

Sanwar Agarwal Vs. Commissioner of Customs (Port) and Ors.

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Court : Kolkata

Decided On : Apr-07-2016

Judge : Arijit Banerjee

Appellant : Sanwar Agarwal

Respondent : Commissioner of Customs (Port) and Ors.

Judgement :

In The High Court At Calcutta Constitutional Writ Jurisdiction Original Side WP No.496 of 2015 Sanwar Agarwal -Vs.Commissioner of Customs (Port) & ORS.Before : The Honble Justice Arijit Banerjee For the Petitioner : Mr.Pranab Kr.

Dutta, Sr.Adv.Mr.S.Banerjee, Adv.For the Respondent : Mr.R.Bharadwaj, Adv.Md.T.M.

Siddiqui, Adv.Heard On : 14.05.2015, 16.06.2015, 20.07.2015, 13.08.2015 25.08.2015, 15.09.2015, 06.10.2015 CAV On : 06.10.2015 Judgment On : 07.04.2016 Arijit Banerjee, J.:(1) In this writ application the petitioner challenges the legality and/or validity of Circular No.19/2013-CUS dated 9th May, 2013 issued by the Central Board of Excise and Customs.Ministry of Finance, (Department of Revenue).Government of India relating to classification of Filters referred to as Disposable Sterilized Dialyzer and Microbarrier for filtering blood.

The said two medical appliances were earlier covered under Tariff Item 90189031 which pertain to Renal dialysis equipment (artificial kidneys, kidney machines and

dialysers).

By the circular impugned in this application, it was directed the aforesaid two articles namely Disposable Sterilized Dialyzer and Microbarrier are classifiable under Heading 84.21 SubHeading 8421.29 and Tariff Item 84212900, attracting a higher rate of customs duty.

The petitioner has also claimed refund of the differential duty collected by the authorities by classifying the goods imported by the petitioner under Customs Tariff Heading (in short CTH) 84212900.

The case of the petitioner:(2) In couRs.of his business, the petitioner imported accessories for hemodialysis i.e.Hollow Fiber Dialyzer and Blood Tubing Line and filed a bill of entry bearing No.8138969 dated 29th January, 2015 along with necessary documents namely invoice, packing list, bill of lading, etc.for clearance of the goods for home consumption.

The said goods were declared under CTH9018931.

(3) The Department withheld the Hollow Fiber Dialyzers on the plea that the said goods have to be classified under CTH8421200 in terms of Circular No.19/2013-CUS dated 9th may, 2013 instead of CTH9018931.

(4) For more than two months the department sat tight over the assessment of the bill of entry, as a result whereof, the petitioner had to suffer loss amounting to approximately Rs.3 lacs on account of demurrage and detention charges.

(5) Left with no other option, and to minimise his loss, the petitioner paid the duty under protest under cover of a letter dated 7th April, 2015 and the Department classified the said goods under CTH8421200 in terms of the aforesaid circular.

(6) The petitioner has challenged the said circular as being ultra vires the Customs Act and violative of Arts.

14, 19(1)(g) and 265 of the Constitution of India.

(7) The dialyzer is an equipment that actually filters the blood.

Almost all dialyzer in use today are of the hollow-fiber variety.

A cylindrical bundle of hollow fibers whose walls are composed of semipermeable membrane, is anchored at each end into potting compound (a sort of glue). This assembly is then put into a clear plastic cylindrical shell with four openings.

One opening or blood port at each end of the cylinder communicates with each end of the bundle of hollow fibers. This forms the blood compartment of the dialyzer.

Two other ports are cut into the side of the cylinder.

These communicate with the space around the hollow fibers, the dialysate compartment. Blood is pumped via the blood ports through this bundle of very thin capillary-like tubes, and the dialysate is pumped through the space surrounding the fibers. Pressure gradients are applied when necessary to move fluid from the blood to the dialysate compartment.

(8) Chapter 84 of the Customs Tariff Act under which the said goods have been sought to be classified by the department speaks of nuclear reactors, boilers, machinery and mechanical appliances and parts thereof.

Chapter 90 speaks of optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus and parts and accessories thereof.

The goods imported by the petitioner are medical instruments and/or apparatus and cannot be termed as machinery and mechanical appliances or parts thereof as has been sought to be done by the department by issuing the impugned circular.

(9) CTH 8421 speaks of centrifuges, including centrifugal dryers, filtering or purifying machinery and apparatus for liquid or gases and item 84212900 speaks of other under filtering or purifying machinery and apparatus for liquids. CTH 9018931 under which the said goods were previously classified and which according to the petitioner, is the correct classification, speaks of renal dialysis

equipment (artificial kidneys, kidney machines and dialyzers).

