

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
SPECIAL JURISDICTION (CUSTOMS)
ORIGINAL SIDE**

RESERVED ON: 13.03.2023
DELIVERED ON: 22.03.2023

CORAM:

THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM

AND

THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

CUSTA NO. 02 OF 2011

B. ARUN KUMAR & COMPANY

VERSUS

COMMISSIONER OF CUSTOMS (PORT), KOLKATA

Appearance:-

Mr. J.P. Khaitan, Senior Advocate.

Mr. Prithu Dudheria, Advocate.

Ms. Namrata Jha, Advocate.

.....For the Appellant.

Mr. Uday Shankar Bhattacharyya, Advocate

Ms. Manasi Mukherjee, Advocate.

.....For the Respondent.

JUDGMENT

(Judgment of the Court was delivered by T.S.SIVAGNANAM, J.)

1. This appeal filed by the assessee under Section 130 of the Customs Act, 1962 (the Act) is directed against the order dated 27th July 2010 passed by the Customs, Excise and Service Tax Appellate Tribunal, East Regional Bench, Kolkata in Customs Appeal No. 37/87. The appeal was admitted on the following substantial questions of law by an order dated 2nd March, 2011.

- (i) *Whether the Tribunal below committed substantial error of law in upholding the confiscation of goods imported by the appellant under Additional Licences issued for the 1978-79 Import Policy period in terms of the order dated April 18, 1985 of the Hon'ble Supreme Court in Union of India V. Rajanikant Brothers and imposition of redemption fine of Rs. 85 lakh and penalty of Rs. 15 Lakh.*
- (ii) *Whether the Tribunal below committed substantial error of law in holding that the question of mens rea was not relevant for adjudging the question of liability for confiscation of imported goods under Section 111 of the Customs Act, 1962 and imposition of penalty under Section 112 of the said Act.*
- (iii) *Whether and in any event, lack of mens rea is a relevant consideration in the matter of determining the quantum of redemption fine and penalty and the Tribunal was justified in law in upholding the redemption fine of Rs. 85 lakh and penalty of Rs. 15 lakh.*

2. We have heard Mr. J.P. Khaitan, learned Senior Advocate assisted by Mr. Prithu Dudheria and Ms. Namrata Jha, learned Advocates for the appellant and Mr. Uday Shankar Bhattacharyya and Ms. Manasi Mukherjee, learned Advocates for the respondent.

3. The appellant filed two bills of entry, namely, (i) 2249.867 M/T Palm Fatty Acid distillate in bulk CIF Rs. 37,47,004.78/- and (ii) 1502.079 M/T Palm Acid Oil in bulk CIF Rs. 23,66,147.33/- .
4. The appellant sought clearance of the above goods against 9 Subsidiary Additional Licences issued from the main licence dated 28th August, 1986. These subsidiary licences were issued in terms of the orders passed by the Hon'ble Supreme Court dated 18.04.1985 and is valid for import of items permissible to export house under Additional Licence category as per Para 176 of Import Policy, 1978-79 excluding those items which were banned in the policy period 1978-79 and which have been banned in the policy period 1985-88. The bills of entry were noted provisionally subject to fixation of actual quantity discharged from the vessel after tank measurements and chemical tests of the subject goods. The department took a stand that the two items imported are canalised items permissible for import by State Trading Corporation only. Further, the stand of the department was that the Hon'ble Supreme Court in the judgement dated 15th May, 1986 in writ petition No. 199 of 1986 in Civil Appeal No. 664 of 1986 held that the Additional Licences issued to diamond exporters for the policy period 1978-79 will be valid only for import of items appearing in appendix 6, List 8, Part II of the Import Policy, 1985-88 and, therefore, it was held that the licences submitted by the appellant are not valid for import of such goods by virtue of them being included in appendix 5, Part I of ITC Policy, 1985-88. Thus, it was held that the imports have been unauthorisedly made in contravention of Clause 3(2) of Import (Control) Order, 1955 and with Section 3 of the Import and Export (Control) Act, 1947

