

Commissioner of Customs Vs. Poona Roller

Commissioner of Customs Vs. Poona Roller

SooperKanoon Citation : sooperkanoon.com/9466

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : May-01-1996

Reported in : (1997)LC237Tri(Mum.)bai

Appellant : Commissioner of Customs

Respondent : Poona Roller

Judgement :

1. Though this group of appeals filed by the Revenue, exercising powers under Section 129D(1) of the Customs Act, involve in consideration of three different orders passed by the Collector of Customs-II at Mumbai, because the main issue for consideration is the same, all the appeals have been argued together and are being disposed of by this common order.

2. First group of appeals (C/375-R/95, C/384 to 386-R/95) are in relation to the order CAO/No. 117/94 CAC, second group of appeals (C/411 to 414-R/95) are against order CAO/No. 116/94 CAC" and third group of appeals (C/432 to 435-R/95) are related to order CAO/No.118/94-CAC. All the orders are dated 24-6-1994. In the first and second group of appeals, the Orders-in-Original are for dropping the proceedings on the ground that the officer issuing the Show Cause Notices, was not the proper officer authorised to issue such Show Cause Notices, whereas in the third group of appeals, the adjudicating authority has, while dropping the part of the proceedings on the same ground as indicated above, have dropped the other part of the demand, by giving his findings on the merits.

3. Confining to the facts necessary for appreciation and determination of the points at issue, three consignments declared to contain "Australian Masoor Whole" were imported and each of the importers were the holders of DEEC Pass Book, and the licences obtained by them, permitted them to import "Raw Whole Masoor (Lentils)". On presentation of the documents, the items were ordered clearance duty free. However subsequently, on some specific information received to the effect that what was actually imported were Australian Vetches, by misdeclaring the same as Australian Masoor Whole, and to fulfil export obligations they had exported Masoor Dal of Indian Origin, investigations were conducted by Directorate of Revenue Intelligence, and during the course of such investigation, 64.58 MT of the material imported by one of the importers namely Poona Roller Flour Mills (P) Ltd. and 67.5 MT of such material imported by M/s. Parekh Food International, were seized. Some documentary evidences (which if necessary would be dealt with hereafter) were also collected, and completion of the investigation three Show Cause Notices, against three importers namely Poona Roller Flour Mills (P) Ltd., M/s. Sagar Industries, and M/s. Parekh Food International, as also their indenting agents, and the partners/directors of the firm/company each company, were issued. The Notices were issued vide Section 28 and Section 124 of the Customs Act 1962, on 15-5-1993, by the Assistant Director DRI, Bombay, where besides raising the demand for duty on the ground of non-availability of benefit of exemption, it was alleged that the goods so imported were liable to confiscation and importers and their abettors were liable to imposition of penalty. As the period of six months, contemplated under Section 28 of the Act, for the purpose of raising demand, had expired, alleging suppression and mis-declaration, extended period, as contemplated in the proviso to Section 28(1) of the Act, was invoked.

4. Responding to the Show Cause Notices, the Notices contended that what they had imported were "Australian Masoor Whole" and there was no misdeclaration, and major part of the Consignment had already been exported in the form of Masoor Dal, after due processing and as such demand was not justified, nor were the goods liable to confiscation or they were liable to any penalty. Besides that, they also raised a legal contention that the Assistant Director DRI was not competent to issue Show Cause Notices and hence, the proceedings initiated

deserved to be dropped.

5. During the adjudication proceedings, by way of preliminary objection, the validity of the notices was challenged and based on the circular dated 14-5-1992, from the Central Board of Excise and Customs, it was pleaded that the Show Cause Notices of the type could be issued only by the Collector of Customs, and not by Assistant Director of DRI. Upholding the said contention the Ld. Adjudicating Authority has dropped the proceedings in relation to two Show Cause Notices as indicated above, whereas in case of M/s. Parekh Food International, he has also held that, so far as the part of the demand as also confiscation of the seized goods are concerned, it is not established that what was imported were vetches and the evidence adduced indicated that Masoor Whole, was the item imported and hence the demand of duty to that extent as also proposed confiscation were not sustainable.

