

Extrusion Vs. Collector of Customs

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Court : Kolkata

Decided On : Mar-31-1993

Reported in : 1994(70)ELT52(Cal)

Judge : Ajit K. Sengupta and Shyamal Kumar Sen, JJ.

Acts : [Customs Act, 1962](#) - Sections 112 and 130(1)

Appeal No. : Matter No. 3417 of 1988

Appellant : Extrusion

Respondent : Collector of Customs

Advocate for Def. : S.K. Mitra, Adv.

Advocate for Pet/Ap. : R.N. Bajoria, Sr. Adv.

Judgement :

Ajit K. Sengupta, J.

1. In this reference under Section 130(1) of the Customs Act, the following question of law has been referred to this Court:-

'Whether on the facts and in the circumstances of the case, the finding of the Tribunal upholding the charges levelled against the appellant and the imposition of the redemption fine or penalty is perverse and/or was arrived at

by excluding relevant material and/or by taking into consideration the irrelevant material and/or was arrived at on the basis of irrelevant or extraneous consideration.'

2. Shortly stated, the facts are as under :-

3. The applicant is a manufacturer of plastic materials for packaging purposes. For its said business, the applicant entered into a contract with a West German firm for importing plastic extruder having screw diameter of 6' equivalent to 152.4 mm. The payment for the said machine was to be made on deferred terms and required the approval of the Reserve Bank of India. As per the Import & Export Policy of 1980-81, extruder machine having screw diameter of above 150 mm was a permissible item for import under the Open General Licence (OGL). On 18th January, 1981, the confirmed order for the above machine was placed to the supplier. The contract was registered prior to 28th February, 1981 and in accordance with the import policy the shipment could be effected within 31st March, 1982. After registration, approval of the Reserve Bank of India was duly obtained for payment of the price on deferred terms. Two letters of credit were duly opened with United Commercial Bank one for payment of the initial sum of 15% and the other for payment of the remaining value of the machine on deferred terms. Two letters of credit were opened on 19th May, 1981.

4. The said machine was duly shipped by the foreign supplier on 30th March, 1982 on the Vessel 'Kastro-K' that is, within the period permitted under the Import Policy for the year 1980-81. All the relevant shipping documents relating to the said machine namely Bill of Lading, supplier's invoice, packing list etc., were duly received by the applicant and negotiated by its bank under the said Letter of Credit for 15% of the price of the machine. The said vessel 'Kastro-K', however, could not arrive at Calcutta as it was detained at Piraeus Port in Greece. The detention of the said vessel was an arbitrary, high-handed and illegal act which resulted in unloading and detention of the cargo carried by the said vessel including the said machine. Several legal proceedings had to be initiated in the Greek Courts for obtaining release of the said machine by the applicant and/or its representatives and by other cargo-owners. Only on 23rd September, 1983 by reason of the said

legal proceedings, it was possible for the applicant to obtain the release of its machine in Greece. As stated earlier, the documents had been duly negotiated in the year 1982 and the applicant's bank had paid the initial 15% value of the said machine. Subsequently, two instalments towards the balance price were also paid under the second Letter of Credit. The other instalments were not paid by the applicant's bankers by reason of an injunction obtained by the applicant from this Court restraining its bankers from making further payment in view of the said wrongful and illegal detention of the machine at the Greek Port. After delivery of the said machine on 23rd September, 1983 a survey was duly conducted at the Greek Port for ascertaining the condition of the said machine and it was discovered that on account of long-uncared storage and improper handling, the machine needed to be attended by the manufacturers for removing the damage/defects. Accordingly, from the Greek Port, the machine was sent to the machinery manufacturer who after rectifying the damage/defects re-shipped the said machine on the vessel 'CASTOR' on 11th February, 1984. The said machine, thereafter, arrived at the Calcutta Port.

5. The applicant had declared in the Bill of Entry for warehousing order that the said machine had a screw diameter of 6" (152.4 mm) under the impression that the goods which had been supplied were in accordance with the terms and conditions of the applicant's order placed as per the catalogue of the supplier and the proforma invoice.