Thus, from a plain reading of the CTH it is apparent that dialyzers cannot be classified under any other CTH accepting CTH9018931.

(10) When a specific CTH is available for a particular good, such good cannot be classified under any other CTH having a generic description as has been wrongfully sought to be done by the department by issuing the circular under challenge.

(11) The Central Board of Excise and Customs by issuing the said circular has sought to change the classification of the goods in question from a CTH having a specific description to another CTH having a generic description.

This is not permissible in law.

A circular cannot override the statute as has been sought to be done in the instant case rendering the impugned circular bad in law and ultra vires the provisions of the Customs Act, 1962 and the Customs Tariff Act, 1975 and in gross violation of Article 14 of the Constitution of India.

Classification of goods can only be changed by way of a notification as laid down in Section 11A of the Customs Tariff Act and every such notification has been laid before both Houses of Parliament.

(12) CTH8421200 speaks of goods which are filtering or purifying machinery and apparatus for liquids or gases.

Such goods are meant purely for industrial purpose and do not have any medical use.

On the other hand, CTH9018931 specifically classifies goods as Renal dialysis equipment (artificial kidneys, kidney machines and dialysers).

Hence, the Circular under challenge is contrary to the provisions of the Customs Tariff Act, and thus, liable to be set aside.

(13) In the trade, in common parlance the goods imported by the petitioner are also known as artificial kidneys.

Hence, such goods can only be classified under CTH9018931 and not under CTH8421200 as the impugned Circular seeks to do.

(14) The Department has issued a show cause cum demand notice dated 21st April, 2015 alleging that the petitioner has violated the conditions of the impugned Circular as the goods are classifiable under CTH8421200 instead of CTH9018931.

In the said notice, the department has demanded differential duty even for the importations which were made prior to the date of the impugned Circular.

(15) Before issuance of the impugned Circular, the goods in question were classified under CTH9018931.

Even after issuance of the said Circular the customs authorities in the other ports of the country including the Calcutta Customs have cleared the goods under CTH9018931.

In this connection, the petitioner has relied on a document at pages 19/20 of the affidavit-in-reply.

(16) The impugned Circular has been challenged on the following grounds:- (a) When there is a specific tariff heading that is 90189031 for classification of the subject goods, the same cannot be changed to a generic tariff heading that is 84212900 by issuing a Circular.

When a Heading provides for more specific description of the goods in question, it shall be preferred to a Heading with a more general description.

Rule 3(a) of the General Rules for Interpretation of the FiRs.Schedule to the Customs Tariff Act provides that when goods are, prima facie, classifiable under two or more Headings, the Heading which provides, inter alia, the most specific description shall be preferred to the Headings providing a more general description.

The impugned Circular is blatantly contrary to the said Rule and as such the show cause notice issued on the basis of the said Circular is contrary to law.

In this connection, reliance was placed on the decision in the case of HPL Chemicals Ltd.-vs.-Commissioner of Central Excise, Chandigarh, 2006 (197) ELT324 In the said case, the Honble Supreme Court held that classification of goods is a matter relating to chargeability and the burden of proof is squarely upon the Revenue.

If the Department intends to classify the goods under a particular heading or sub-heading different from that claimed by the assessee, the department has to adduce proper evidence and discharge the burden of proof.

It was also held that since the goods were covered by a specific heading, in that case Heading No.25.01, the same could not be classified under the residuary heading.

Rule 3(a) of the Interpretative Rules was referred to and the Supreme Court reiterated that the Heading which provides the most specific description shall be preferred to the Heading providing a more generic description.

In this connection, the Supreme Court also referred to its earlier decision in the case of M/S.Bharat Forge and Press Industries (P) Ltd.-vs.Collector of Central Excise, Baroda reported in 1990 (1) SCC532 (b) The tariff heading can only be changed by way of a notification as laid down in Section 11A of the Customs Tariff Act, 1975.

Where a power is given to do a certain thing in a certain way, they must be done only in that way or not at all and all other methods of performance are forbidden.

This rule squarely applies where the whole aim and object of the legislature would be defeated if the command to do the thing in a particular manner did not imply a prohibition to do it in some other manner.

In this connection reliance was placed on the Supreme Court decision in the case of Ramchandra Keshav Adke (dead) by LRs-vs-.Govind Joti Shavere,(1975) 1

SCC559 (c) A Circular cannot take away the effect of a notification statutorily issued.