6. All the three orders were however taken in review by the Board, and in exercise of powers under Section 129D(1) of the Act, applications have been filed, which vide Sub-section (4) of that Section, have been registered as appeals.

7. Mr. KM. Mondal, the Ld. SDR, initially taking up the issue as to validity of Notice, which is a common issue in all the three groups of appeals, has pleaded that undisputedly, the Show Cause Notices have been issued by the Assistant Director DRI, Bombay, but, vide Notification No. 19/90 (N.T.)-Cus., dated 26-4-1990 the Assistant Director of DRI Bombay Zone, has been appointed as Assistant Collector, and thus, he can exercise all the powers of the Assistant Collector. In his submission the subject Show Cause Notices are the composite notices issued vide Section 28 and Section 124 of the Act, and so far as Section 28(1) is concerned "Proper Officer" has been authorised to issue the Show Cause Notice. Conceding the fact that prior to its amendment with effect from 14-5-1992 vide Finance Act of 1992, for invoking the extended period, it was only the Collector of Customs who was competent to issue the Show Cause Notice under Section 28(1) of the Act. Subsequent to the amendment, with deletion of the words Collector of Customs, the officer who is a proper officer for issue of notice within normal period of limitation, could also issue a Notice invoking extended period.

Submitting that the subject Show Cause Notices have been issued subsequent to the amendment, the Assistant Director DRI falling within the category of "proper officer" by virtue of his appointment as Assistant Collector of Customs, was authorised to issue the Show Cause Notices. Referring to the Board's Circular dated 14-5-1992, the Ld. SDR has submitted that those directions are merely of administrative nature, and could not over ride the statutory empowerment under the Act, and the quasi judicial authority is not bound by such administrative instructions. In his submission the approach of the adjudicating authority, thus is not correct. He has further pleaded that even otherwise, the subject Show Cause Notices are the composite Notices, invoking provisions also of Section 124 and assuming, without admitting, the notice under Section 28 is without jurisdiction, the said criteria would not stand applicable to the Show Cause Notices vide Section 124 of the Act, and hence the Adjudicating Authority could not have dropped the proceedings in totality so far as first two groups of appeals are concerned and ought to have adjudicated upon the same. In the submission of the Ld. SDR the order of the Adjudicating Authority is therefore not sustainable. Referring to the direction issued by the Board, under Section 129D(1) of the Act, the Ld. SDR has submitted that the same also covers up the prayer for giving appropriate finding on merits, but concedes that the order of the Adjudicating Authority so far as the first two group of Appeals are concerned, do not provide for seeking any decision on merits, and in that case it is open to the Tribunal to remand the matters for appropriate decision on merits, if the Tribunal is of the opinion that the Show Cause Notices issued are valid.

8. So far as the third group of appeals are concerned, the Id. SDR has in addition to his plea as to validity of notice, raised as common plea in relation to all the three groups of appeals, pleaded that there are voluminous documentary evidences to indicate that what is imported is vetches (*Vicia Sativa*) which are unfit for human consumption. He refers to phytosanitary certificates issued by the Government of Australia as well as other corresponding documents and correspondence, as also the test certificate issued by the Central Food Laboratory, to indicate the imported item to be not Masoor Whole (Lentils) but vetches. The Ld. SDR has then referred to the circular issued by the Australian Government warning against export of vetches describing them as lentils. In his submission the adjudicating authority

has, ignoring all those evidences, relied upon opinion of some other institutions. In his submission, this is done by the adjudicating authority without bringing these aspects to the Notice of the prosecuting agency or without cross-examining the persons who had carried out such re-test, and establishing authenticity thereof.

