

CASE NO.:
Appeal (civil) 4151-4157 of 2001

PETITIONER:
Commissioner of Customs, Kolkatta

RESPONDENT:
Vs.
M/s. Grand Prime Limited and Ors.

DATE OF JUDGMENT: 07/07/2003

BENCH:
M.B. SHAH & ARUN KUMAR

JUDGMENT:

J U D G M E N T

ARUN KUMAR, J.

These appeals are directed against the order of the Customs Excise & Gold (Control) Appellate Tribunal (hereinafter referred to as the 'Tribunal') dated 20th November, 2000. By the impugned order the Tribunal allowed re-export of the three consignments of tussah silk and one consignment of silk fabric having a total value of Rs.45,85,291/-. The Tribunal further set aside the penalties imposed on individuals by the Commissioner of Customs, Kolkatta. The individuals had filed appeals before the Tribunal against the order of the Commissioner of Customs and the Tribunal allowed the same. Hence these appeals by the Department.

Briefly the facts are that M/s. Olympia Exports of New Delhi through its proprietor Shri Mahesh Chowhan imported the goods in question from Hong Kong purportedly against an advance licence. The goods in question fall within list of restricted items import whereof is permitted subject to certain conditions. The importer had obtained an advance licence in July, 1997. Against the said licence the importer had imported and cleared five consignments of raw silk through the Kolkatta port free of duty subject to the condition that the imported goods after conversion had to be re-exported. Intelligence was gathered by the officers of the Directorate of Revenue Intelligence, Kolkatta to the effect that M/s. Olympia Exports based in New Delhi had imported and cleared five consignments of raw silk against a fraudulently obtained advance licence and had sold the said imported silk in the open market without discharging the export obligation. Thus they had violated the provisions of the revenue exemption notification and the export-import policy. Further intelligence was gathered to the effect that the same importer had again imported two consignments of silk fabric and tussah silk through Kolkatta port and the said consignments were awaiting clearance. It appears that while the investigation by the Directorate of Revenue Intelligence, Kolkatta was going on, the importer got a wind of it and therefore it never turned up to get the goods under the aforesaid two consignments released. According to the revenue the advance licence obtained by the importer was forged. Summons under the provisions of the Customs Act,

1962 were repeatedly issued to M/s. Olympia Exports and Shri Mahesh Chowhan, proprietor of M/s. Olympia Exports, New Delhi to appear before the Directorate of Revenue Intelligence. The summons could not be served on either M/s. Olympia Exports or Shri Mahesh Chowhan and they never appeared in response to the summons. Summons were also issued to various other parties involved in the previous transaction of import of five consignments which had been cleared through customs. They appeared in response to the summons and their statements were recorded. Ultimately a demand-cum-show cause notice under Section 124 of the Customs Act, 1962 read with Section 28 of the said Act was issued on 14th May, 1999 to M/s. Olympia Exports, New Delhi, Shri Mahesh Chowhan and others. So far as the consignment, subject matter of the present appeals is concerned, the show cause notice called upon the noticees' to show cause why goods subject matter of the two consignments, should not be confiscated under Section 111(d) of the Customs Act, 1962 and why penalties should not be imposed. The importer did not respond to the show cause notice. Instead M/s. Grand Prime Limited respondent No.1 addressed a communication dated 27th May, 1999 to the Commissioner of Customs stating that they had exported the goods subject matter of the two consignments. In the letter respondent No.1 stated that it had failed to locate that exporter. It was further stated that efforts were made to find an alternative purchaser for the goods which it had failed to arrange. Request was made to the Commissioner to grant permission to re-ship/re-export the goods comprising the said consignments. An advocate named Shri Om Prakash Chowdhary of Kolkatta sent a Power of Attorney purported to be executed in his favour by respondent No.1 to the Commissioner of Customs, Kolkatta and purported to represent respondent No.1 in the proceedings by virtue of the said Power of Attorney. It appears that in view of the representation made on behalf of respondent No.1 a supplementary show cause notice was issued to the said respondent and its Director Shri Rajesh Kumar Khattar on 11th February, 2000. Vide order dated 1st May, 2000, the Commissioner of Customs, Kolkatta confirmed confiscation of goods, duty and the penalties proposed in the show cause notice. The Commissioner found that the importer was guilty of misrepresentation of facts and falsification of documents. The import was contrary to law and therefore the goods were liable for confiscation.