as amended. In the light of the above there was a proposal to confiscate the goods under Section 111 (d) of the Customs Act, 1962 and also proposing action against the persons concerned in the unauthorized importation under Section 112 of the Act. The appellant in the written statement dated 4th October 1986 contended that the judgement of the Hon'ble Supreme Court dated 18th April 1985 clearly holds that the appellant shall be entitled to import all other items whether canalised or otherwise in accordance with the relevant goods. Chief Controller of Imports and Exports, New Delhi has issued three clarifications dated 17th March, 1986, 23rd April, 1986 and 4th May, 1985 that Import of canalised items against the Additional Licences issued to diamond exporters for the period 1978-79 will be allowed. Further, it was pointed out that in the judgement of the Hon'ble Supreme Court in the ***Union of India Versus Godrej Soaps Pvt. Ltd. and Another*** ¹, it has been observed that the goods in the said case which were purchased on 27th June, 1986 after the judgement of the Hon'ble Supreme Court in ***Raj Parkash Chemicals Limited Versus Union of India*** ² and ***M/s Indo Afghan Chambers of Commerce and Anr. Versus Union of India*** ³, there cannot be any question of restitution of right. With this submission the appellant requested for release of the goods by pointing out that the contract for purchase of the goods was made on 17th March, 1986 well before the date of the judgement of the Hon'ble Supreme Court dated 12th September, 1986 (Godrej soaps). The adjudicating authority, the Collector of Customs, Calcutta held that though it may be true that there were decisions of the

¹ 1986 (26) ELT 465 (SC)

² 1987 (30) ELT 45 (SC)

³ 1986 (3) SCC 352 (SC)

Hon'ble Supreme Court in ***M/s Indo Afghan Chambers of Commerce*** as well as the decision in the case of ***Union of India Versus Rajanikant Brothers*** the revised judgement of the Hon'ble Supreme Court dated 15th May, 1986 (***M/s Indo Afghan Chambers of Commerce***) was very much known to the appellant before the shipment of the subject goods and the judgement of the Hon'ble Supreme Court and the said judgement ought to have been complied with by the appellant. Further, it was observed that the appellant should have made all the efforts to stop the shipment in spite of having knowledge of the judgement of the Hon'ble Supreme Court in ***M/s Indo Afghan Chambers of Commerce***. Therefore, the Collector of Customs concluded that the goods have been imported unauthorisedly in contravention of the regulations and liable for confiscation. An option for redemption of the goods was made on payment of fine of Rs. 45 lakhs and Rs. 40 lakhs in respect of the two consignments. Aggrieved by such order, the appellant preferred appeal before the Tribunal. The Tribunal while framing the point for determination, held that what was required to be decided in the appeal was whether the appellant is entitled for refund of the redemption fine of Rs. 85 lakhs and whether the order of penalty requires to be set aside. The Tribunal referred to the decision in the case of ***B. Vijay Kumar & Co. etc. Versus Collector of Central Excise*** in Civil Appeal no. 3335 and 4446 of 1988 and held that the said decision in would be binding and accordingly the order passed by the Collector of Customs dated 31st October, 1986 was set aside and the department was directed to refund the redemption fine abd penalty paid by the appellant. The Collector of Customs filed reference application before the Tribunal seeking reference to this

