



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reserving the Judgment	Date of Pronouncing the Judgment
14.07.2021	26.07.2021

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CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE S.ANANTHI

W.A. (MD) No.688 of 2021
and
C.M.P. (MD) No.2982 of 2021

1. The Commissioner of Customs
Custom House, New Harbour Estate
Tuticorin-628 004
 2. The Joint Commissioner of Customs
Custom House, New Harbour Estate
Tuticorin-628 004
 3. The Assistant Commissioner of Customs (SIIB)
Custom House, New Harbour Estate
Tuticorin-628 004
- ... Appellants

-vs-

M/s.Sri Venkateshwara Paper Boards
Rep.by its General Manager Mr.L.Barath
No.4/39, Pethureddipatti Village
Sattur-626 203, Tamilnadu

... Respondent

Prayer : Writ Appeal filed under Clause 15 of Letters Patent to set aside the order, dated 16.02.2021, passed in W.P.(MD) No.2124 of 2021, on the file of this Court.

Prayer in WP(MD) . 2124 of 2021 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court to pass an order of writ or Direction, more particularly a writ of Certiorarified Mandamus calling for the records in File C.No.VIII/48/64/2020-SIIB-dated 29-12-2020, issued by the 3rd Respondent herein and quash the same and Direct the Respondents to permit the petitioner to Mutilate the imported goods viz., 459 Packages viz., 55.740 MT of Mixed Wet Strength Scrap paper (Silicon Paper and Coated vide Bill of Entry No.9846155, dated 06-12-2020, under Section 24 of the Customs Act,



1962 under Customs Supervision and to Allow Clearance of the above goods under the Exemption claimed for Waste paper considering the PSI Certificate issued by the Approved Certification Agency by the Government of India.

For Appellants : Mr.B.Vijay Karthikeyan
For Respondent : Mr.A.K.Jayaraj

J U D G M E N T

T.S.SIVAGNANAM, J.

This appeal filed by the Commissioner of Customs, Tuticorin and two others is directed against the order, dated 16.02.2021 in W.P.(MD) No.2124 of 2021, filed by the respondent herein.

2. For the sake of convenience, the appellants shall be referred to as "the Revenue" and the respondent shall be referred to as "the Importer".

3. The prayer sought for in the writ petition was to quash the proceedings of the third appellant / The Assistant Commissioner of Customs (SIIB), Thoothukudi, dated 29.12.2020 and to direct the Revenue to permit the Importer to mutilate the imported goods, namely, 459 packages weighing 55.740 MT of mixed wet strength scrap paper (silicon paper and coated) vide bill of entry No.9846155, dated 06.12.2020, under Section 24 of the Customs Act, 1962 ("the Act" for brevity) under the supervision of the Customs Authorities and to allow clearance of the goods under the exemption claimed for waste paper considering certificate issued by the Approved Certification Agency by the Government of India.

4. Before the Writ Court, the Importer contended that they never sought for provisional release of the goods under Section 110 of the Act, but the third appellant had passed the order directing provisional release on execution of a bond for a sum of Rs.34,65,334/- and production of cash security / bank guarantee for a sum of Rs.12,12,867/- towards redemption fine and penalty and on payment of applicable duty of Rs.9,43,411/-.

5. Further, the Importer reiterated that the goods have already been mutilated and if according to the Revenue, the goods are serviceable items, the Importer is ready to get them totally mutilated to the satisfaction of the Customs Authority and under their supervision. The Importer referred to Section 24 of the Act, which deals with power to make Rules for denaturing or mutilation of goods and pointed out that even though the Central Government has not framed any Rules pursuant to the Rule making power under Section 24 of the Act, Courts have consistently applied the said provision



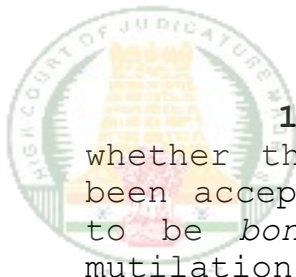
in favour of the Importers and referred to certain decisions, wherein it was held that if the Revenue was of the view that the goods in question were serviceable, it is within their power to convert the same into waste and scrap and permit clearance of the goods.

