

**Shree Electronics Vs. Collector of Customs**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** Nov-29-1995

**Reported in :** (1996)(81)ELT407TriDel

**Appellant :** Shree Electronics

**Respondent :** Collector of Customs

**Judgement :**

1. Transshipment cargo consignment covered by Airway Bill No.098-57616812 and House Airway Bill No. 21732 which had arrived from Hongkong by Air India Flight on 6-5-1992 was intercepted on 8-5-1992 on the basis of intelligence information. The consignment consisted of 48 cartons of "Polyester Film Capacitors". Consignee was shown as Shree Electronics, G-41, Noida, Ghaziabad (appellant in Appeal No.C/533/94/A). Consignor was shown as NRCOLA Ltd., Hongkong. Consignor's cargo agent was M/s. Air Freight Ltd., Hongkong. Consignee's cargo agent was M/s. Air Freight, Calcutta. Instruction was issued to Air India not to load the consignment for transshipment to Calcutta, till the consignee's address was verified. Enquiries conducted through customs and excise officers at Delhi, Noida and Calcutta revealed that there was no such unit by the name. "M/s. Shree Electronics" at the given address. Hence, consignment was opened and examined in the presence of Panch witnesses. The cartons were found to contain 20,02,000 polyester film capacitors of foreign origin. They were seized on 29-5-1992 in the reasonable belief that the same were liable for action under Customs Act, 1962. Representative samples were drawn. The same were valued at Rs. 120/- per

piece by the Assistant Collector of Air Cargo Complex. The total value was worked out at Rs. 24,02,400/- CIF and market value at Rs. 72,07,200/-. Ultimately, notice was issued by the Asstt. Collector to show cause to the Addl. Collector. On the ground that cause was not shown, order dated 31-3-1994 was passed by the Collector, Customs Airport confirming the show cause notice, confiscating the goods but allowing option to pay fine of Rs. 2,00,000/- in lieu of confiscation and imposing penalty of Rs. 1,00,000/- on each of the two partners, Satish Luthra (appellant in Appeal No. C/645/94-A) and Sunil Kumar (appellant in Appeal No.C/565/94-A). The firm and the partners have filed these separate appeals.

2. We may at this stage refer to certain events which transpired before and after the show cause notice. Seizure was on 29-5-1992 and was without prior or subsequent intimation. On 18-7-1992, Satish Luthra, having found that the goods did not reach Calcutta but were detained at Bombay, wrote a letter to the Bombay Collectorate stating that the goods were intended to be transhipped to Calcutta and requesting that transhipment to Calcutta may be made so that the goods can be cleared at Calcutta. The Asstt. Collector, Bombay sent notice to Satish Luthra under Section 108 of the Customs Act, 1962 for recording his statement.

The notice was sent to the address referred to above, namely, G-41, Noida, Ghazlabad. Satish Luthra's statement was recorded on 28-7-1992.

By letters dated 27-8-1992 and 19-12-1992 Bombay Customs Authority was requested to tranship the goods to Calcutta. A similar letter dated 16-9-1992 is not admitted by the respondent. (Letters dated 28-7-1992 and 19-12-1992 are admitted). A show cause notice dated 23-11-1992 was sent to the appellants but was received back. Thereafter, it was handed over personally to Satish Luthra who had gone to the office of the respondent. Along with the notice copies of certain documents were also handed over. Admittedly on 28-4-1993, Satish Luthra wrote a letter to the respondent reiterating his earlier stand requesting speedy transhipment to Calcutta and also praying that copies of documents relied in the show cause notice be supplied. Copies of further documents were not supplied admittedly. According to the respondent, notices of hearing fixed for 19-6-1993 and 22-3-1992 were returned on the ground that the addressee was not found.