6. In the said Bill of Entry, the applicant duly stated the fact of shipment of the said machine originally on the vessel 'Kastro-K' on 30th March, 1982 and its impounding at the Greek Port.

7. However, on examination, the diameter of the screw was found to be only 150 mm only by the Customs authorities. The customs authorities also alleged that the Import Policy for 1983-84 did not specify extruder as an item under O.G.L.

8. The Import Policy for the year 1980-81 which permitted the import of the machine with a screw diameter above 150 mm was discontinued in the subsequent policy, namely, Import Policy for the year 1983-84 which was in vogue when the said machine was re-shipped on 11th February, 1984 after its wrongful and illegal

detention in the Greek Port. Accordingly, the Customs authorities were not allowing the clearance of the said machine and further wanted confirmation as to the diameter of its screw from the foreign supplier. Such confirmation was obtained from the foreign supplier and submitted to the Customs authorities. The Customs authorities later measured the diameter of the screw of the said machine and found that it was 150 mm instead of 152.4 mm as claimed by the applicant and as certified by the foreign supplier.

9. A notice to show-cause was issued by the Customs authorities alleging that the said machine was liable to confiscation on the ground that its importation was not permitted at the relevant time and that there had been mis-declaration of the goods inasmuch as the screw diameter was described as 152.4 mm instead of 150 mm. The applicant duly submitted its reply to the show-cause notice and appeared at the personal hearing. In the course of the said hearing, the representative of the foreign supplier also appeared before the Collector of Customs and explained that at the time, when the machine had been sent back to their works for removing the defects, the barrel which had been damaged was replaced with barrel and screw of 150 mm diameter overlooking the fact that the said machine was originally supplied with screw of 152.4 mm diameter and the replacement should have been with a screw of that diameter. The said representative admitted the mistake on the part of the foreign supplier and offered to replace the barrel and screw. By his order dated 9th November, 1984, the Collector of Customs ordered for confiscation of the said machine and allowed the applicant to redeem the same on payment of redemption fine of Rs. 8 lacs. A personal penalty of Rs. 2 lacs was also imposed under Section 112 of the Act on the applicant.

10. Against the said order of the Collector of Customs, an appeal was preferred by the applicant before the Customs, Excise and Gold (Control) Appellate Tribunal (in short 'the Tribunal'). During the pendency of the appeal, the foreign supplier approached the applicant for settlement of the litigation pending in this Court by reason whereof further payments to it had been held up and for resolving the dispute relating to supply of the undersized machine. Arbitration was also tried for settlement of the dispute. These subsequent facts were also brought to the notice of the Tribunal at the hearing of the appeal. The Tribunal by its order dated 17th

February, 1986 upheld the order of the Collector confiscating the said machine and levying the said redemption fine and personal penalty.

11. At the hearing before us, it has been contended that the finding of the Tribunal is perverse and vitiated by reason of its excluding relevant materials and/or evidence and basing its conclusion on surmises and extraneous considerations. Mr. Bajoria, learned Advocate, has drawn our attention to the certain materials stated to have been ignored by the Tribunal and not taken into consideration. It is the contention of Mr. Bajoria that the facts and circumstances relevant to the bonafide conduct of the importer in importing the goods and the extenuating circumstances leading to the import have to be taken into consideration for determining as to whether the goods should be confiscated and if so whether an option for redemption of goods should be allowed. He has submitted that the Tribunal fell in error in holding that the question of intention is not relevant in deciding the question of confiscation and quantum of redemption fine.

12. On the other hand, the contention of Mr. S.K. Mitra, learned Advocate for the respondents, is that the machine arrived when the policy for 1980-81 was not in force. This is a clear and an undisputed fact. According to him, nothing further is required to be considered. The validity of the import should be considered with reference to the policy for 1983-84 which did not permit the impugned importation. Hence, the order is justified. He has submitted that the Tribunal took into account all the relevant facts and such finding cannot be held to be perverse. According to Mr. Mitra, mens rea and/or motive is wholly irrelevant in the context of confiscation and imposition of redemption fine. Mr. Mitra has also sought to suggest mala fides on the part of the applicant. It is contended that the conduct of the applicant was such that levy of redemption fine and/or penalty was fully justified and was reasonable.