In this connection reliance was placed on a decision of the Honble Supreme Court in the case of Sandur Micro Circuits Ltd.-vs.-Commissioner of Central Excise, Belgaum, 2008 (229) ELT641 (d) Executive instruction has no statutory force and cannot override the statute.

In this connection reliance was placed on a decision of the Honble Supreme Court in the case of Rajasthan State Industrial Development and Investment Corporation-vs.-Subhas Sindhi Cooperative Housing Society, Jaipur, (2013) 5 SCC427 wherein at paragraph 27 of the judgment it was held that executive instruments which have no statutory force, cannot override the law.

Hence, any notice, circular, guidelines etc. which run contrary to statutory laws cannot be enforced.

(e) Although, the High Court normally would not interfere with a show cause notice, in certain circumstances, even at the show cause stage, the High Court would intervene.

These are (i) When the show cause notice ex facie or on the basis of admitted facts does not disclose the offence alleged to be committed.

(ii) When the show cause notice is without jurisdiction.

(iii) When the show cause notice suffers from an incurable infirmity.

(iv) When the show cause notice is contrary to judicial decisions or decisions of the Tribunal.

(v) When there is no material justifying the issuance of the show cause notice.

In this connection, the petitioner relied on a decision of this Court in the case of Indian Cardboard Industries-vs.-Collector of Central Excise, 1992 (58) ELT508. It was submitted that in the instant case, the show cause notice is contrary to judicial decisions and as such liable to be quashed.

Respondents Contention:(17) The petitioner filed Bill of Entry bearing No 1938969 dated 29th January, 2015 along with other necessary documents for clearance of the goods for home consumption classifying the goods under CTH9018931.

(18) Subsequently, on 6th April, 2015 the respondent authority assessed the said Bill of Entry and classified the goods under CTH8421200 in terms of the impugned circular and thereby assessed duty to the tune of Rs.2,18,470.80 instead of Rs.1,45,647.20 which had been calculated as duty by the petitioner.

On 6th April, 2015 the petitioner agreed with the said assessment of the respondent Department and declared WE AGREE FOR AMMEND OF ITEM No.1 OF THE B/E UNDER CTH8421200 AS PER BOARD CIRCULAR No.19/2013 DTD.

09.05.2013 (page 40 of the supplementary affidavit-inopposition).On 8th April, 2015 the petitioner submitted a letter to the Department intimating that due to some urgency the petitioner will pay the amount of duty as assessed by the Department on protest and paid the assessed duty on 19th April, 2015.

(19) It is submitted that the petitioner having agreed to the assessment as made by the Department, subsequently the petitioner cannot be allowed to turn around and challenge such assessment.

The petitioner has not approached the court with clean hands since he has suppressed the fact that on 6th April, 2015 he agreed to the assessment as made by the Department.

(20) Section 17 of the Customs Act, 1962 lays down the procedure for assessment of duty.

Sub-Section (1) states that an importer/exporter shall self-assess the duty, if any, leviable on the goods which are being imported.

Sub-Section (2) states that the proper officer of the Customs Department may verify the self-assessment and for this purpose he may examine or test the goods.

Sub-Section (3) provides that the proper officer may ask for specified documents to ascertain the duty.

Sub-Section (4) states that the proper officer may re-assess the duty if it is found that self-assessment has not been done correctly.

Sub-Section (5) provides that where the re-assessment made is contrary to the assessment, the proper officer shall pass a speaking order on the re-assessment within 15 days from the date of re-assessment excepting those cases where the importer confirms his acceptance of such re-assessment in writing.

In the instant case, the entire dispute started since the petitioner initially agreed in writing and confirmed the re-assessment of duty through proper online submission on the portal of the Customs Department and after two days the petitioner changed his mind and disagreed with the re-assessment and informed the department that he would pay the re-assessed duty under protest.

At the time of filing of the writ petition, the petitioner disclosed the subsequent letter whereby he informed the Department that he would pay the reassessed duty under protest but suppressed that he had agreed with the re-assessment in writing on 6th April, 2015.

In case the assessee accepts the re-assessment, the duty of the proper officer is to give out of charge order subject to payment of the differential duty by the assessee.

Upon issuing such order the proper officer becomes functus officio.

This is what happened in the instant case.

Had the assessee not agreed with the re-assessment, the proper officer would have passed a speaking order in writing within 15 days from the date of re-assessment.

under the provisions of the Customs Act.

Such an order is appealable (21) In the instant case, since the assessee agreed in writing with the re-assessment order, the proper officer became functus officio and no question of refund of differential duty can be raised at this stage.

(22) The petitioner challenged the vires of the impugned circular after the petitioner agreed to the re-assessment of the imported goods in terms of the impugned circular.