At this stage, it is noted that respondent No.1 had filed a Writ Petition in the Kolkatta High Court while the proceedings were still pending before the Commissioner of Customs, Kolkatta. At the initial stage the High Court had passed an order giving four months' time to the Commissioner of Customs to adjudicate upon the show cause notice. However, the Writ Petition was disposed of on 5th July, 2000. By that time the Commissioner of Customs had already passed an order in the adjudication proceedings arising out of the show cause notice. The High Court noticed that the party had a right of appeal against the said order. The Writ Petition was disposed of with the direction : " CEGAT, Eastern Bench will proceed only on the point as to whether the petitioner is the owner of the goods and the goods are entitled to be re-exported.

The appeal will be preferred by the petitioner within a period of seven days from

the date of communication of this order and if it is filed, it will be decided by the CEGAT, Eastern Bench within a period of one month from the date of filing of the appeal.

The matter is disposed of accordingly.
No order is passed as to costs."

The Tribunal vide its order dated 20th November, 2000 allowed the appeals solely basing its judgment so far as the question of re-export of goods is concerned on Union of India versus Sampat Raj Dugar and others [(1992) 2 SCC 66]. Further without assigning any reasons at all the Tribunal set aside the penalties imposed on the various parties by the Commissioner of Customs. These appeals are directed against the said judgment of the Tribunal.

The learned Additional Solicitor General â\200\223 Mr. Mukul Rohtagi appearing for the appellant submitted that the Tribunal clearly misunderstood the order passed by the Kolkatta High Court in as much as it considered that it had to dispose of the appeal in terms of Dugar's case (supra). The High Court while disposing of the Writ Petition filed by respondent No.1 never directed the Tribunal to decide the case as per Dugar's case (supra). The operative part of the decision of the High Court has already been reproduced hereinbefore and in our view it cannot be inferred from the said decision that there is any direction to pass an order in terms of Dugar's case. The learned Additional Solicitor General then proceeded to distinguish the present case from Dugar's case. His basic contention is that the present is a case of fraud while in Dugar's case it was not so. Secondly, according to the learned counsel there is no valid import of goods in the present case. Rather the import is contrary to law and Section 111(d) of the Customs Act, 1962 squarely applies. In this context, he further submitted that there is no provision for re-export of goods in the Customs Act and therefore there was no question of re-export being permitted. It was pointed out that in Dugar's case because of the peculiar facts of the said case re-export was permitted in equity. The present case being a case of fraud and misrepresentation, equity had no place and therefore Dugar's case cannot be treated as a precedent.

We have already noticed the facts of the present case. The goods in question are in the restricted list under the Import-Export Policy for the relevant period. The import of the goods in question is permitted only against a licence. The licence is granted subject to the condition of re-export of goods. The importer had failed to comply with the condition of re-export of finished or semi-finished goods, qua, the imports already made under the same licence. When the consignments in question were imported, the importer did not even turn up in spite of notice for fear of action regarding the previous imports and likelihood of action being taken regarding the current imports. No licence was produced and no bill of entry was filed to complete the process of importation. This rendered the import against the prohibition imposed regarding the import. As such Section 111(d) of the Customs Act comes into play. It clearly empowers confiscation of the goods. The action of the Department in confiscating the goods was clearly in accordance with law.