6. The learned Writ Court referred to a decision of the Tribunal in the case of **Dewan Steel Industries and C.C.Amristar [2008 (226) E.L.T. 722 (Tri. Del)]**.

7. The learned Writ Court held that when the Importer is entitled to call upon the Customs Authorities to mutilate the goods and clear them and when the Importer has not invoked the right under Section 110 of the Act, the third appellant could not have passed the order impugned in the writ petition, dated 29.12.2020 and therefore, quashed the said order. The learned Writ Court further directed the Revenue to permit the Importer to mutilate the goods at their cost under the supervision of the third appellant. Aggrieved by the said order, the Revenue is before this Court by way of this appeal.

8. Mr.B.Vijay Karthikeyan, learned Senior Standing Counsel appearing for the Revenue, submitted that the writ petition was allowed at the admission stage and the Department was not able to place the important fact that the goods were seized by the Officers of the SIIB for mis-declaration under a Mahazar, dated 11.12.2020 and the matter has been taken up for investigation. The reason for seizing the goods is that the goods imported are prohibited items in terms of the Notification No.45/2015-2020-DGFT, dated 31.01.2020 and it was concealed with mixed wet strength scrap paper (silicon paper and coated) falling under CTH 4707 9090, which item is not prohibited for import. The vital fact that the goods have been seized under a Mahazar for mis-declaration was suppressed by the Importer and since the Revenue was not aware that the writ petition is to be listed for admission on 16.02.2021, these important facts could not be placed before the Court.

9. It is further submitted that the decision relied on by the learned Writ Court is distinguishable on facts and in any event, each case has to be considered and dealt with taking note of the factual position. It is submitted that when the prohibited goods have been concealed along with the goods freely importable with an intention to defraud the revenue, mutilation of the said goods should not be permitted under Section 24 of the Act. In support of such contention, the learned counsel referred to the decisions of the Honourable Supreme Court in the cases of **Union of India vs. Madanlal Steel Industries Ltd [2001 (132) ELT 526 (SC)]** and **Collector of Customs, Bombay vs. Hardik Industrial Corporation [1998 (97) ELT 25 (SC)]**.

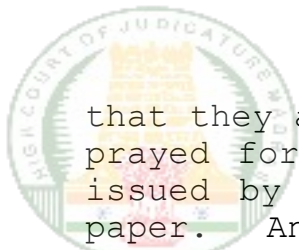


10. Further, it is submitted that the question as to whether the offer for further mutilation of the goods could have been accepted would arise only in a case where the import is found to be *bona fide* and the matter only related to the extent of mutilation of goods, which had been imported and the Importer cannot claim the benefit of the offer to have the goods to be further mutilated to avoid confiscation. In support of such contention, reliance was placed on the decision of the Honourable Supreme Court in the case of **Garg Woollen Mills (P) Ltd. vs. Addl. Collr. of Customs, New Delhi [1998 (104) ELT 306 (SC)]**.

11. Further it is submitted that when the writ petition was allowed, the investigation was in progress and as on date, the investigation has been completed and a show-cause notice, dated 07.06.2021, has been issued as to why the declared value of the cargo should not be rejected under Rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and redetermined as Rs.44,75,353/- under Rule 3(1) *ibid*; why the bill of entry should not be reassessed and duty re-determined under Section 17(4) of the Act; why the entire cargo covered under the bill of entry should not be confiscated under Rule 111(d)(l) and (m) of the Act r/w Section 3(2) and 11 of the Foreign Trade (Development and Regulation) Act, 1992; why penalty should not be imposed under Section 112(a) of the Act and why penalty should not be imposed under Section 114AA of the Act for knowingly making a false declaration in the bill of entry. It is submitted that the show-cause notice has been served on the Importer and the Importer may be directed to participate in the adjudication and the order impugned in this appeal may be set aside.