9. Mr. V. Laxmikumaran, the Ld. Advocate for the Respondents has, while supporting the order, submitted that there is no dispute as to the appointment of the Assistant Director DRI as Assistant Collector of Customs, and there is also no challenge to the position that with effect from 14-5-1992, with the amendment in Section 28(1) "Proper Officer" could issue a Show Cause Notice, even if the same invokes an extended period. In his submission the point to be considered is as to who is the "proper officer" and whether Assistant Director DRI could be construed as the proper officer for the purpose of raising demand vide Section 28(1) of the Act. In his submission "proper officer" has been defined in Section 2(34) of the Act, to mean the officer of Customs who is assigned those functions by the Board or the Collector of Customs, and hence for the Assistant Director DRI to be categorised as "proper officer" for the purpose of Section 28 of the Act, he must have been assigned the functions as such, either by the Board or by the Commissioner of Customs and here, there is no delegation of such powers. Pleading that the delegation should be specific, the Ld.

Advocate has referred to the Supreme Court Judgment in Marathwada University v. Sheshrao Balvantrao Chavan - (1989) 3 Supreme Court Cases, 132. Further, as is submitted by the Ld. Advocate, before the amendment in Section 28 on 14-5-1992, the Collector of Customs was statutorily designated as the "proper officer" for the purpose of issuance of the Notice invoking extended period, which position though stood altered on and from 14-5-1992, the Board, acting on the instructions from the Government and in view of the empowerment vide Section 2(34) of the Act to designate "proper officer", have, by issuance of the circular dated 14-5-1992 (i.e. the date on which the amended provisions come into force) designated the Collector of Customs, to be the "proper officer" for the purpose of raising the demand vide Section 28(1) of the Act, by invoking extended period.

Refuting the submissions that the circular from the Board contained only the administrative instruction, the Ld. Advocate submits that the Circular which also direct issuance of appropriate Trade Notices, and consequent to which Trade Notices have also been issued, is the one delegating or assigning or limiting the powers of "proper officer" to issue Show Cause Notices by invoking extended period, into Collectors of Customs, to the exclusion of other officers, who could otherwise fall within the category of proper officer. Thus, as is submitted by the Ld. Advocate, the Show Cause Notices issued by the Assistant Director DRI vide Section 28(1) of the Act, is rightly held by the adjudicating authority, as issued without Jurisdiction. As regards, Notice under Section 124 of the Act the Ld. Advocate has pleaded that the Notice has to be read as a whole, and determination on both the counts is so interlinked that they cannot be conducted under different adjudication proceedings.

10. As to the decision on merits given in the third group of appeals, besides raising a preliminary Objection as to maintainability of the appeals on merits, on the ground that the order of the Board vide Section 129D(1) of the Act, does not cover the said issue, the Ld.

Advocate for the Respondents has pleaded that the allegation is principally based on the report from the Central Food Laboratory and Shirodkar the Director has been cross-examined and it is duly established by documentary evidence that the basic standard of BCLA for conduct of proper test as per Ressler method was not available with them on the date shown as the one when the test was carried out, and hence the test result have been held as not reliable piece of evidence, and as against that the samples have been examined by Port Health Authorities, FDA, IARI and NBPGR to whom the samples were sent by DRI themselves at the request of the Respondents. In his submission, the Ld. Adjudicating Authority has duly considered and accepted the said evidence and there is no cause for disturbing the said finding.

Replying to the plea of non-acceptability of the said evidence, the Ld.

Advocate has pleaded that none from the department has chosen to challenge the same or seek cross-examination on the authenticity of those test results, which

were known to them as the samples for testing were sent only through the DRI.¹¹ Mr. S.B. Patil, the Ld. Consultant appearing for indenting Agent, has pleaded that going by the points raised by the Boards in their directions given vide Section 129D of the Act, there is no ground made out for any action against the indenting agents and hence the appeals filed are not maintainable and even otherwise, there are no allegations against them which could warrant applicability of the provisions of Section 112 of the Act. For the technical point raised, he has endorsed the submissions by Mr. V. Laxmikumaran.