Thus, the petitioner having accepted the validity of the said circular cannot, thereafter, be permitted to challenge the same.

(23) Prior to the imported consignment which is the subject matter of the instant writ petition, the petitioner had imported 21 other consignments by filing 21 Bills of Entry.

The respondent Department had issued a show cause cum demand notice dated 21st April, 2014 for those earlier Bills of Entry and served the said notice to the authorised representative of the petitioner by hand on the same date and also sent a copy of the notice through speed-post.

The said notice was issued relying on the Circular which is challenged in the present proceeding.

However, in the present writ application the petitioner has challenged only the Circular without challenging the said show cause notice.

The intention of the petitioner appears to be that if he gets a favourable order in the instant proceeding, he will use the same in the adjudication proceeding which is in a nascent stage right now.

Until and unless the said show cause notice attains its finality after the petitioner files his reply and order is passed, it cannot be said that the petitioner is aggrieved by the said Circular.

It is to be determined whether or not the said Circular is applicable in the petitioners case and that cannot be done without going through the proper fact finding i.e. adjudication process.

Thus, in the instant writ petition, the petitioner cannot say that he is aggrieved by the said Circular.

(24) As regards the decisions cited by the petitioners Ld.

Counsel in support of the contention that in an appropriate case the Writ Court may interfere with a show cause notice, it is submitted that in both the said cases the writ application was filed after the adjudication proceeding was completed by following the prescribed procedure, that is, issuance of show cause cum demand notice, reply thereto by the assessee along with his personal hearing and passing of the order in original by the adjudicating authority.

In the instant case also it is necessary for the adjudicating authority to decide whether the goods in question fall under CTH9018931 or under 84212900.

Courts View:(25) I have considered the rival contentions of the parties.

(26) It is not in dispute that originally the goods in question, being Dialysers were classified under CTH9018931.

The impugned circular has sought to change such classification by bringing Dialysers under CTH8421200.

The question that falls for determination in this writ application is whether or not the impugned circular is legally valid.

(27) Chapter 90 of the Customs Tariff Act has the caption optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; parts and accessories thereof. Heading 9018 under Chapter 90 pertains to instruments and appliances used in medical, surgical, dental or veterinary sciences including scientigraphic apparatus, other electro-medical apparatus and sight-testing instruments.

CTH9018931 specifically pertains to renal dialysis equipment (artificial kidneys, kidney machines and dialysers).(28) Chapter 84 of the Customs Tariff Act has the caption nuclear react ORS.boileRs.machinery and medical appliances; parts thereof. Heading 8421 under Chapter 84 pertains to centrifuges, including

centrifugal dryers, filtering or purifying machinery and apparatus, for liquids or gases. CTH8421200 talks of filtering or purifying machinery and apparatus for gases. (29) Thus, CTH9018931 specifically provides for dialysers whereas CTH8421200 provides for generic description of articles.

Heading 9018 under Chapter 90 pertains to medical instruments whereas heading 8421 under Chapter 84 pertains to goods which are generally used for industrial purposes and do not appear to have any medical use.

Hence, in my opinion, the natural classification of dialysers should be under CTH9018931 as it was prior to issuance of the impugned circular.

I am in agreement with the submission of the Ld.

Sr.Counsel for the petitioner that when a specific tariff heading for classification is available, the goods concerned cannot be classified under a generic tariff heading.

A heading with a more specific description of the goods in question shall be preferred to and prevail over a heading with a more general description.

Just as a special law in a particular field would prevail over a general law that may be operational in that field, a heading with a more specific description would prevail over a heading with a more general description.

In this connection, Rule 3(a) of the General Rules for interpretation of the FiRs.Schedule to the Customs Tariff Act makes it very clear that the heading which provides the most specific description shall be preferred to headings providing a more general description.

The decision of the Honble Supreme Court in the case of HPL Chemicals Ltd.-vs.Commissioner of Central Excise, Chandigarh (supra) is squarely on the point.

In that case, the Honble Apex Court held that since the goods in question were covered by a specific heading, the same could not be classified under the residuary heading.

The Honble Apex Court further held that if the Department intends to classify the goods in question under a heading which is different from the heading under which an assessee classifies such goods, the burden of proof is on the Department which has to be discharged by adducing proper evidence.

In the instant case, the onus was on the department to justify the change of classification sought to be made by the impugned circular, which onus, in my opinion, has not been discharged by the Department.

Thus, it is evident that the impugned circular is blatantly contrary to the said Rule and is thus, not sustainable.