According to the appellant, on 10-2-1994 a letter was sent to the respondent reiterating the earlier demand and intimating new office address in Delhi. This letter is not admitted by the Departmental Representative. On 31-3-1994, the impugned order was passed. On 26-4-1994 and 28-5-1994 the appellant again sent letters reiterating earlier demand for transshipment and supply of documents. These letters are admitted. A similar letter dated 20-5-1994 is not admitted. Copy of the impugned order addressed to Satish Luthra at G-41, Noida was received on 16-6-1994.

3. Learned counsel for the appellants has urged the following contentions :- (i) Bombay Customs authority had no jurisdiction to seize or initiate confiscation proceedings or pass the impugned order since the goods were landed at Bombay for transshipment to Calcutta.

(ii) In any event, since the bona fides of the intended transshipment to Calcutta port is undeniable, transshipment should have been allowed, in which case the Bombay Customs authority had no jurisdiction to initiate confiscation proceedings.

(iv) The valuation made in the impugned order is erroneous and has no basis at all. The order itself does not indicate how exactly the value was arrived at.

(v) Since show cause notice was not served within six months from the date of the seizure, the appellants are entitled to have the goods released.

4. There is no dispute that according to the documents available to Bombay Customs authority, the goods consigned from Hongkong landed at Bombay by Air India flight for transshipment to Calcutta Airport and the consignee was shown as Shree Electronics, G-41, Noida, Ghaziabad.

According to the learned counsel of the appellants, since the goods were intended for transshipment to Calcutta, Bombay Customs Authority had no jurisdiction to take any action.

5. Reliance was placed on Sections 46, 53 and 54 of the Customs Act, 1962 (for short the Act).

6. Section 46 deals with entry of goods on importation. The importer of any goods other than intended for transit or transshipment, shall make entry thereof by presenting to the proper officer a bill of entry for home consumption or warehousing in the prescribed form. Section 47 deals with clearance of goods for home consumption. According to Section 48, if any goods brought into India from a place outside India are not cleared for home consumption or warehoused or transhipped within 30 days from the date of the unloading thereof at a customs station or within such further time as the proper officer may allow or if the title of such goods is relinquished, such goods may, after notice to the importer and with the permission of the proper officer, be sold by the custodian. Section 49 requires storage of imported goods in warehouse pending clearance.

"53. Transit of goods in same vessel or aircraft. - Subject to the provisions of Section 11, any goods imported in a vessel or aircraft and mentioned in the import manifest as for transit in the same vessel or aircraft to any port or airport outside India or any customs port or customs airport may be allowed to be so transitted without payment of duty." If the import manifest mentions that the goods are for transit in the same vessel or aircraft to any port or airport outside India or any customs port or customs airport, subject to the provisions of Section 11, such goods may be allowed to be transitted without payment of duty.

Section 54 of the Act reads thus :- "54. Transshipment of goods without payment of duty. - (1) Where any goods imported into a customs port or customs airport are intended for transshipment, a bill of transshipment shall be presented to the proper officer in the prescribed form.

(a) Where any goods imported into a customs port are mentioned in the import manifest as for transshipment to any port outside India, or (b) Where any goods imported into a customs airport are mentioned in the import manifest as for transshipment to any airport outside India, such goods may be allowed to be so transhipped without payment of duty.

(3) Where any goods imported into a customs port or a customs airport are mentioned in the import manifest as for transshipment - (a) to any major port as defined in the Indian Ports Act, 1908 (15 of 1908), or the customs airport at

Bombay, Calcutta, Delhi or Madras, or any other customs port or customs airport which the Board may, by notification in the Official Gazette, specify in this behalf, or (b) to any other customs port or customs airport, and the proper officer is satisfied that the goods are bona fide intended for transshipment to such customs port or airport, the proper officer may allow the goods to be transhipped, without payment of duty, subject to such conditions as may be prescribed for the due arrival of such goods at the customs port or customs airport to which transshipment is allowed." A bill of transshipment is required to be presented where any imported goods are intended for transshipment. Where the import manifest mentions that the goods imported are for transshipment to major airport or customs airport at Calcutta or other designated places and the proper officer is satisfied that the goods are bona fide intended for transshipment to such customs airport or port, he may allow the goods to be transhipped, without payment of duty, subject to such conditions as may be prescribed for the due arrival of such goods at the customs port or customs airport to which transshipment is allowed.