12. Considering the submissions made and going through the record, it is clear that in first two group of appeals, there is no decision given on merits, and the proceedings are dropped on the ground of invalidity of the Show Cause Notice, whereas in the third group, for the past clearances, the Show Cause Notice is held as without Jurisdiction, whereas for the seized goods, it is held on appreciation of evidence, that the confiscation of the goods is unwarranted as the goods are found to conform to the declaration of they being Masoor (Whole).

13. Before taking up the issues that have been raised for determination, it may be observed that it has come on record, that subsequent to the passing of the orders-in-original, because permission is given to issue fresh notices by the competent authorities, such fresh notices have been duly issued and proceedings have been initiated, and conducted and the matters are at the stage of passing of the final orders. The Ld. SDR has however submitted that he has instructions to pursue with the appeals and get an appropriate decision, and that the passing of the final order is withheld till the final outcome of these appeals.

14. Taking up first the issue as to the validity of the Show Cause Notices, and issue which is common for all the three groups of appeals, with certain facts and legal positions, as indicated earlier being admitted, the only point required to be considered is who is the proper officer and whether Assistant Director DRI could have issued the Show Cause Notices for demand of duty, vide Section 28(1) of the Act, where the period of demand goes beyond the normal period of 6 months laid down as limitation period and where extended period has been invoked.

In other words, whether the Assistant Director DRI is the "proper officer" for the purpose of Section 28(1) of the Act.

"Proper Officer" in relation to any functions to be performed under this Act, means the Officer of Customs who is assigned those functions by the Board or Collector of Customs'.

Thus, for the purpose of being designated as "proper officer" he must have been assigned those functions by the Board or Collector of Customs. There is no evidence available on record to show that such specific function of levy and collection of duty or to raise a demand by issuance of Show Cause Notice, have been specifically assigned to the said Officer. Though, the Assistant Director DRI has been designated as Assistant Collector of Customs, by virtue of Notification No. 19/90, dated 26-4-1990, that may entitle him to perform other functions which could be performed by the Assistant Collectors, but going by the definition of the word "proper officer" as given in the Act, it indicates that only such of the officer, (even out of the officers of the cadre of Assistant Collectors) who are specifically assigned the work of levy and collection of duty, can issue the Show Cause Notice in their capacity of the "proper officer" with no specific assignment of such duty either by the Board or the Commissioner of Customs, the Assistant Director DRI cannot issue a Notice contemplated under Section 28(1) of the Act.

16. In the instant case it is not mere non-investiture of powers in the Assistant Director DRI, but there is a specific investiture of powers in some other authority, namely the Collector (now Commissioner of Customs) under the specific directions from the Board, vide their circular dated 14-5-1992. The said circular of the Board reads thus : "Section 28 of the Customs Act is being amended to provide that in cases where any duty has not been levied or has been [short] levied or has been erroneously refunded because of- collusion, wilful mis-statement or suppression of facts, the Show Cause Notices demanding such duties for a period of 5 years can be issued by the respective Adjudicating Officers (namely the Assistant Collector, the Deputy Collector, the Additional Collector or the Collector etc.) depending upon the powers of adjudication, instead of the Collector of Customs, as was the position hitherto. It may however be noted that though as a result of this aforesaid

amendment the Assistant Collectors/Deputy Collectors or Additional Collectors are competent to issue a Show Cause Notice for the extended period of five years, it has been decided by the Government that notwithstanding the aforesaid amendment, such Show Cause Notices shall continue to be issued and the cases decided by the Collectors only. It is repeated that the status quo should be maintained for the issue of Show Cause Notices and deciding cases involving the extended period of five years. The Collectors are required to issue appropriate standing orders as also Trade Notices/Public Notices for this purpose".