Court on certain questions of law. This application was rejected by the Tribunal and thereupon reference application was filed before this Court, seeking a direction upon the Tribunal to refer the case to this Court on the following two questions (i) whether on the facts and in the circumstances of the case the Tribunal was right in law in setting aside the order of the Collector dated 31st October, 1986 and directing the refund with interest, (ii) whether on the facts and in the circumstances of the case the Tribunal was right in law in transferring the cross-objection to be decided by the Special Bench of the Tribunal. The Division Bench of this Court by order dated 15.01.2010 held that the second question on which reference was sought for has become infructuous and with regard to the first question the Division Bench noted that the only reason given by the Tribunal to set aside the order of the Collector of the Customs is by placing reliance on the judgement of the Hon'ble Supreme Court in **B. Vijay Kumar & Co. Etc. Versus Collector of Central Excise** ⁴ and there has been no separate decision or finding rendered by the Tribunal and the decision of the Tribunal is flawed as the Hon'ble Supreme Court in the said decision has held that the decision would not be a binding precedent and therefore, the Tribunal erred in treating the same to be binding. Accordingly, the order passed by the Tribunal was set aside to that extent and the matter was remanded for fresh hearing without taking note of the decision in **B. Vijay Kumar & Co.** On remand the Tribunal noted the facts of the case and pointed out that the question to be considered is whether the imported goods which are not covered by licence are liable for confiscation and whether the appellant /

⁴ 1991 (33) ECR 669 (SC)

importer is liable for penalty. Referring to the decision of the Hon'ble Supreme Court in ***Pine Chemical Suppliers Versus Collector of Customs***⁵ the Tribunal held that mens rea is not relevant for holding that the goods are liable for confiscation and for imposition of penalty. In this regard reference was also made to the decision of the Hon'ble Supreme Court in be ***D. Navinchandra & Co. Versus Union of India*** ⁶ . Thus, the Tribunal concluded by holding that there was no infirmity in order of the Collector in ordering confiscation of the imported goods which are not covered by the Additional Licences and imposing penalty on the appellant. Aggrieved by the order passed by the Tribunal the present appeal has been preferred.

5. Before we go into the various decisions which were referred to by the Tribunal, it is relevant to first take note of the factual aspect in the matter and thereafter to examine as to what extent the judgements relied on by the revenue before the Tribunal could have an impact on the present proceedings. The following are some of the undisputed facts. The appellant is an importer of rough diamonds and exporter of cut and polished diamonds and claimed certification as an Export House under the provisions of the Imports and Exports Policy, 1978-79. As an Export House they will be entitled for Additional Licence for direct import of Palm Fatty Acid distillate and Palm Acid Oil and under the policy period 1978-79 these items were not canalised. The Import Trade Control Authorities rejected the claim for grant of Export House Certificate to the appellant. The appellant and other similarly placed persons aggrieved by such decision challenged the same

⁵ 1993 (67) ELT 25 (SC)

⁶ 1987 (29) ELT 492 (SC)

before the High Courts and relief was granted by the High Court of Bombay and the High Court of Delhi. The Hon'ble Supreme Court disposed of several Special Leave Petitions by order dated 18th April, 1985 (***Union of India Versus Rajanikant Brothers***) confirming the order passed by the High Court with a direction to issue Export House Certificate for the year 1978-79 within 3 months with a condition that save and except items which are specifically banned under the prevalent import policy at the time of import, the diamond exporters shall be entitled to import all other items whether canalised or otherwise in accordance with the relevant rules. In terms of the said direction, the appellant was issued Additional Licence on 28th August, 1985 for import of items permissible to export house under an Additional Licence category as per Para 176 of the Import Export Policy, 1978-79 excluding those items which are banned in the Import and Export Policy 1985-86.

6. One ***Raj Parkash Chemicals*** who were engaged in the manufacture of acrylic ester monomers at its factory in Maharashtra. In terms of the Import Export Policy, 1985-1986 import of acrylic ester monomers was not permissible ordinarily and the Government could permit import if considered, necessary and justified. Writ Petition was filed before the High Court of Bombay which was dismissed, affirmed by the Division Bench and the matter was carried on appeal to the Hon'ble Supreme Court. The Hon'ble Supreme Court in ***Raj Parkash Chemicals Limited Versus Union of India***⁷. By judgment dated 05.03.1986, it was held that acrylic ester monomers could not be imported under the said additional licenses. While

