CASE NO.:
Appeal (civil) 6069 of 1999

PETITIONER:
COLLECTOR OF CUSTOMS, BOMBAY

RESPONDENT:
M.J. EXPORTS LTD.

DATE OF JUDGMENT: 14/08/2001

BENCH:
B.N. KIRPAL & SHIVARAJ V. PATIL

JUDGMENT:
JUDGMENT

2001 Supp(1) SCR 564

The Judgment of the Court was delivered by

KIRPAL, J. The main question which arises for consideration in the present case is whether the show cause notice which was issued by the appellant to the respondent beyond the period of one year of the import of the items in question is covered by the provisions of Section 28(1) proviso of the Customs Act, 1962 (for short "the Act") and, therefore, within time.

Briefly stated the facts are that on 19th October, 1988 the respondent imported and cleared 55 units of Haemodialysers under the Open General Licence (OGL). It claimed the benefit of Customs Notification No. 208 of 1981 and no duty was paid on the said import.

The goods were then taken to Kandla and were sought to be exported to USSR. On 2nd December, 1988, the customs authorities at Kandla were of the opinion that the goods which had been imported from abroad could not be so exported to Russia. On advice having been received from Joint Chief Controller of Import & Export, a show cause notice on 25th March, 1989 was issued by the Deputy Collector of Custom Kandla for confiscation of the goods under Section 113(d) of the Act. The respondent was also asked to show cause why short charged customs duty of Rs. 2,94,42,867 should not be recovered since the goods had been cleared at NIL rate of duty claiming the benefit of Customs Notification No. 208 of 1981. It may here be stated that on a bond being executed, the goods in question were in fact allowed to be exported to Russia. On 22ed October, 1990, the Collector of Customs,. Kandla, ordered confiscation of goods under Section 113(d) and imposed a penalty of Rs. 50 Lakhs. As regards the recovery of short duty, the Collector observed that the counsel for the respondent had submitted that Collector of Customs, Kandla, had no jurisdiction to demand duty for the goods imported through Bombay. The Collector agreed with this contention but added that even otherwise Notification No. 208/1981 exempted the goods unconditionally from import duty. The demand of duty was. therefore dropped

The decision of the Collector of Customs Kandla imposing the penalty of Rs. 50 lakhs was challenged in appeal before the CEGAT but without success. Appeal was then filed to this Court and was contended by the respondent that under the OGL the goods could he imported and cleared and thereafter there was no prohibition in re-exporting the same. By judgment dated 14th May, 1992 reported as M.J. Exports Ltd. v. CEGAT, (1992) 6 ELT 161 (SC), this court while dismissing the appeal of the respondent, inter alia,, came to the conclusion that in the OGI, List 2 of the Schedule permitted import of life saving equipment. The court interpreted this to mean that the life-saving equipment appealing in List No. 2 of Appendix 6 of the Import & Export Policy had to be such as for use in India. It was on this basis that the court came to the conclusion that the goods could not have been validly exported and the penalty levied was upheld. The Court also noticed the

contentions on behalf of the Revenue regarding the import of goods free of duty by relying on the said Notification and in this respect it observed as follows :

"25.....

(1) Much emphasis has been laid by the counsel for the Revenue on the circumstance that the appellant had obtained the import of the goods free of duty by relying on the notification granting exemption from customs duty It is obvious that could not have been the intention of the legislature to grant exemption from customs duty in respect of vital goods of the nature in question in order that an importer may make profit by selling them abroad. The notification is, therefore, relevant for the issue before us to the limited extent that it lends supports to the construction of List 2 of Appendix 6 in the manner we have interpreted it. This apart. we are not concerned here with the questions whether the attempt of the assessee to export the goods (which has in the event, been successful) would amount to an infringement of the conditions permitting the import so as to render either the import itself [vide S.111(o) of the Act] or the exemption from import duty or both illegal and invalid and, if so, the consequences thereof."

It also observed that such goods which were imported had to be for use in this country and not in another.