It is not disputed, that pursuant to the said circular from the Board, various Collectorate's have also issued Trade/Public Notice.

17. In the submission of the Ld. SDR, these are mere executive/administrative directions and when the statute empowers the officers to issue Show Cause Notices, such instructions from the Board cannot be curtail their statutory powers. This submission however has to be rejected on two counts namely, as duly discussed earlier only such of the officers, who have been "assigned" the duty, either by specific or general order alone can exercise the functions as "proper officer" and, reading the wordings of Section 2(34) of the Act, it is the Board who is statutorily empowered to assign the duties for being designated as a "proper officer", and the said status by itself has not conferred on any officer of any cadre under the statute, the status of "proper officer" but has left it within the exclusive domain of the Board (or the Collector of Customs) to assign the function and designated an officer as a "proper officer". Any assignment made within the same frame work would not be administrative/ executive instructions but would be the exercise of statutory powers invested in them, by virtue of provisions of Section 2(34) of the Act.

18. Reading of the Circular re-produced hereinabove what the Board has done is nominating the Collector (now Commissioner of Customs) as the "proper officer" for the purpose of issuance of Show Cause Notice and Adjudication, when extended period is to be invoked for implementing the provisions contained in Section 28 of the Act. To put it the other way, the Board which is empowered to designate a 'proper officer' vide Section 2(34) of the Act, have vide the said

Circular, designated only the Collectors (now Commissioner) of Customs to the exclusion of all other officers, to be the "proper officer", when the extended period is to be invoked.

19. The subject Notices have been issued from the Directorate of Revenue Intelligents and are signed by the Assistant Director DRI, and are not issued from the Jurisdictional Collectorate of Customs, and signed by the said officer, on the order from the Collector of Customs, so as to construe them to have been in effect issued by the Collector of Customs.

20. The subject notices raising demand vide Section 28(1), invoking extended period, have thus been correctly held as without Jurisdiction by the Ld. Adjudicating Authority and the said conclusion therefore, cannot be disturbed.

21. The subject Show Cause Notices are composite notices, both for action under Sections 28(1) and 124 of the Act, and for a Notice under Section 124 of the Act, there is no qualifying clause, like the one under Section 28(1), and as such any Competent Authority could issue the same. Only the Adjudicating Authorities have been specified under Section 122 of the Act, and what Section 124 contemplates is that before such adjudication, the person against whom the order is proposed to be passed for confiscation or imposition of penalty, should be served with notice to Show Cause why such order should not be passed.

The Ld. SDR has pleaded that with Section 28 and Section 124 covering entirely different spheres of adjudication, even if the notice under Section 28(1) is held to be not proper, the Adjudicating Authority ought to have proceeded with adjudication in relation to confiscation, and imposition of penalty. In his submission, even if the goods are not physically available, the proceedings initiated require adjudication as to the "liability to confiscation", and case law exists to the effect that in such a case appropriate order for penalty could be passed.

22. The Show Cause Notices, in the instant cases are issued on the allegations that the items imported are other than those for which the advance licence have been granted and as such, the importers are not eligible to avail the benefit of duty free import and hence, the duty amount have to be recovered. It is undisputed that

except for small quantity, the goods after import and after alleged processing, have been re-exported by way of fulfilling the export obligation and with goods physically not available, the issue to be determined would be the quantum of penalty amount, if the allegations are proved. This aspect will have a direct bearing on the issue of attempted evasion of duty which issue again falls within the ambit of the provisions of Section 28(1) of the Act. Thus, both the issues appear to have been so interlinked that holding of separate proceedings or segregating the issues may neither be feasible nor desirable. Thus, though theoretically it can be held that notice under Section 124 of the Act, cannot be held as invalid on the ground raised for notice under Section 28(1) of the Act, and the Ld. Adjudicating Authority himself has adjudicated upon such a notice in relation to the seizure from M/s.