8. Imported Goods (Conditions of Transshipment) Regulations, 1984 have been framed under Section 54(3) read with Sections 157 and 158 of the Act. Clause 3 lays down the circumstances to which regard must be had by the Collector in considering an application for permission for transshipment. It also states that Collector shall, before refusing any such application for permission, give a reasonable opportunity of being heard to the applicant. The other conditions are that manifest must show that the goods are for transshipment, the owner of the aircraft executes a bond in the prescribed form for completion of the transshipment if the Collector finds execution of such bond necessary and undertakes to produce within the period prescribed a certificate issued by the proper officer at the customs station situated at or nearest to the place of destination specified in the manifest that the goods imported have been produced at that station. Clause 6 requires that before transshipment by aircraft small bags must be placed in durable bags and the bags sealed with the customs department's seal in the presence of a representative of the owner of the aircraft. Along with every application for transshipment a fee of Rs. 5.00 must be paid.

9. It is the contention of the appellants that in the case of goods intended for transshipment, bill of entry cannot be presented at the place where they have landed in transit, transshipment without payment of duty under Section 54 is conditional and, if the conditions are fulfilled, transshipment is compulsory.

10. The following propositions emerge on a reading of the provisions referred to above :- (a) All imported goods unloaded in a customs warehouse shall remain in the custody of person approved by the Collector of Customs until cleared for home consumption or are warehoused or are transhipped in accordance with the provisions of Chapter VIII (Section 45).

(b) In case of import of goods other than goods intended for transit or for transshipment, the importer shall make entry by presenting to the proper officer a bill of entry for home consumption or warehousing in the prescribed form (or a declaration). The bill of entry presented at any time after delivery of the import manifest or import report or (in special circumstances) may be permitted to be presented before delivery of such report. If the proper officer is satisfied that the goods are not prohibited goods and import duty and charges have been paid, clearance of goods for home consumption may be made.

(c) Imported goods mentioned in import manifest as for transit in the same vessel or aircraft to any port or airport outside India or any customs port or customs airport may be allowed to be transitted without payment of duty. (Section 53) (d) Where imported goods are intended for transshipment, bill of transshipment shall be presented in the prescribed form. (Section 54) (e) If goods are mentioned in the import manifest as for transshipment to any port or airport outside India, they may be allowed to be so transhipped without payment of duty. (Section 54) (f) Where the import manifest mentions transshipment to any major port or the customs airport at Bombay, Calcutta, Delhi or Madras or any other notified customs port or customs airport the goods may be allowed to be transhipped without payment of duty subject to the conditions as may be prescribed for due arrival of such goods at the destination to which transshipment is allowed. (Section 54) (g) Where the import manifest mentions transshipment to any other customs port or airport and the proper officer is satisfied that the goods are bona fide intended for

transshipment to such customs port or airport, he may allow transshipment without payment of duty and subject to prescribed conditions as in the case of (f). (Section 54) (h) Where goods are transitted under Section 53 or transhipped under Sub-section (3) of Section 54 to any customs port or customs airport, on arrival at such port or airport, the goods shall be liable to duty and shall be entered in like manner as goods are entered on the first importation thereof and the provisions of the Act and rules and regulations shall apply in relation to such goods.

(Section 55) (i) Imported goods may be transported without payment of duty, from one land customs station to another and any goods may be transported from one part of India to another part through any foreign territory, subject to such conditions as may be prescribed for the due arrival of such goods at the place of destination. (Section 56) (j) Warehousing is to be in accordance with provisions in Chapter IX of the Act.