⁷ 1987 (30) ELT 45 (SC)

considering the scope of the order passed by the Hon'ble Supreme Court dated 18.04.1985 in the case of **Rajanikant Brothers** it was observed as follows:

11. It is admitted between the parties in this appeal that the fundamental question for consideration is the true meaning and scope of the order dated April 18, 1985 made by this Court. There is no dispute that the diamond exporters enjoying the benefit of the order are entitled to the issue of Export House Certificates under Import Policy 1978-79 and to the facilities flowing from such grant. There can also be no dispute that the consideration whether the items sought to be imported by such diamond exporters are canalized cannot act as an impediment to the import directly by them. The order declares further that such diamond exporters shall be entitled to import all items "save and except items which are specifically banned under the prevalent import policy at the time of import." The controversy between the parties centers around the meaning of the expression "specifically banned", specially in the context of an additional Licence granted to such diamond exporter.

7. In the above paragraphs, it is significant to note the findings that there can be no dispute that the consideration whether the items sought to be imported by such diamond exporters are canalized cannot act as impediment to the import directly by them. This finding of the Hon'ble Supreme Court has a significant impact on the present litigation. The appellants specific case is that taking into consideration the legal position as held by Hon'ble Supreme Court in **Rajanikant Brothers** and as explained in **Raj Parkash Chemicals Limited**, the appellants were under the bonafide belief that the goods can be imported directly under the additional

licenses though it were canalized items in the 1985-1988 import export policy.

8. The appellant placed orders for purchase of the goods on 12.03.1986 and 14.03.1986 from a supplier in Malaysia and the total value of the goods is stated to be Rs. 60,00,000/-.The appellant in order to strengthen their case referred to the clarifications issued by the Joint Chief Controller of Imports dated 17.03.1986 stating that against the additional licenses issued in terms of the order passed by the Hon'ble Supreme Court in **Rajanikant Brothers**, import of items permissible against additional licenses in terms of policy for 1978-1979 would be allowed even if such items were in the list of canalized items in the policy. The appellant also referred to the meeting of the Member of the CBEC and the Principal Collector held on 03.04.1986 wherein minutes were recorded with effect that the items which were under OGL during 1978-1979 and subsequently canalized in policy for 1985-1988 would be allowed to be imported. Further on 23.04.1986,a circular was issued by the Under Secretary to the Government of India to the Port authorities stating that canalized items were not covered within the purview of the decision of the Hon'ble Supreme Court in the case of **Raj Parkash** and additional license holders would be allowed to import canalized items. Further the Principal Collector by letter dated 14.05.1986 addressed to the Chairman, Western Region, Federation of Indian Export Organisation also clarifies that clearances of canalized items against additional licenses was unconditionally allow. On 15.05.1986 in the case of **M/s. Indo Afghan Chambers of Commerce**, the Hon'ble Supreme Court held that dried fruits

could not be imported under the said additional license. What is important to note is that in the said decision the issue was as to whether there was a restraint for importing dried fruits during the period 1985-1986 under additional licenses granted to the appellants therein under the Import Policy 1978-1979. The issue as to whether item was a canalized item or not was not subject matter of decision in ***M/s. Indo Afghan Chambers of Commerce*** as the facts were entirely different. The orders placed by the appellant with the supplier in Malaysia on 12th and 14th May, 1986 were shipped and arrived in the Calcutta Port in September 1986. Yet another decision of the Hon'ble Supreme Court which came to be delivered on the 12.09.1986 was in the case of the ***Godrej Soaps*** wherein the Hon'ble Supreme Court held that canalized items cannot be imported even under additional license held by the exporter and the items which was the subject matter in the case was also Palm Fatty Acid. On account of the decision in ***Godrej Soaps***, the appellant had no other go except to accept that the additional license issued to them did not cover import of the said goods and therefore, the import was unauthorized and liable for confiscation and/or penalty. The appellant contended that their bonafides should be considered though it was held by the Hon'ble Supreme Court in ***Godrej Soaps*** that canalized items cannot be imported under the additional licenses, the facts of the case has to be considered and the goods should not be confiscated nor any fine or penalty should be imposed. The Collector of Customs did not accept and imposed redemption fine and also imposed penalty. In the mean time, another mater came before the Hon'ble Supreme Court in the case of ***D Navinchandra and Company, Bombay and Another Versus Union of***