13. The Counsel for the parties have relied on several decisions to which we shall presently refer.

14. Before we deal with the respective contentions, it is necessary to highlight certain facts appearing from the order of the Collector of Customs and the Tribunal.

15. The Collector of Customs held against the applicant on the undernoted allegations :-

(i) The date of shipment of the said machine is to be taken as 11th February, 1984 when it was re-shipped after rectification of the damage/defects and not 30th March, 1982 when it had been originally shipped;

(ii) The applicant had mis-declared the diameter of screw in collusion with the foreign supplier;

(iii) Catalogue of the foreign supplier relied upon by the applicant in support of its contention that the foreign supplier the machine with screw diameter in British system of inches was not genuine since the other dimensions of the machine mentioned in the said catalogue were in round figures in millimetres and only the screw diameter was in fractions of millimetre.

16. At the time of hearing before the Tribunal, the various aspects of the case were highlighted and the order of the Collector was assailed with reference to each of the aforesaid aspects which led him to order for confiscation of the said machine and imposition of the said redemption fine and penalty. The Tribunal in its order did not at all deal with the contentions of the applicant on those issues in it. The Tribunal considered the materials produced before it. The Tribunal in its order held that 'it was immaterial from the point of view of the Customs Act whether the mis-statement was the result of a collusion between the supplier and the importer or not. The fact of mis-statement was itself sufficient to establish an offence.'

17. With regard to the catalogue on which reliance was placed by the Collector, the Tribunal held that 'the controversy regarding diameter shown in the catalogue in mms. and fraction of mms. is in our opinion of no significance.' Thus, the Tribunal brushed aside the only finding of the Collector on the basis of which he sustained the charge of collusion. The Tribunal proceeded merely on the basis that the date of shipment of the machine had to be considered as 11th February, 1984 and on the same material date a specific licence was required which the applicant was not having; proceeding on the aforesaid basis, the Tribunal came to the conclusion that the applicant had taken a calculated risk in importing the machine without licence.

The Tribunal held that there had been a wrong statement in the Bill of Entry with regard to the diameter of the screw of the machine and the question of mens rea, motive or bonafides was not relevant for confiscation or imposition of redemption fine. In the context of imposition of penalty, an observation was made that the applicant was not innocent. The Tribunal, accordingly, upheld the order of the Collector confiscating the same machine and levying the same redemption fine and penalty.

18. In our view, Mr. Bajoria is right in his submissions that the Tribunal came to its finding by ignoring relevant materials without taking into consideration some relevant evidence. Firstly, the Tribunal completely ignored the conditions and in particular condition 4, governing imports under Open General Licence (OGL) specified in Appendix-10 of the said Import Policy for 1980-81. The said Clause 4 reads as under :-

'(4) In the case of capital goods, equipment and permissible spares covered under Open General Licence (OGL), vide Items 3, 4, 5 and 6 above, if the eligible actual User Importer enters into a firm contract for import upto 28-2-1982 but the goods cannot be shipped on or before 31-3-1981 on account of the longer delivery period involved the shipment may be allowed upto 31-3-1982 in pursuance of such firm contract, provided the contract, in question, is duly registered with a foreign exchange dealer (Bank) on or before 28-2-1981.'

19. The said Clause 4 makes it clear that the condition of the Open General Licence (OGL) was that the machine should be shipped before 31st March, 1982. The approval of the Reserve Bank also contained the same stipulation. The date of the original shipment on 30th March, 1982 could not be ignored by the Tribunal since the shipment for the purpose of the said import would only be that date and not the subsequent re-shipment necessitated on account of unforeseen circumstances of the impounding of the machine at the Greek Port. Further, neither the Open General Licence (OGL) nor the approval of the Reserve Bank stipulated any particular date by which the importation was required to be completed. The actual arrival of the machine in the country in 1984 is not relevant for the purpose of deciding the legality of its import.

20. Secondly, Tribunal did not consider the fact of shipment of the said machine within 30th March, 1982, its subsequent detention at the Greek Port, its being taken back to the manufacturer's premises for rectification of the damage suffered due to detention.