It is to be found from the facts on record that respondent No.1 surfaced only after the show cause notice had been issued. It put in appearance through an advocate purportedly appointed as an Attorney. The actual party

never came forward. This gives rise to a suspicion that the importer and exporter were same or they were acting in collusion. Respondent No.1 prayed for permission to re-export the goods. In any case, the transaction leaves doubts in the mind about its genuineness. It gives an impression that when the importer found itself to be in troubled waters, the exporter was set up as a front to retrieve the situation.

It is also true that the Customs Act does not contain any provision regarding re-export of goods. It gives power of confiscation of goods which are illegally imported and for various other reasons enumerated in Section 111 of the Act.

From the facts of the case, we have seen that the imported goods are in the list of restricted goods. They could be imported against valid advance import licence issued by the authorities. The licence against which the import took place in the present case was found to contain forgery. This rendered the licence invalid. As per conditions of licence the goods were meant for re-export and they could not be sold in India. The importer was found to have violated this condition of the licence in case of an earlier import. Fearing action in case of present import, the importer did not even come forward to clear the goods. No body presented a Bill of Entry or took any other step to clear the goods. Thus the import was clearly contrary to law being without a valid licence and in violation of condition/restrictions imposed under the licence. Section 3(1) of the Imports and Exports (Control) Act, 1947 empowers the Central Government to provide for prohibition, restricting or otherwise controlling import and export of specified goods. Such an import clearly attracts the provisions of Section 111 of the Customs Act and the appellant was within its right to confiscate the goods in question.

On the power of confiscation of goods imported contrary to any prohibition or restriction under Section 111(d), this court had occasion to observe in *Sheikh Mohd. Omer versus Collector of Customs, Calcutta and others* [1970 (2) SCC 728] :

"What clause (d) of Section 111 says is that any goods which are imported or attempted to be imported contrary to "any prohibition imposed by any law for the time being in force in this country" is liable to be confiscated. "Any prohibition" referred to in that section applies to every type of "prohibition". That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression "any prohibition" in Section 111(d) of the Customs Act, 1962 includes restrictions. Merely because Section 3 of the Imports and Exports (Control) Act, 1947, uses three different expressions "prohibiting", "restricting" or "otherwise controlling", we cannot cut down the amplitude of the word "any prohibition" in Section 111(d) of the act. "Any prohibition" means every prohibition. In other words all types of prohibitions. Restriction is one type of prohibition."

On the question of breach of conditions contained in the exemption notification by the importer, this court held

in Sheshank Sea Foods Pvt. Ltd., Karnataka versus Union of India and others [(1996) 11 SCC 755] that :

"The communication of the Central Board of Excise and Customs dated 13.5.1969, refers to the breach of the condition of a licence and suggests that it may not be possible to take action under Section 111(o) in respect thereof. It is true that the terms of the said exemption notification were made part of the appellants' licences and, in that sense, a breach of the terms of the said exemption notification is also a breach of the terms of the licence, entitling the licensing authority to investigate. But the breach is not only of the terms of licence, it is also a breach of the condition in the exemption notification upon which the appellants obtained exemption from payment of customs duty and, therefore, the terms of Section 111(o) enable the Customs authorities to investigate."

In this case the goods imported by the appellant were exempted from customs duty subject to the condition that they would not be sold, loaned, transferred or disposed of in any other manner. The appellants had however disposed of the goods. It was observed that the customs authorities had the power to take action under the provisions of Section 111(o).

In Dugar's case (supra) relied upon by the respondents, this court had permitted re-export of goods in special circumstances on equitable grounds. The goods in that case had been imported under a valid licence but had not been cleared from customs. This court was concerned with the question whether import of the goods was contrary to law and whether the goods were liable to confiscation under the Customs Act. After considering clauses (d) and (o) of Section 111 of the Customs Act, this court took the view that the said clauses were not attracted in the facts of the case and therefore the power to confiscate goods could not be exercised. It was in this background that the court also considered the question of passing of property in goods in favour of the importer and ultimately the foreign exporter was permitted to re-export the goods.