After the aforesaid decision, on 6th April, 1993, a show cause notice was issued by the Collector of Customs, Bombay, under Section 11 l(o) of the Act for recovering duty of Rs. 2,94,42,867 under Section 28(1) of the Act read with proviso to the said Section. After giving an opportunity to the respondent of being heard, on 28th January, 1994, the Collector of Customs, Bombay ordered confiscation under Section 11l(o) of the Act and imposed a penalty of Rs. 1 crore under Section 112(a) and further ordered payment of duty of Rs. 2,94,42,867.

The said decision of the Collector was challenged before the CEGAT. On a difference of opinion with regard to the question as to whether the extended period of limitation of five years could be invoiced in the present case, the matter was referred to a third Member. The third Member agreed with the Judicial Members and came to the conclusion that there was no wilful suppression on the part of the respondent and, therefore, the extended period of limitation did not apply. The order of the Collector of Customs was, accordingly, set aside. Hence, this appeal.

After hearing the counsel for the parties, we are of the opinion that in view of the decision of this court in M.J. Exports case (supra) there can be no doubt that any item which was imported under OGL which fell in the category of life saving drugs or medicines or equipment clearly implied that the import was for India and not for being exported to another country. Mr. Andhyarujina, learned senior counsel for the respondent referred to Hansraj Gordhandas v. H.H. Dave, Assistant Collector of Central Excise and Customs, Surat and Two Ors., [1969] 2 SCR 253 and submitted that it is well established that in a taxing statute there is no rule for any intendment but regard must be had to the clear meaning of the words. While there can be no quarrel with this proposition in Hansraj's case, the Court did observe at page 259 as follows :

"..... If the tax-payer is within the plain terms of the exemption it cannot be denied its benefit by calling in aid any supposed intention of the exempting authority. If such intention can be gathered from the construction of the words of the notification or by necessary implication therefrom the matter is different, but that is not the case here....."

(Emphasis added)

It is, therefore, clear that if on construction it necessarily follows that the goods though imported under OGL were to be used only in India then such a construction could be properly placed. In this regard, it will be useful to refer to the observations of this Court in M.J. Export case (supra) at page 171 which are as follows :

"22. We are. therefore, of the opinion that. although there is no express prohibition the re-export as such of items of goods specified in List 2 and imported into India is prohibited by necessary implication by the language of and the scheme underlying, the grant of OGL in regard to them It is difficult to agree that the import-export policy envisages the re-export of goods belonging to this category. The opinion of the CCIE is also to the same effect. The opinion also derives some binding effect from Para 24 (1) of the Import Policy read with Paras 22 & 23 of the Export Policy, which say :

Para 24(1) : The interpretation given by the Chief Controller of Imports and Exports, New Delhi in the matter of interpretation of Import Policy and procedures shall be final and will prevail over any clarification given by any other authority and person in the same matter

Pare 24(1): Cases for relaxation of existing policy and procedures where it creates genuine hardship or where a strict application of the existing policy is likely to affect exports adversely may be considered by the Chief Controller of Imports and Exports.

Para 23: In matters relating to export, as well as the interpretation of export policy and procedures, the person concerned may address the Chief Controller of Imports and Exports. New Delhi for necessary advice. Any interpretation of the export policy given in any other manner or by any other person will not be binding on the Chief Controller of Imports and Exports, or in

It is, however, contended by the learned senior counsel for the respondent that notwithstanding the aforesaid decision of this Court, in the present case the Exemption Notification No. 208/1981 does not contain any condition that exemption will not be granted if the goods imported are not used in India. The notification of exemption has been issued under Section 25 of the Customs Act. The heading of the Schedule indicates that the exemption relates to life saving drugs or medicines as well as to life saving equipments. Just as this Court in M.J. Exports' case has observed that inherent in the import for life saving drugs or medicines as per List 2 of Appendix is the condition that the goods imported must be for use in India, similarly when the exemption is granted under Section 25 from the total amount of customs duty in respect of life saving drugs or medicines, it necessarily implies that it is only with respect to those life saving drugs or medicines which are used in India. Furthermore, the notification under Section 25 has to be read along with the OGL permitting such import of life saving drugs or medicines and equipments and reading the two together it would follow that when import of such items is only for use in India then the exemption from payment of customs duty necessarily has to be of those items only, namely, those which are used in India. This being the case, the respondent was not entitled to claim the benefit of exemption as provided by Notification No. 208 of 1981.