12. Mr.A.K.Jayaraj, learned counsel appearing for the Importer, submitted that the imported consignment is silicon paper and coated waste roll paper and the classification as declared is CTH 47079000, which is applicable to waste scrap papers. The Certification Agency, as approved by the Ministry of Commerce, had certified the cargo as waste paper as per the International Norms for waster paper in the PSI Certificate issued by them after visual examination of the consignment at the load port. Therefore, it is submitted that the classification, which has been declared by the Importer, cannot be rejected only on the basis of the examination report of the officers when the expert opinion of the Certifying Agency is available.

13. Further, it is submitted that the pre-inspection certificate issued by the said Agency, has not been rejected or objected to by the Authorities and no enquiry has been made overseas to find out the composition of the material. Further, it is submitted that the Importer never sought for any provisional release of the cargo and in their, letter dated 23.12.2020, they had stated



that they are actual user of the imported goods and not a trader and prayed for release of the goods by taking note of the certificate issued by the Certifying Agency that the imported cargo is waste paper. An alternate relief was sought for in the said letter by stating that if the Department is not convinced, the Importer may be permitted to mutilate the consignment as envisaged under Section 24 of the Act under the Customs supervision and then may be allowed clearance with exemption from duty by applying Notification No.50/2017, dated 30.06.2017. The Importer also agreed to bear the cost of mutilation. When such was the request made by the Importer, the order dated 29.12.2020, has been passed granting provisional release by imposing very onerous conditions.

14. The learned counsel placed reliance on the decision of the Tribunal in the case of **Pudumjee Agro Industries Ltd. vs. Commissioner of Customs, Pune [2007 (216) E.L.T.127 (Tri.-Mumbai)]**, wherein mutilation was permitted on similar facts and the said decision has become final as the appeal filed by the Revenue before the Honourable Supreme Court was dismissed in **Commissioner vs. Pudumjee Agro Industries Ltd. [2015 (325) E.L.T. A152 (SC)]**.

15. By placing reliance on the decision in the case of **Patiala Castings Private Limited vs. Union of India [2003 (156) E.L.T.458 (P&H)]**, it is submitted that whenever the Revenue entertains a doubt regarding the goods, it has the option to get them mutilated, so that the Importer is not put to prejudice and the interest of the Revenue is also protected.

16. In support of the contention that the Revenue has not given any cogent reasons for discarding the pre-inspection certificate, reliance was placed on the decision of the Tribunal in the case of **Prince Fortified Steels Pvt. Ltd. vs. Commissioner of Cus., Tuticorin [2019 (369) E.L.T. 1228 (Tri-Chennai)]** and the decision in the case of **Bansal Alloys and Metals Pvt. Ltd. vs. Commr. Of Cus. Amritsar [2018 (364) E.L.T. 269 (Tri-Chan)]**.

17. Further, it is submitted that the Revenue failed to take into consideration that the Importer is not a trader, but an actual user and no due certificate will be produced by the Importer to show his *bona fides*. The learned counsel referred to the decision of the Tribunal in the case of **Sri Renga Steel Corporation vs. Commissioner of Customs, Madurai [2006 (206) E.L.T. 993 (Tri-Chennai)]** for the contention that merely because the Importer at a subsequent stage, requested permission to mutilate the goods, it need not necessarily be held that they are concealing mis-declaration of goods as scrap.