21. These facts were ignored by the Tribunal solely on the ground that they were merely historical. The said facts were very material and relevant for the purpose of judging the circumstances in which the said machine came to be imported and for determining whether there was any act of omission on the part of the applicant which could justify the confiscation of the machine and /or imposition of the redemption fine and penalty.

22. Thirdly, the fact that substantial payment had been made under the letters of credit and it would have been a total loss if the machine was not taken and would have exposed the applicant to charges of wasting the foreign exchange and not having utilised it for the purpose for which it was allowed, was also ignored.

23. Fourthly, the Tribunal did not uphold the finding of the Collector with reference to the catalogue of the foreign supplier and inference sought to be drawn by him from the fact that whereas the other dimensions were given in whole millimetres only the screw diameter was expressed in fractions of millimetre. It did not agree with the finding of the Collector that there was collusion between the applicant and the foreign supplier. Tribunal was of the view that the said finding was wholly irrelevant and, accordingly, did not deal with or advert to the evidence on record, e.g. proforma invoice of the foreign supplier, the order placed by the applicant, the foreign supplier's acknowledgement, letters of credit, Bill of Lading, Packing lists, suppliers' invoices and confirmation, payments made, disputes between the applicant and the foreign supplier, proceedings in this Court, statement of the foreign supplier's representative before the Collector etc. This evidence undoubtedly establishes that there was no basis for the finding of collusion.

24. Fifthly, the Tribunal proceeded on the basis that the bonafides and the other attending facts and circumstances concerning the import were wholly irrelevant in the matter of imposition of redemption fine and, accordingly, ignored all these aspects and the evidence and/or materials relating thereto.

25. Sixthly, the Tribunal proceeded on the erroneous assumption that since the machine was re-shipped in 1984 it could not be imported under Open General Licence (OGL) of the Import Policy for 1980-81 and that a licence was required for its import. On the said assumption, the Tribunal held that the applicant not having made any attempt to obtain a licence took calculated risk to import the machine without licence. In our view the Tribunal mis-directed itself in coming to the said finding. As already stated, the material date of shipment in the instant case was 30th March, 1982 and since the applicant bonafide believed that the screw diameter of the machine was 6' (152.4 mm), it did not apply for or obtain any licence. The mere fact that the machine was re-shipped in 1984 was wholly irrelevant and it could not be said that the applicant took any calculated risk since it sought to import the said machine under Open General Licence (OGL) in the bonafide belief that its screw diameter was 6' (152.4 mm).

26. Seventhly, the casual observation, if at all it could be considered a finding, to the effect that the applicant was not innocent and that there was mis-statement, is totally perverse. As indicated, the Tribunal failed to take into account the facts and circumstances under which the said machine had been imported as well as the materials and evidence produced before it to show the circumstances under which the import was delayed. According to the Tribunal, whether there was any collusion between the applicant or the foreign supplier was immaterial and the Tribunal proceeded on the footing that bonafide or mens rea was not relevant for the purpose of imposition of redemption fine. In this context, and setting of facts, the finding of the Tribunal that the applicant was not innocent or there was a mis-statement is unwarranted. In our view, the Tribunal proceeded to equate an incorrect statement with a mis-statement totally overlooking the fact that mis-statement implies making an incorrect statement with the knowledge that the statement was not correct. Having refused to go into the circumstances leading to the import of the said machine, the conduct of the applicant and all the other relevant materials and/or evidence, the Tribunal could not arrive at any finding that there was mis-statement or that the applicant was not innocent.

27. Eighthly, it is now well-settled that in the matter of imposition of redemption fine and/or penalty, mens rea and/or conduct and/or attending extenuating

circumstances are material and relevant.