India and others ⁸ wherein the Hon'ble Supreme Court held that the canalization was not done away with in the order dated 18.04.1985 (**Rajanikant Brothers**) and that items which were canalized under 1985-1988 policy could not be imported under the said additional licenses. On the question of penal action, the Hon'ble Supreme Court held that the authorities should decide the same after taking into consideration all the facts and circumstances and taking into consideration of the case of the petitioner and their alleged claim of bonafide on their part. In the case of **B. Vijay Kumar and Company** the order of confiscation and imposition of redemption fine was set aside however the Hon'ble Supreme Court observed that the order has been passed in the special circumstances and should not be treated as precedent. On reading of the said judgment, it is evidently clear that what weighed in the minds of the Hon'ble Supreme Court was the bonafides of the importer who was issued the additional licenses and this was held to be a special circumstance. Thus, in our view, though the decision of the Hon'ble Supreme Court has been held to be rendered considering the special circumstances of the case and not to be treated as precedent, we can very well adopt the concept based on which the Hon'ble Supreme Court had granted relief to the appellant therein. This concept was whether the action of the importer bonafide. The bonafides of action in such cases have to be decided based on facts and there can be no universal formula to assess the bonafides in such cases. Yet another decision of the Hon'ble Supreme Court also would be of relevance which is in the case of

⁸ 1987 (29) ELT 492 (SC)

Collector of Customs Versus M. Shashi Kant and Company ⁹ wherein the Hon'ble Supreme Court considered all the decisions but however the decision in the case of **Navinchandra** which have also considered all the decisions on the point, was not brought to the notice in the case of **M. Shashi Kant**. Be that as it may, we are convinced that the bonafides of the appellant has to be considered. Admittedly on the date when the orders were placed by the appellant for purchase of the products i.e. on 12th and 14th March, 1986 legal position was clearly in favour of the appellant. Added to that the clarifications issued by the Joint Chief Controller of Imports dated 17.03.1986, the minutes of the meeting of the Central Board of Excise and Customs and Principal Collector of Customs dated 03.04.1986, the circular issued by the Under Secretary to the Government of India to port authorities dated 23.04.1986 and the letter addressed by the Principal Collector of Customs to the Federation of Indian Export Organization dated 14th/15th May, 1986 all clarified position that the appellant would be entitled to import canalized items under the additional licenses which were issued to them. The Collector of Customs while ordering confiscation, imposing fine and penalty states that the appellant did not take any steps to stop the consignment which was shipped on August 30, 1986 from Malaysia after knowing about the decision in **Godrej Soaps** which was delivered by the Hon'ble Supreme Court on 12.09.1986. It cannot be disputed that the contract having been entered into and processed, it is virtually next to impossible to stop, the consignment mid sea which the Customs Department would be well aware and there are several procedures

⁹ 1992 (57) ELT 684 (SC)