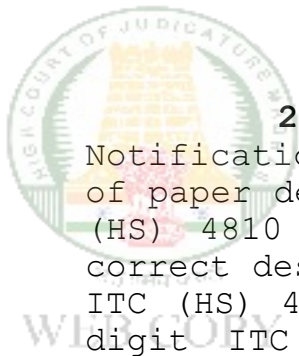


18. We have elaborately heard the learned counsel for the parties and carefully perused the materials placed on record.

19. The Government of India, Ministry of Commerce and Industry, Department of Commerce, Directorate General of Foreign Trade (DGFT), in exercise of powers conferred under Section 3 of the Foreign Trade (D&R) Act, 1992 r/w Paragraph 1.02 and 2.01 of the Foreign Trade Policy, 2015-2020, as amended from time to time, introduced a policy condition for items under EXIM Code 4810 of Chapter 48 of ITC (HS), 2017, Schedule-I (Import Policy). This was vide a Notification, dated 31.01.2020 in Notification No.45/2015-2020. The policy condition for items under EXIM Code 4810 was free, but import of stock lot was prohibited. This prohibition came into force on 31.01.2020.

20. It appears that representations were received seeking clarification with regard to the description of "Stock Lot" used in the Notification, dated 31.01.2020 and the matter was examined in consultation with the Department for Promotion of Industry and Internal Trade (DPIIT) and clarification was issued by DGFT vide Trade Notice No.8/2020-2021, dated 04.05.2020, which is to the following effect.

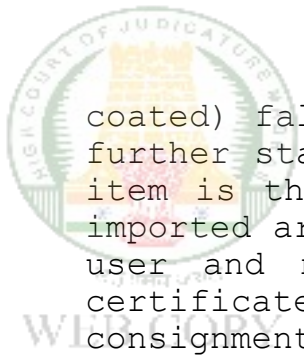
- a. Import of different kinds of paper description under all the 22 tariff lines covered under ITC (HS) 4810 is "Free".
- b. Importers should mention correct description of paper being imported at 8 digit under ITC (HS) 4810. They are expected to clearly specify quantities of paper under each 8 digit ITC (HS) Code separately.
- c. If the whole imported paper consignment is without description for each category of paper it is a Stock lot.
- d. The Customs would check before allowing consignment where the description of imported paper matches with any/some of the 8 digit entries under ITC (HS) 4810. The Customs would not allow consignment where paper of different description are intended to be imported and are bundled together under ITC (HS) 4810 as a Stock Lot.
- e. In case paper proposed to be imported is not covered in any of the existing 8 digit ITC (HS) codes under ITC(HS) 4810, Trade is advised to request Department of Revenue for the creation of a new tariff line with proper justification."



21. In terms of the above clarification read along with Notification No.45, dated 31.01.2020, the import of different kinds of paper description under all the 22 tariff lines covered under ITC (HS) 4810 was free. The Importers were required to mention the correct description of the paper being imported at eight digit under ITC (HS) 4810 and clearly specify quantities of paper under each 8 digit ITC (HS) Code separately. If the whole imported paper consignment is without description for each category of paper, it is a stock lot. The Customs would check as to whether the description of the imported paper matches with the 8 digit entries and they will not allow the consignment where paper of different description are intended to be imported and are bundled together under ITC HS 4810 as a stock lot.

22. The Importer filed bill of entry on 27.10.2020 well after Notification No.45 came into force. The imported goods were examined at the Tuticorin Port by the Officers attached to the SIIB and on examination, the Officers found that the imported goods were coated paper classifiable under RITC 4810 and coated paperboard classifiable under RITC 4810 and tissue paper classifiable under RITC 4823 imported in the guise of waste paper. After de-stuffing and segregation work of the entire cargo from both the containers, the weight of tissue paper was found to be 16960 Kgs. and the weight of the coated paper was found to be 12134.50 Kgs. and the weight of coated paperboard was found to be 26585.50 Kgs. Thus, the Revenue, on reasonable belief that the Importer has mis-declared the goods in order to evade payment of appropriate customs duty by availing ineligible duty exemption, the entire cargo was seized by the officers under Mahazar, dated 11.12.2020. Thus, the Mahazar would state that there are three types of papers, which have been imported and this appears to have come to light when the containers were de-stuffed and after the cargo was segregated. Therefore, the Revenue's contention is that the Importer had concealed the prohibited items along with the items freely importable and it is the case of deliberate mis-declaration and therefore, the Revenue has rightly seized the goods, commenced investigation and has now issued show-cause notice proposing to reject the value of the cargo as declared by the Importer, redetermine the customs duty, confiscate the goods and impose penalties. In such circumstances, it is required to be seen as to whether the Importer, as a matter of right, can seek for a direction for mutilation of the goods.