The points of distinction between the present case and Dugar's case (supra) are that the importer did not disappear in that case. Rather it appeared before the Customs Authorities and claimed the right to take delivery of goods. The importer in Dugar's case participated in adjudication proceedings before the Customs Authorities and during the course of the proceedings the exporter appeared on its own and pleaded that the goods be not confiscated as title in the goods had not passed. In Dugar's case, there was a valid import licence while in the present case it is not so. There is forgery on the licence which rendered the licence invalid. Therefore, the import was without a licence. This was prohibited. In Dugar's case this court had held that none of the clauses of Section 111 of the Customs Act were attracted, the import being under a licence. The import was legal. In the present case, the import is without a valid licence and is clearly in violation of Section 111 (d) and (o) of the Customs Act. This is a clear distinction between Dugar's

case and the present case. Therefore, in our view Dugar's case can be of no help to the respondent No.1.

The learned senior counsel for respondent No.1 â\200\223 Shri Rajeev Dhawan had argued that the exporter continued to be the owner of the goods as the property in goods had not passed. The importer had not retired the document of title to goods which were sent through the bank. Therefore, it was submitted that the exporter had title to the goods and was entitled to re-export the goods. In our view, this argument has no merit so far as the facts of the present case are concerned. The present is a case of illegal import and provisions of Section 111 (d) and (o) of the Customs Act clearly apply. The goods are liable to confiscation. The considerations which are relevant under the sale of Goods Act cannot be applied in the context of present facts.

In support of his argument that the property in goods had not passed, Mr. Dhawan, learned senior counsel for respondent No.1, relied on *Garden Silk Mills Ltd. versus Union of India* [1999 (113)E.L.T. 358 (S.C.)]. On the basis of this judgment, it was argued that the importation of goods had not been completed. In that case, the goods had not crossed the customs barrier and had not become part of mass of goods in India. Hence, this judgment has no relevance so far as the present case is concerned. In the present case, importation of goods was complete. Further, the present is a case where the appellant is invoking its power to confiscate the goods and we are called upon to decide whether appellant is entitled to exercise power under Section 111 of the Customs Act to confiscate the goods.

It has been held by this Court in *M.J. Exports Limited and another versus the CEGAT, Bombay* [1993 (Suppl.)1 SCC 169] that export of goods contrary to any prohibition imposed under the law for the time being in force will render the goods liable to confiscation. The same principle applies

to illegal import. The Import-Export Policy, 1988-91 permitted issuance of Open General Licence for import of life saving goods. Life saving equipment was imported from Germany under the OGL after obtaining customs clearance without payment of customs duty. It was re-packed and sought to be exported to the USSR under a contract. It was held that object of permitting import of life saving goods being that the goods may be available for use in the country, re-export thereof was prohibited by necessary implication by or under the OGL. Such goods being prohibited within the meaning of Section 2(33), re-export thereof rendered them liable to confiscation under Section 113(d) and penalty under Section 114 of Customs Act.

The result of the above discussion is that import of the consignments in question being contrary to law, the goods were liable to confiscation under Section 111 of the Customs Act. The order of confiscation of goods passed by the Commissioner of Customs is held to be in accordance with law. We are unable to agree with the view taken by the Tribunal in permitting re-export of the goods. Further, the Tribunal in its impugned order has waived the penalties imposed by the Commissioner on respondents 3 to 7. This part of the order of the Tribunal is without any reasons. The Tribunal has not considered the evidence against these persons which lead the Commissioner to impose the penalties. Nothing has been said in the order to justify

waiver of the penalties. Therefore, that part of the order of the Tribunal also can not be sustained. Accordingly, the impugned order of the Customs Excise and Gold (Control) Appellate Tribunal dated 20th November, 2000 is set aside and the order of the Commissioner of Customs, Kolkatta dated 1st May, 2000 is hereby restored.

The appeals are thus allowed with costs.

JUDIS