11. A close examination of the above provisions reveals the statutory scheme in regard to imported goods. Where goods reach the destination and are not intended for transit or transshipment, bill of entry shall be presented, same has to be examined and cleared by a proper officer on satisfaction that the goods are not prohibited goods and import duty and charges have been paid. Once a proper officer arrives at such satisfaction, he has no discretion to prevent clearance. Goods in transit or transshipment either to outside India or to a port or airport inside India are to be dealt with under Chapter VIII of the Act. If the goods are mentioned in the import manifest as for transit in the same vessel or aircraft, such transit or transshipment to any port or airport outside India or customs port or airport has to be allowed without payment of duty. Section 53 does not leave any area of discretion to the customs authority. Transshipment of goods imported into a customs port or airport is governed by Section 54. Goods mentioned in the import manifest as for transshipment outside India have to be allowed to be transhipped without payment of duty under Section 54(2) of the Act.

This is not a matter of discretion.

12. Where the import manifest mentions transshipment of imported goods into another major airport or designated customs airport or other customs port or

airport it is governed by Section 53 of the Act. The legislature has made a distinction depending on the nature of the customs port or airport which is the intended destination. In cases covered by clause (a) of Sub-section (3) of Section 54 i.e. major port or designated customs airport, the proper officer may allow transshipment without payment of duty subject to prescribed conditions, the conditions being intended to ensure due arrival of the goods at the destination to which transshipment is allowed. Where the destination is any customs airport or port other than those referred to in clause (a), the same consequence shall follow on condition that the proper officer is satisfied that the goods are bona fide intended for transshipment to customs port or airport. The procedure required to be followed at the destination, is indicated in Section 55 and such cases are required to be dealt with under the Act and rules and regulations. In other words, once the goods reach the destination in India, the procedure prescribed under Chapter VII and Chapter IX of the Act is required to be followed.

The Imported Goods (Conditions of Transshipment) Regulations, 1984 require an application for permission for transshipment. Permission may or may not be granted depending on the circumstances but denial of opportunity has to be preceded by an opportunity of hearing. Here again, the customs authority does not have any unguided or arbitrary discretion in the matter of granting or refusing permission. The authority has to be guided by considerations prescribed in proviso to clause 3 of the Regulations, namely, nature of the imported goods, restrictions on import of such goods into the country and other relevant circumstances.

13. The bone of contention in this case relates to the understanding of the expression "may allow goods to be transhipped". While according to the appellants the expression "may" in the context has mandatory flavour of "shall", according to the department it signifies only discretion and nothing more. As observed by the Supreme Court in Superintendent and Remembrancer of Legal Affairs to Govt. of West Bengal v. Abani Maity, 1979 CENCUS 505D : "18. Words in a statute often take their meaning from the context of the statute as a whole. They are, therefore, not to be construed in isolation. For instance, the use of the word "may" would normally indicate that the provision was not mandatory. But in the context of a particular statute, this word may connote a legislative imperative, particularly when

its construction in a permissive sense would relegate it to the unenviable position, as it were," of an ineffectual angel beating its wings in a luminous void in vain." "If the choice is between two interpretations," said Viscount Simon L.C. in *Nokes v. Doncaster Amalgamated Collieries Ltd.* (1940) A.C. 1040 at page 1022, "the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result." "19. The provisions of Sections 63 and 64 of the Act are to be interpreted in the light of this principle. The language and scheme of the Excise Act, taken as a whole, show that the purpose of this legislation is not only to raise revenue but also to control and restrict the import, export, transport, manufacture and sale of intoxicants. Free and unrestricted use of intoxicants and illicit trade in contraband intoxicants not only means a loss of revenue to the public exchequer but also has a harmful effect on public health and morals. Moreover, illicit trade and smuggling of intoxicants is often committed in an organised and clandestine manner, and is difficult to detect." In the light of the above, the Court held that expression "shall be liable to confiscation" used in Section 63(2) of Bengal Excise Act, 1909 and "may" in Sub-section (1) of Section 64 of that Act, in order to preserve the efficacy of the provision as an instrument for combating these anti-social activities, shall be understood as having a compulsive force. The Supreme Court in *State of U.P. v. Jogendra Singh*, AIR "8. There is no doubt the word "may" generally does not mean "must" or "shall". But it is well-settled that the word "may" is capable of meaning "must" or "shall" in the light of the context. It is also clear that where a discretion is conferred upon a public authority coupled with an obligation, the word "may" which denotes discretion should be construed to mean a command." 14. Customs Act has been enacted to control and regulate export and import of goods from or into India, in the interest of the economic and fiscal well being of the country and the all round progress of the nation. The Act contains drastic provisions of control and regulation.