Parekh Food International, so far as the goods seized from them are concerned, in the given set of circumstances when, in first two group of appeals, and in relation to import of the quantity other than the one seized, in relation to the third group of appeals, it does not appear justified in remanding the matters limited for that purpose, particularly when he has permitted issuance of fresh notices, which have been actually issued and process of adjudication thereon is nearly at the stage of completion. The submission of the Ld. SDR, that, in any case, the Adjudicating Authority should be directed to adjudicate on the Show Cause Notice issued vide Section 124 of the Act, cannot be accepted.

23. The first two groups of appeals, namely Appeal No. C/375/95, C/384 to 386/95 forming one group and appeal Nos. C/411 to 414/95 forming another group, do not merit any consideration and are rejected. Part of the order-in-original. (Re: invalidity of notice to Show Cause) in the third group of appeals also does not call for any interference and hence those appeals to that extent, are rejected.

24. It is clarified that the order rejecting these appeals will not have any bearing on the fresh adjudication proceedings initiated pursuant to the said orders as the respondents have not filed any cross-objections challenging the same, and no finding as to validity of such direction is given under this order, because that being not the issue here.

25. So far as 67.5 MT of the seized quantity from M/s. Parekh Food International is concerned, the basic question is whether the same is proved to be Vetches or Lentil, and for that the material and clinching evidence could be the test report, and the other documentary evidence which may have some significant value. The Department have got the samples taken from the seized quantity and tested at Central Food Laboratory at Pune, and there the same is certified as Vetches. The samples have been examined on 1-2-1993. Dr. Shirodkar the Director of the Laboratory who has signed the Test Results has been subjected to cross-examination at the adjudication stage, and it appears that he has accepted to have adopted the procedure laid down in the paper by Ressler, and seems to have stated that standard of BCLA that was necessary for the due testing, was Sigma Brand procured from M/s. M.M.Suppliers, Pune. The respondents have, on enquiry from M/s. Sigma Aldridth Chemical Co. USA brought out that said material was supplied to M/s. M.M. Suppliers, Pune only on 23-3-1993, indicating that the Test Results conducted by the CFL could not be relied upon. On the other hand, on the representation of the importers, the DRI sent samples to Chief Chemist CRCL, who in turn sent the samples to two authorities. Dr. Sharma Head of the Department Division of Genetic IARA and Dr. Rana Director of National Bureau of Plant Genetic Research at New Delhi, and both the said authorities have opined the items tested to be "LENS" CULINARIS (the Botanical name of Masoor Dal). These Tests appear to have been carried out at the request from the Chief Chemist CRCL, who seem to have selected these two authorities on the subject.

The samples so tested were taken by the DRI, who have also forwarded them to the Chief Chemist CRCL. Because this is done through DRI, it cannot be presumed that DRI were unaware of such sample testing and the report, and hence the plea from the Ld. SDR that these reports ought not to have been relied upon unless an opportunity was given to the DRI to cross-examine them, is misplaced. Having known the existence of such report (and the presumption is that it was known to them as samples were sent by them and not the party affected), if at all they wanted to challenge the same, they could have intimated the adjudicating authority accordingly. That they were unaware of the proceedings also, would be too far fetched assumption. No request for cross-examination appears to have been made. The Respondents also seem to have produced the

certificates from Plant and Quarantine Authority, and Port Health Laboratory.

26. When such documentary evidence is brought on record to Counter the solitary report of CFL, produced by the Department, which, on the grounds duly discussed in minute details by the Ld. Adjudicating Authority, has been held as not acceptable and reliable, and when no clinching evidence to re-counter the same or convincing reasons to discard the said evidence has been advanced, there seems no justifiable ground to interfere with the finding arrived at by the Ld. Adjudicating Authority, and hence the same is also confirmed.

27. When on merits the appeals do not deserve any consideration the minor issues whether the direction from the Board cover up all the issues, are not considered.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com