It was contended that there has been no wilful suppression on the part of the respondent. The law as it then stood enabled the importer to take the benefit of the exemption notification and the larger period of limitation would, therefore, not be applicable. In support of this contention, reliance was placed on the decisions of this Court in Padmini Products v. Collector of C. Ex., (1989) 43 ELT 195 (SC) and Collector of Central Excise, Hyderabad v. M/s. Chemphar Drugs and Liniments, Hyderabad, [1989] 2 SCC 127. We are of the opinion that these decisions can be of little

assistance to the respondent. From what has been stated hereinabove, it must follow, logically, that inherent in the import of the life saving equipment was the condition that the same had to be used only in India. That condition also stood attached to the terms of Exemption Notification No. 208/1981. There was an obligation on the respondent intended to export the life saving equipment to Russia. There can be little doubt, and the examination of the respondent's Director makes it very clear, that the equipments were imported from abroad solely with the intention of exporting the same to Russia. This being the position, the respondent could not have claimed exemption under the said Notification No. 208/1981. If in law such exemption could not be claimed because the goods were to be exported from India, then it is by suppressing such a fact that the goods were cleared at Bombay without payment of customs duty. It is contended by Mr. Andhyarujina that the bill of entry does not require the importer to indicate the purpose for which the goods were being imported. That may be so but when in law benefit of exemption notification can only be availed of if the goods are to be used in India, then by claiming, the exemption what is given out to the customs authorities is that the goods arc not going to be exported. That was a suppression of correct fact, namely, that in fact the goods were to be exported, if this fact had been known, import duty would have been levied and benefit of exemption notification would not have been allowed. It is to be seen that when the imported items were sought to be exported merely within two months of the import, the goods were detained at Kandla. The customs authorities were, therefore, quite clear in their mind that such life saving equipments when imported under the OGL could not be re-exported. This was the correct position in law as has been upheld by this Court. If at the time of import on l9th October, 1988, it had been known that the goods imported are not to be used in India but are to he exported, then the benefit of exemption notification would not have been granted. By not disclosing the correct fact that the goods were meant for re-export, the benefit of exemption was availed of. In our opinion, therefore, the provisions of the proviso to Section 28(1) was applicable and the show cause notice issued by the customs authorities on 6th April, 1993 was valid.

Further this is not a case of mere failure or negligence on the part of the exporter, it was clearly a design on its part to import and then export as is eviden: from the following passage at page 174 of the judgment in M.J. Exports case (supra) wherein with regard to the conduct of the respondent in relation to the export to Russia the Court observed as follows :

"Learned counsel for the Revenue also pointed out that the shipping bills called for a mention as to whether the goods of which export was sought were "free goods or India produce to be exported or India produce". The appellant did not strike off any of these descriptions as inappropriate. The customs authorities were given the impression that these were Indian goods that were being exported. Indeed, the appellant itself well knew that goods imported could not be exported as such without the performance of some operation of processing or manufacture in regard to them. That is why it put up a facade of taking the goods to Ankleshwar after their import allegedly for being subjected to some processes. The customs officers, on verification, found that all this was untrue and that the appellant was surreptitiously trying to export imported goods, after just repacking them as goods of Indian manufacture. The appellant had adopted a similar subterfuge on the earlier occasion in December 1987 and succeeded in exporting like goods by not striking out the appropriate columns of a shipping bill proforma which required the exporter to specify whether the goods were "Indian produce or foreign produce to be re-exported". It is, therefore, urged that the goods sought to be exported do not conform to the description in the bill of entry for export, attracting the provisions of clause 3(3) of the Export Control Order and, in turn, S.113(d) of the Act. There is some force in this contention but we express no opinion thereon as this was not the ground on which action was taken and it is a new ground, involving investigation of facts, taken for the first time before us."

For the aforesaid reasons, this appeal is allowed and the decision of CEGAT is set aside and that of the Collector of Customs is restored.