Arbitrary power is anathema to the Indian Constitution. The Act, rules and regulations contain elaborate provisions of control and regulation, prescribing the conditions under which, the circumstances under which and the extent to which

export of goods from and import of goods would be allowed into India. Once the circumstances are found to be present and the conditions prescribed are satisfied, ordinarily, there cannot be a further area of discretionary power vesting in any customs authority. Scheme of the provisions in Chapters VII, VIII and IX would make it clear that elaborate prescriptions and conditions are laid down on import, transit, transshipment and the like on satisfaction of which, the proper officer "may" permit clearance on transshipment, etc. It cannot be that even after satisfying all the conditions and prescriptions, the importer would have to face the arbitrary discretion of the authority in denying either clearance or transshipment. That would be contrary to the statutory scheme and would introduce enormous amount of uncertainty in foreign trade which would certainly affect the economic and fiscal health of the country. Having regard to all the circumstances, the necessary conclusion is that the expression "may" used in Sub-section (3) of Section 54 has compulsive force, subject to the importer satisfying all the conditions and prescriptions contained in the statute, the rules and the regulations. Once the conditions and prescriptions are satisfied, the customs authority has no further discretion in the performance of his duties, since the discretion is coupled with an obligation.

15. The goods despatched from abroad reached Bombay en route Calcutta.

Since the goods are intended for transit or transshipment, bill of entry is not required to be presented at Bombay customs port. The bill of entry is to be presented to the proper officer at the destination.

Since the destination is the customs airport at Calcutta, which is a designated port under Sub-section (3)(a) of Section 54, subject to such conditions as may be prescribed for due arrival of such goods at the customs airport at Calcutta, the proper officer is obliged to allow the goods to be transhipped to Calcutta. The conditions in this regard are prescribed by the Regulations referred to earlier. The conditions are :- (a) Bill of transshipment shall be presented to the proper officer at Bombay in the prescribed form.

(b) The Collector shall have the regard to the prescribed procedure provided in clause 3 of the Regulations.

(d) Denial of permission shall be preceded by reasonable opportunity of being heard.

16. The Bombay customs authority temporarily detained the goods on the basis of intelligence report till the consignee's address was verified.

Address was shown as Shree Electronics, G-41, Noida, Ghaziabad district. The impugned order states that enquiries through customs and excise officers at Delhi, Noida and Calcutta revealed that there was not such concern in the name of M/s. Shree Electronics at the given address. The result of the enquiry is not available to us for scrutiny.