23. The argument made on behalf of the Importer is that the request made by the Importer was for mutilation vide Letter dated 23.12.2020 and not for provisional release. But, the third appellant passed the Order dated 29.12.2020 permitting provisional release of the cargo and imposing onerous conditions. The Letter dated 23.12.2020 was addressed to the first appellant, wherein the Importer would state that they had filed a bill of entry for clearance of mixed wet strength scrap paper (silicon paper and



coated) falling under CTH 47079090, imported from Singapore. It is further stated that they are manufacturers of "pulp sheets" and the item is the primary raw material. It is submitted that the goods imported are not stock lot, but waste paper only and they are actual user and not a trader. Further, the Importer referred to the certificate issued by the Approved Agency certifying that the consignment is actually waste paper as per international acceptable parameters for such material. Therefore, the Importer requested the first appellant to permit clearance of the goods by taking note of the certification by Inspecting Agency (at the load port).

24. The Importer made an alternate prayer before the first appellant by stating that if the Department is not convinced, they may be permitted to mutilate the consignment as envisaged under Section 24 of the Act. Thus, the Letter dated 23.12.2020 given by the Importer to the first appellant was a request for release of the goods. Though the word "provisional" has not been specifically used by the Importer in the said letter, it goes without saying that the release of the imported goods sought for was to be a provisional release as the Importer was fully aware that the goods have already been seized under a Mahazar dated 11.12.2020 and investigation was proceeding.

25. The request for mutilation is an alternate prayer made before the first appellant and this prayer has been made for the first time much after the goods were seized under a Mahazar dated 11.12.2020. Therefore, the Importer is not correct in contending that they never made a request for provisional release of the cargo and only sought for mutilation and then clearance. The request made by the Importer vide letter dated 23.12.2020 is a clear request for release of the cargo. When the cargo has been seized under a Mahazar, then the request, if to be considered by the Revenue, has to be only for a provisional release. More so, when the Revenue has not dropped the proceedings, but proceeded to complete the investigation and issued a show-cause notice, dated 07.06.2021. Therefore, we reject such contention raised by the Importer.

26. Though there is a passing reference in Paragraph No.3 of the affidavit filed in support of the writ petition regarding the Mahazar dated 11.12.2020, it appears to have not been specifically brought to the notice of the learned Single Bench and all that was submitted before the learned Single Bench was that the goods imported have already been mutilated and if the consignment contains usable paper, the Importer is agreeable to mutilate them and bear the cost of such mutilation. This aspect appears to have waved in the minds of the learned Writ Court to issue directions in the impugned order.

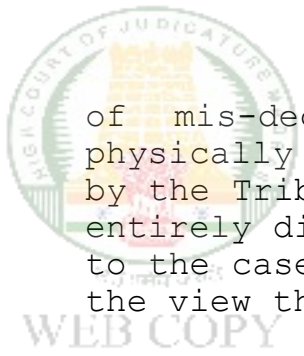


27. As noticed above, the request for mutilation was much after seizure of the goods. On and after 31.01.2020, stock lot goods are prohibited. Therefore, the issue would be if there are three varieties of paper bundled into one, whether it would fall within the definition of stock lot. This matter needs to be adjudicated by the Authorities in the show-cause notice, which has now been issued to the Importer. The allegation is one of concealing the prohibited item with the items, which are freely imported. Therefore, the alternate request made by the Importer for mutilation cannot be treated to be a *bona fide* claim. It is too early to come to a conclusion whether there is a positive evidence of mis-declaration, because the show-cause notice is yet to be adjudicated. Therefore, as on date, the Revenue is of the *prima facie* view that it is a clear case of mis-declaration and the import has to be treated as a stock lot and if it is so, the import is prohibited. Therefore, the Revenue has rightly construed the prayer sought for by the Importer and passed the order dated 29.12.2020 permitting provisional release of the cargo subject to certain conditions. Therefore, no error can be attributed to the manner in which the Revenue construed the Letter dated 23.12.2020 as we are of the clear view that the Letter was for release of the goods and the request for mutilation was only an alternate submission, if the Department is not convinced for release of the goods. The Revenue agreed for release of the goods by way of provisional release subject to certain conditions. Therefore, the Importer cannot state that the order impugned in the writ petition, dated 29.12.2020 was not based on the recommendation given by the Importer.