28. In *Akbar Badruddin Jiwani v. Collector of Customs* reported in : 1990(47)ELT161(SC) , the Supreme Court held as follows :-

'57. Before we conclude it is relevant to mention, in this connection, that even if it is taken for argument's sake that the imported article is marble falling within Entry 62 of Appendix-2, the burden lies on the Customs Department to show that the appellant has acted dishonestly or contumaciously or with the deliberate or distinct object of breaching the law;

58. In the present case, the Tribunal has itself specifically stated that the appellant has acted on the basis of bonafide belief that the goods were importable under OGL and that, therefore, the appellant deserves lenient treatment. It is, therefore, to be considered whether in the light of this specific finding of the Customs, Excise & Gold (Control) Appellate Tribunal, the penalty and fine in lieu of confiscation required to be set aside and quashed. Moreover, the quantum of penalty and fine in lieu of confiscation are extremely harsh, excessive and unreasonable bearing in mind the bonafides of the appellant, as specifically found by the Appellate Tribunal;

59. We refer, in this connection, the decision in *Merck Spares v. Collector of Central Excise & Customs, New Delhi*, *Sharma Engine Valves Ltd., Bombay v. Collector of Customs, Bombay* and *Madhusudan Gordhandas & Co. v. Collector of Customs, Bombay* wherein it has been held that in imposing penalty the requisite mens rea has to be established. It has also been observed in *Hindustan Steel Ltd. v. State of Orissa* : [1972]83ITR26(SC) by this Court that :-

'The discretion to impose a penalty must be exercised judicially. A penalty will ordinarily be imposed in case where the party acts deliberately in defiance of law or is guilty of contumacious or dishonest conduct, or acts in conscious disregard of its obligation; but not, in cases where there is a technical or venial breach of the provisions of the Act or where the breach flows from a bonafide belief that the offender is not liable to act in the manner prescribed by the statute.'60. In the instant case, even if it is assumed for argument's sake that the stone slabs imported for home consumption are marble still in view of the finding arrived at by

the Appellate Tribunal that the said product was imported on abona fide belief that it was not marble, the imposition of such a heavy fine is not at all warranted and justifiable.'

29. In *Jain Exports Private Limited v. Union of India*, reported in : 1990(47)ELT213(Bom) , the Supreme Court observed as follows :-

'5. In our opinion, the Tribunal committed apparent error in refusing to take into account the extenuating circumstances leading to the import of the disputed goods for purposes of determining the quantum of redemption fine.

'6. While determining the question of quantum of redemption fine it is essential to consider the facts and circumstances relevant to the bona fide conduct of the importer in importing the goods. The question of bona fide import is irrelevant for determining the quantum of redemption fine as held by this Court in *M/s. D. Navinchandra & Co., Bombay & Ors. v. Union of India & Ors.* : 1987(29)ELT492(SC) ; and *B. Vijay Kumar v. Union of India*, reported in AIR 1987 SC 1794. In these two decisions, this Court held that while imposing fine or penalty for the import of goods in contravention of the Import Policy, the authorities should consider the plea of bona fides in the background of the facts attending to the import of the relevant goods.'

30. In *P. Ripakkumar and Company v. Union of India*, reported in : 1991ECR318(Bombay) , a Division Bench of the Bombay High Court set aside the confiscation on the finding that the importer had acted bona fide. It was held at page 71 of the report as follows :-

'8. On the specific statement made by both the counsels, we propose to examine the question as to whether on the facts and circumstances of the case, the order of confiscation passed by the Customs authorities and the order of imposition of redemption fine in lieu thereof should be sustained. In these circumstances, Shri Mehta submitted that the action of the petitioners was bona fide and consequently the order of confiscation and redemption fine in lieu thereof should be set aside.... In these circumstances, in our judgment, the import made by the petitioner cannot be faulted on the ground of mala fide and the order of confiscation is

required to be set aside. As the petitioners have already cleared the goods on payment of redemption fine, it is necessary to direct the respondents to refund the said amount to the petitioners.'