(30) Section 11A of the Customs Tariff Act empowers the Central Government to amend the fiRs.schedule to the said Act.S.11A of the said Act runs as follows:S.

11A.

Power of Central Government to amend FiRs.Schedule.- (1) Where the Central Government is satisfied that it is necessary so to do in the public interest, it may, by notification in the Official Gazette, amend the FiRs.Schedule: Provided that such amendment shall not alter or affect in any manner the rates specified in that Schedule in respect of goods at which duties of customs shall be leviable on the goods under the Customs Act, 1962 (52 of 1962).(2) Every notification issued under sub-Section (1) shall be laid, as soon as may be after it is issued, before each House of the Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the notification or both Houses agree that the notification should not be issued, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that notification. Thus, the said Section specifies the manner in which the fiRs.schedule to the Customs Tariff Act may be amended.

Such amendment may be carried out by notification in the Official Gazette and such notification must be placed before both the Houses of the Parliament for their approval.

It is trite law that where a statute empowers an authority to do a certain thing in a certain way that thing must be done only in that way or not at all.

All other methods of exercising such power are forbidden.

This is the age old principle of law laid down by Jessell M.R.in the case of Taylor-vs-Taylor, reported in (1876) 1 Ch.

D426 reiterated in the Privy Council decision of Nazir Ahmed-vs.-Emperor, reported in AIR 1936 PC253and subsequently followed by our Supreme Court in innumerable cases.

In this connection, reference may be given to the decision of the Honble Apex Court in the case of Ramchandra Keshav Adke (dead) by LRs-vs.Govind Joti Chavare (supra).(31) In the present case, the Department sought to amend the fiRs.schedule to the Customs Tariff Act by issuing the impugned circular.

This falls foul of S.

11A of the said Act and on this ground also the impugned circular must be set aside.

(32) I am inclined to accept the submission of Ld.

Sr.Counsel for the petitioner that a circular cannot take away the effect of a notification statutorily issued.

In this connection reference may be made to the Supreme Court decision in the case of Sandur Micro Circuits Ltd.-vs.Commissioner of Central Excise, Belgaum (supra).(33) The impugned circular at best contains executive instructions.

It is not issued under any statute and has no force of law.

It cannot override the statute.

Any notice, circular, guidelines etc. which are contrary to statutory laws cannot be enforced as held by the Honble Apex Court in the case of Rajasthan State Industrial Development and Investment Corporation-vs.-Subhash Sindhi Cooperative Housing Society, Jaipur (supra).⁽³⁴⁾ Two points have been urged by Ld.

Counsel for the Department in opposing this writ application.

Firstly, he submitted that on 6 April, 2015 the petitioner agreed with the decision of the Department and recorded so in writing.

It was only two days later i.e. on 8 April, 2015 that the petitioner wrote a letter stating that he was paying the reassessed amount of duty under protest.

Having once agreed to the assessment made by the Department, the petitioner cannot be permitted to challenge the said assessment or the impugned circular on the basis whereof the assessment was made.

Ld.

Counsel submitted that the fact that the petitioner had initially agreed with the Department's assessment has been concealed by the petitioner which amounts to suppression of material facts.

The petitioner has not approached the court with clean hands and does not deserve any relief.

In my opinion, non-mentioning of any and every fact does not amount to suppression of material facts.

A material fact is one that would have a bearing on the decision of the court.

Even if the petitioner mentioned in the writ petition about the factum of he having initially agreed with the Department's assessment, my decision would not have been any different.

This is so because there can be no estoppel against the statute.S.11A of the Customs Tariff Act does not countenance amendment of the FiRs.Schedule to the said Act by issuance of a mere departmental circular.

The method in which the FiRs.Schedule has been sought to be amended is contrary to the method prescribed by S.

11A and as such the circular cannot be sustained.

Hence, in my opinion, the fact that the petitioner initially agreed with the Departments assessment is not a material fact and accordingly the respondents fiRs.point is rejected.

(35) The second point urged by the Ld.

Counsel for the Department is that the petitioner has not challenged the show cause cum demand notice dated 21 April, 2014.

In my view, this is a point without any substance.

The said show cause notice is admittedly based on the impugned circular.

If the circular is quashed, the show cause notice automatically goes.

(36) In view of what has been discussed above, I hold that the impugned circular is bad in law being without jurisdiction and cannot be sustained.

The Circular No.19/2013-CUS dated 9 May, 2013 is quashed and set aside.

The writ application accordingly succeeds.

There will, however, be no order as to costs.

(37) Urgent certified photocopy of this judgment, if applied for be given to the parties upon compliance of necessary formalities.

(Arijit Banerjee, J.)