All that is seen on the record is that a few letters addressed to the concern were returned without delivery. It is seen that in response to a notice by the Assistant Collector of Bombay for recording statement under Section 108 of the Act, one of the partners Satish Luthra appeared on 28-7-1992 and his statement was recorded. The concern is a registered firm having a code name. The appellants repeatedly wrote to the customs authority at Bombay requesting for onward transshipment of goods to Calcutta customs airport. Such letters dated 18-7-1992, 27-8-1992, 19-12-1992 and 28-4-1993 which were admittedly received by the customs authority to whom the letters were addressed. Admittedly, Satish Luthra went to the office of the respondent on 22-4-1993 to find out the fate of the case and request for transshipment and show cause notice dated 23-11-1992 was handed over to him. The show cause notice was not based on the ground that the concern is imaginary but on two specific grounds, namely, the consignment contained 20,02,000 capacitors as against the figure 2,00,000 shown in the record and under-valuation. These were matters for the appropriate customs authority to deal with. It must be remembered that the appellants had not presented any bill of entry or any declaration at Bombay, as they were not required to do so by Section 46 of the Act. The appellants do not have a case that they presented a bill of transshipment to the proper officer at Bombay customs airport as required under Sub-section (1) of Section 54 of the Act and an application as required by the Regulations. Without presentation of such bill of transshipment and application, the proper officer could not have allowed the goods to be transhipped. On

presentation of bill of transshipment and application, the proper officer has to look to the prescriptions in the Regulations and permit transshipment only thereunder. All that the appellants state is that letters were written repeatedly to various officers in Bombay customs airport for despatch to Calcutta, but these letters cannot be substitute for bill of transshipment contemplated in Section 54(1) of the Act. Under these circumstances, the Bombay customs authority is justified in contending that they had no option but to detain the goods and initiate adjudication proceedings.

17. Appellants contend that the impugned orders are vitiated on account of principles of natural justice. Opportunity of hearing contemplated in the proviso to clause 3 of the Imported Goods (Conditions of Transshipment) Regulations, 1984 was not given to the appellants.

Necessity for such hearing would arise only where a bill of transshipment is presented to the proper officer under Section 54(1) of the Act and thereupon the proper officer considers the question of granting or refusing permission for transshipment. Since the bill of transshipment has not been presented, the question of hearing under the proviso to clause 3 of the Regulations does not arise.

18. It is also contended that though show cause notice was issued, copies of all the documents relied were not furnished. The show cause notice states that copies of documents were furnished. The appellants admit that copies of certain documents were furnished. Letter dated 28-4-1993 addressed by the appellants to the Collector of Customs, NIPT Sahar, Bombay admits that copies of panchnama and 2 statements of Satish Luthra were given and copy of no other document was given.

Request for furnishing copies was reiterated by letter dated 28-5-1994 addressed to the Collector of Customs, Bombay and also in the advocate's notice dated 14-6-1994 addressed to the Collector of Customs. The show cause notice shows that the authority contacted M/s.

Prosound Products and M/s. Unisound Pvt. Ltd. who had their offices in Bombay and who are pioneers in the field of manufacturing audio system and obtained

customs approved invoices from them. The CIF value of the consignment in this case was arrived at Rs. 14,32,620.00 based on comparative studies. It is not shown that copies of these invoices were given to the appellants. This amounts to violation of principles of natural justice.

19. Apart from a bland reference to comparative studies of the invoices obtained from M/s. Prosound Products and M/s. Unisound Pvt. Ltd., the show cause notice and the impugned order do not indicate the basis for arriving at the CIF value as Rs. 14,32,620/-. The authority also fixed the market value at 72,07,200/-. The order does not indicate the basis on which this figure was arrived at. It was absolutely necessary that the basis of arriving at the CIF value and the so-called market value should have been intimated to the appellants.

20. In the absence of disclosure of the basis of valuation arrived at by the authority in this case, the valuation cannot be accepted.

21. Learned counsel for the appellants submitted that the appellants will urge this contention before the appropriate authority and it will be premature for this Tribunal to consider the same. This submission is recorded.

22. In the result, the impugned order is set aside. The Collector of Customs, Airport Bombay shall furnish to the appellants at the address shown in these appeals, namely, M/s. Shree Electronics, E-199, Raghbir Nagar, J.J. Colony, Delhi-110 027, copies of the invoices relied on and the method of arriving at the CIF value and the market value and give an opportunity to the appellants to produce such materials as they desire and also give them an opportunity of hearing and pass a fresh order in accordance with law. Appeals are allowed in this manner.

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