31. The principles which can be culled out from the aforesaid decisions are that facts and circumstances relevant to the bona fide conduct of an importer in importing the goods and the extenuating circumstances leading to the import have to be taken into consideration for determining as to whether the goods should be confiscated and any redemption fine imposed. Even if the import be in contravention of any prohibition, the importer should not be visited with confiscation if his conduct in making the import is bona fide. Even if confiscation is made in such a case, the redemption fine can only be a token one. Merely because action against goods is action in rem it does not mean that a person who had committed no offence in respect of them or with reference to them could be made to suffer by way of payment of fine or otherwise. Imposition of fine, in effect amounts to awarding a punishment to the person held liable to pay the same and a person can be held liable to punishment only if he is found to be responsible for some act of omission or commission with reference to the law and the goods in question. In our view, to impose or inflict punishment on a person who is not guilty is against all canons of natural justice and fair play. Even otherwise, merely because the goods are liable to confiscation it is not always necessary to impose a fine in lieu of confiscation, in the same way, as merely because a penalty is imposable under a provision, it is not necessary that it must always be imposed. The facts and circumstances of the case as a whole have to be borne in mind and it has to be ensured that absurd situations unintended by law do not result. There are innumerable cases in which goods are released on caution or warning when some technical violation or breach of provision is noticed and imposition of fine or penalty is not warranted. Both in cases of fine and penalty, it is the non-observance of law by the person concerned which is required to be established in the first instance. In our view, the principles laid down by the Supreme Court in *Hindustan Steel Ltd.* (Supra) have to be kept in mind and duly applied, *mutatis mutandis*, in cases of confiscation of goods and imposition of redemption fine as well. In the instant case, however, the Tribunal fell in error in holding that the question of intention is irrelevant in deciding upon the confiscation and quantum of

redemption fine. The instant case is a fit one where confiscation should not have been made having regard to the bonafide conduct of the applicant.

32. Mr. Mitra, learned Advocate appearing for the respondents, has however relied on a decision of Supreme Court in *Collector of Customs v. D. Bhoormul*, reported in : 1975 CriLJ 545 . In that case, the Supreme Court held that proceedings for confiscation of contraband goods were proceedings in rem and the penalty of confiscation was enforced against the goods irrespective of whether the offender was known or unknown. Goods found to be smuggled could be confiscated without proceeding against any person and without ascertaining who is their real owner or who were actually concerned in their illicit import. It was held that penalty on the other hand was enforced against the person concerned in the smuggling of the goods and was one in personem.

33. He has also relied on the decision of this Court in *Charandas Malhotra v. Assistant Collector of Customs*, reported in : AIR 1968 Cal 28 . In that case, a Division Bench of this Court held that whereas confiscation could be ordered irrespective of knowledge of the person in whose possession goods were found, the imposition of a penalty required deliberate action and knowledge. It was held that Section 112 of the Act which provides for imposition of penalty required such knowledge.

34. He has further relied on a decision of the Supreme Court in *Sewpujanrai Indrasanrai Limited v. Collector of Customs*, reported in : 1958 CriLJ 1355 . There the Supreme Court held that confiscation of goods was a proceeding in rem and the penalty was enforced against the goods whether the offender was known or not known and the order of confiscation operated directly upon the status of the property.

35. On a perusal of the aforesaid decisions, it would appear that these decisions are no authority for the proposition that for the purpose of levy of redemption fine and/or penalty, the conduct of the parties is irrelevant. In these cases, the issues involved were altogether different. Goods which had been smuggled like gold, wrist watches etc., were sought to be confiscated in the hands of the person possessing them. The plea of such persons that they had nothing to do with the smuggling

themselves and were bonafide purchaser/possessors and as such the goods could not be confiscated was rejected on the ground that proceedings were in rem against the goods. The ratio of the said decisions is that the owner or possessor of smuggled goods could not avoid liability for confiscation of smuggled goods on the ground that he himself had nothing to do with the smuggling although on such plea he can avoid personal penalty. The question of bona fide importer of technical breach of import regulations or bonafide conduct of the importer in bringing the goods were not at all involved. The sole issue in the said cases was whether smuggled goods once they leave the custody of the actual smuggler could be confiscated in the hands of subsequent owners/possessors who had nothing to do with the smuggling. These cases had nothing to do with the question of bona fide of import or imposition of redemption fine.