intervening such matters if at all it is feasible of being performed. Therefore, the Collector of Customs has faulted the appellant not performing of an act (stoppage of the shipment in the mid sea) which was next to impossible. In any event, the conduct of the appellant should be examined on the date when they placed the order i.e. on 12th and 14th March, 1986 and as stated earlier the law on the subject was clearly in favour of the appellant and the concerned department were also of the clear view that canalized items can be imported on additional license. Therefore, failure to examine bonafides of the appellant on the above facts has led to an erroneous approach by the department. Reference was made by the Tribunal to the decision in the case of the **Pine Chemicals**, the said decision can have no application to the case on hand as the said decision arose out of the case of willful mis-declaration of the goods. Coming to the aspect as regards levy of penalty, as held by the Hon'ble Supreme Court in **Pratibha Processors Versus Union of India** ¹⁰ penalty is ordinarily levied on the assessee for some contumacious conduct or for deliberate violation of the provisions of the particular statute. In **Akbar Badruddin Jiwani Versus Collector** ¹¹, it was held that the appellant therein having acted on the basis of the bonafide belief that the goods were imported under OGL, deserves lenient treatment. In **Hindustan Steel Limited Versus State of Orissa** ¹², it was held that the discretion to impose penalty must be exercised judicially, penalty will ordinarily be imposed in cases where party acts deliberately in defiance of law or is guilty of contemptuous or dishonest conduct or acts in conscious disregard of its

¹⁰ 1996 (88) ELT 12 (SC)

¹¹ (1990) 47 ELT 161 (SC)

¹² 1978 2 ELT 159 (SC)

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 bonafide belief that the offender is not liable to act in the manner prescribed by the statute. Thus, bearing in mind the above legal principles and taking note of the facts which were set out above, we are of the view that the case on hand is a case where no penalty could have been imposed.

9. Coming back to the aspect as to whether the imposition of redemption fine of Rs. 80,00,000/- was justified we need to take note of two factors. Admittedly on the date when the goods arrived in the Calcutta Port and when the appellant sought for clearance of the said goods the decision in **Godrej Soaps** held the field and consequently import was unauthorized as the goods imported were canalized items and could not be imported under additional licenses. If that be the case, the appellant can have no other option except to accept the fact that the import is unauthorized, but however we have considered the conduct of the appellant and we were satisfied with the bona of the appellant. Nevertheless, on the date when the goods were sought to be cleared from the Kolkata Port there was a clear bar for importing such goods under the additional licenses and this being a bar created under the policy which binds the appellant as additional licenses were issued under the policy, the appellant cannot escape from the rigour of imposition of redemption of fine. Having held so, the next point to be considered is whether the imposition of redemption fine of Rs. 80,00,000/- as imposed by the Collector of Customs and affirmed by the tribunal was justified. In fact, we are not expected to substitute our views but

nevertheless, we have taken note of the penalty which was imposed in the case of **Shashi Kant**. In the said case the importer imported a canalized item which is Palm Acid Oil which is also the product imported by the appellant. The quantity imported was 4000 metric tons and the redemption fine imposed was Rs. 58,00,000/-. In the case on hand the total quantity of both the products imported by the appellant more or less is 3700 metric tons and if the same yardstick as applied by the department in the case of **Shashi Kant** is applied to the case on hand the redemption fine could at best be imposed to the tune of around Rs. 50 to 53 lakhs and definitely not Rs. 80,00,000/-. Therefore, we are of the view that redemption fine imposed on the appellant was excessive and disproportionate and inconsistent with the stand taken by the department in other contemporaries imports of same product in the same factual background. Therefore, we are inclined to interfere with the quantum of redemption fine which was imposed.

10. In the result, the appeal is allowed in part and the orders passed by the authority imposing a redemption fine of Rs. 80,00,000/- is set aside and the fine stands reduced to Rs. 50,00,000/- and the penalty imposed on the appellants is set aside in its entirety. The appellant is entitled to seek refund of the excess amount of redemption fine as well as the entire penalty remitted by them by filing an application before the appropriate authority and if the same is done within the period of 30 days from the date of receipt of the server copy of this order, the concerned authorities shall process the application and refund the excess amount of redemption fine and the entire

penalty to the appellant within a period of 45 days from the date of receipt of the such application.

(T.S. SIVAGNANAM, J.)

I agree.

(HIRANMAY BHATTACHARYYA, J.)

(P.A.-PRAMITA/SACHIN)

