent Authority. Further mensrea cannot be taken as a shield against penal proceedings particularly where economic offences are proved and party failed to fulfil binding obligations prescribed under the I.T.C. Policy availed of by the appellants. However, as regards quantum of penalty, we feel that imposition of penalty upon the appellants is on higher side and required to be reduced; after taking all the facts and circumstances of the case. Accordingly, we reduce the penalty to Rs. 50,000/-as against Rs. 2 lakhs.