28. The decisions referred to by the learned counsel for the Importer, more particularly, those decisions of the Tribunal have been rendered after the adjudication process has been completed and final orders were passed by the Adjudicating Authority or the First Appellate Authority and the correctness of the order was questioned before the Tribunal and those decisions are not arising out of the writ petitions. Therefore, those decisions of the Tribunal are distinguishable on facts and taking note of the factual position in each of those cases, the request for mutilation was granted.

29. In the case of Patiala Castings Private Limited (supra), the Court specifically found that there was no mis-description of the goods and hence, issued directions. Whereas, the case on hand is factually different as there is an allegation of mis-declaration.

30. In the case of **Sri Renga Steel Corporation** (supra), which is a decision rendered by the Tribunal, it was held that the Adjudicating Authority did not record a finding of mis-declaration on the basis of a statement and in the said case, the only evidence



of mis-declaration was the report of the Commissioner, who physically examined the cargo. This was held to be not sustainable by the Tribunal and therefore, relief was granted. This decision is entirely distinguishable on facts and does not render any assistance to the case of the Importer. Thus, for the above reasons, we are of the view that the Revenue is entitled to succeed in the appeal.

31. In the result, the writ appeal is allowed and the order dated 16.02.2021, passed in W.P.(MD) No.2124 of 2021 is set aside. Consequently, the order dated 29.12.2020, passed by the third appellant stands restored.

32. We have perused the order dated 29.12.2020 permitting provisional release of the cargo, subject to the following conditions:

- (a) execution of a bond for Rs.34,65,334/-,
- (b) production of cash security / bank guarantee for Rs.12,12,867/- towards redemption fine and penalty, and
- (c) payment of duty of Rs.9,43,411/-.

33. We find nothing unreasonable about conditions (a) and (c), however condition (b) is concerned directing the Importer to furnish Bank guarantee / cash security towards redemption fine and penalty would be harsh as the show-cause notice is yet to be adjudicated. Therefore, we modify the condition (b) alone by directing the Importer to execute the bond for Rs.12,12,867/-.

34. On compliance of the execution of the bond for the amount mentioned in conditions (a) and (b) supra and payment of duty as mentioned in condition (c), the Revenue shall permit provisional release of the cargo within seven (7) days therefrom, which shall be subject to the result of the adjudication of the show-cause notice.

35. The Importer is directed to extent full cooperation in the adjudication proceedings. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CO)

// True Copy //

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Sub Assistant Registrar(CS)



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Note :

In view of the present lock down owing to COVID-19 pandemic, a web copy of the Judgment may be utilized for official purposes, but, ensuring that the copy of the Judgment that is presented is the correct copy, shall be the responsibility of the advocate / litigant concerned.

To

1. The Commissioner of Customs
Custom House, New Harbour Estate
Tuticorin-628 004
2. The Joint Commissioner of Customs
Custom House, New Harbour Estate
Tuticorin-628 004
3. The Assistant Commissioner of Customs (SIIB)
Custom House, New Harbour Estate
Tuticorin-628 004

+1 CC to M/s.A.K.JAYARA, Advocate (SR-23907[F] dated 26/07/2021)

+1 CC to M/s.B.VIJAYAKARTHIKEYAN, Advocate (SR-23829[F] dated 26/07/2021)

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RC (03.08.2021) 11P-6C