36. Mr. Mitra, learned Advocate for the respondent has also contended that even for the purposes of imposition of penalty under Section 112 of the Act, presence of mens rea is not a condition precedent. This contention, however, is contrary to even the authorities relied upon on behalf of the respondent. On the other hand, Akbar Badruddin Jiwani (supra) and Jain Exports Private Ltd. (supra) clearly lay down that for imposition of penalty mens rea is a necessary condition. In our view, the decisions in Gujarat Travancore Agency v. Commissioner of Income Tax, reported in : [1989]177 ITR 455 (SC) ; Kirloskar v. Union of India, reported in : 1988 (34) ELT 30 (Bom) ; Nizam Sugar Factory v. Collector, reported in : 1987 (27) ELT 40 (AP) and Arun Spinning Mills v. Collector of Customs and Central Excise, reported in 1988 (33) E.L.T. 270, do not assist the respondent as they were rendered on construction of the provisions of different statutes.

37. The respondent has also submitted that the intention of the importer was mala fide and the conduct of the importer justified the levy of redemption fine and penalty. The Tribunal, as indicated, neither considered nor had given any finding on the bona fide and otherwise of the applicant. None of the aspects sought to be raised by the respondent has been considered by the Tribunal. In our view, these aspects, having not been considered and having been ignored by the Tribunal, cannot be urged by the respondent in this reference. These do not arise out of the appellate order. As a matter of fact, the controversy, in this reference, as we have

already indicated, is the failure of the Tribunal to consider these aspects and the Tribunal fell in error in ignoring the same.

38. One other aspect of the matter has to be considered. From the facts found and/or admitted, it appears that the question of collusion between the foreign exporter and the applicant is a vital aspect of the whole matter. It is not disputed that there was some obstacle to the consignment arriving at the Indian port on time. The admitted position is that the goods were despatched by the exporter on time, but the consignment was detained by the ship's owner in Greece. It is accepted as fact that the applicant after protracted correspondence and litigation could secure the release of the goods after a long time. It is also a fact that the delay caused damages to the goods being some machines. This was noticed on delivery abroad. The same had to be returned to the manufacturer for replacement. Therefore, the fact that the import policy for AM 1984 excluded extruder as an item under OGL was a development subsequent to the import order which was governed by Import & Export Policy of 1980-81 which allowed import of extruder having screw diameter above 150mm as an item under OGL. It is not disputed that the order as placed on 18-1-1981 was for extruder with diameter of 6' equivalent to 152.4 mm. Now the allegation is that even going by the benefit of OGL available under the policy of 1980-81 the applicant made a violation as the diameter of the screw ultimately arrived in 1984 was found to be 150 mm only, though the applicant declared in the Bill of Entry that the said machine had a screw diameter of 152.4mm.

39. But one fact has to be kept in mind that the history of this particular consignment is out of the ordinary. It had to pass through many odds. Firstly, the arrival of the shipment was unusually delayed and second the manufacturer in the process of rectifying the damage by replacement could have possibly deviated from the specification without the knowledge of the applicant. Therefore, the learned Counsel for the applicant was right in laying emphasis on the question of proof of collusion as the most decisive question of fact in the case. Unless it could be said that the applicant consciously and in collusion with the exporter sought to pass off the mis-statement to get away with the violation, it would not be proper to take an adverse inference against

the applicant, particular regard being had to the fact that the exceptional circumstances which disrupted shipment and the normal arrival of the goods. The applicant's statement in the Bill of Entry could be said to be a mis-statement only if the mis-statement was the result of a collusion between the supplier, i.e. the foreign exporter and the Indian importer, the applicant.

40. It is clear from the correspondence between the foreign exporter and the applicant that the applicant was not aware that the exporter replaced the earlier machines damaged by new machine with screw of 150 mm diameter. The deviation again appears to have crept in because of the long period during which litigation was going on and the foreign manufacturer changed over to metric system and 150 mm diameter was adopted as the usual size. It was principally on account of the obstructions in the import that this mistake could creep in. The correspondence also shows that the applicant was totally unaware of these eventualities until the imports arrived. Thus, the Tribunal failed to appreciate the facts and circumstances of the case and arrived at an important conclusion which is not sustainable.

41. For the reasons aforesaid, the question in this reference must be answered in the affirmative.

42. There will be no order as to costs.

43. Shyamal Kumar Sen, J.

I. agree.