

CASE NO.:
Appeal (civil) 5306-5307 of 2002

PETITIONER:
M/s Relax Safety Industries, Mumbai and Anr

RESPONDENT:
The Commissioner of Customs, (Import), Mumbai

DATE OF JUDGMENT: 09/05/2007

BENCH:
Dr. ARIJIT PASAYAT & LOKESHWAR SINGH PANTA

JUDGMENT:
J U D G M E N T

Dr. ARIJIT PASAYAT, J.

Challenge in these appeals is to the judgment of the Customs, Excise and Gold (Control) Appellate Tribunal, West Zonal Branch at Mumbai (in short the 'CEGAT'). In the three appeals before the CEGAT the order of the Collector of Customs, Bombay was under challenge. By that order the Collector of Customs (hereafter referred to as 'Collector') had ordered confiscation of a consignment comprising of dust and mist respirators, one of earplugs and a mould, under clause (d) and (m) of Section 111 of the Customs Act, 1962 (in short the 'Act'). However, the appellants were permitted to redeem the confiscated articles on payment of fine. He had ordered enhancement of the assessable value of the respirators and earplugs and imposed penalty under Section 112 of the Act on Jaynat Maru, the proprietor of appellant No.1 and Himant Tank.

Background facts in a nutshell are as follows:

Relax Safety Industries, the appellant had imported in 1994, a consignment of what it described in the bill of entry that it filed for their clearance as "moulded plastic parts" and "plastic fabricated cups". The value of the consignment was declared by the importer to be of Rs.85670/-. The bill of entry that was filed for their clearance indicated that some or all the goods were subjected to some adjudication, as a result of which they were permitted to be cleared on payment of fine. This information was claimed to be available from the rubber stamp put which prima facie indicates the result of adjudication. A copy of the adjudication order claimed to have been passed was not made available to CEGAT by the appellant despite its request. The goods were cleared on payment of duty on the value declared by the importer. Subsequently, the Directorate of Revenue Intelligence investigated into the matter, seized the goods in Gujarat and issued a notice which led to the adjudication. The notice alleged that the goods were in fact respirators and earplugs, based on the statement of Jayant H. Maru, alleged gross under-valuation of goods, proposing enhancement of the value of the goods to about Rs.27.88 lakhs. Confiscation of the goods was proposed under clause (m) of Section 111 of the Act. The notice also noted that respirator is classifiable under heading 63.07 of the tariff, and not under heading 39.26 as claimed. Confiscation of the mould, which was not declared in the bill of entry under clause (m) of Section 111 of the Act, was also proposed as were penalties. After considering the replies

of the parties, and hearing them, the Collector passed the order impugned in the appeals before CEGAT.

The contentions of the appellants were (a) the goods having been subjected to adjudication once before, they could not again be subjected to adjudication, and hence the second order of confiscation is not tenable, (b) subsequently, the goods have been subjected to adjudication on a third occasion, (c) alternatively the goods were found by their manufacturer in the United States of America not to conform to the local standards and hence were given away for distribution to India. They, therefore, could not be used as respirators or ear plugs. That is why they were described as plastic moulded cups. It was submitted that the Collector had ignored the certificates issued by the manufacturer as to the use of the goods. Their proposed confiscation under the import policy was questioned. CEGAT noted that the same was without any reasoning in support. It was also contended alternatively that if they are held to be prime quality goods, they are life saving equipments and did not require any import licence.

Revenue's representative supported order of the Collector.

The CEGAT noted that the basis for the contention that the goods were subjected to adjudication earlier is a rubber stamp on the bill of entry which was filed for clearance of the goods. Despite the CEGAT's directions neither the assessee nor the revenue could produce the adjudication order. According to the departmental representative the files were not traceable in the Customs House as nearly a decade had elapsed. No explanation was forthcoming from the assessee. According to CEGAT, the rubber stamp is a kind that is used to indicate the result of adjudication to importer or his agent pending issue of formal order so as to expedite clearance of goods. All that could be culled out from the bill of entry was that redemption value of Rs.15,000/- and penalty of Rs.5,000/- was imposed.

The report filed by the shed operating staff on the reverse of the bill of entry indicated that bag Nos. 41, 43, 44, 45, 80, 81 and 82 were nothing but the consumer goods and they are mouth covers for dust protection fitted with elastic bulbs.

The basic issue raised before the CEGAT was that once goods were subjected to adjudication, confiscation for the same goods were not impermissible. Though the appellant placed strong reliance on *Mohan Meakin Ltd. v. CCE* [(2000 (115) ELT 3 (SC)] the CEGAT found that the same was not applicable to the facts of the case. CEGAT noted that the decision was inapplicable as only a part of the goods was subjected to adjudication. The mere fact that they formed part of the same consignment of which one part was held liable to confiscation earlier does not impinge on the rest of the consignment. That part can be subjected to confiscation subsequently.

The CEGAT did not find any substance in the plea that any of the goods had been correctly declared and a transaction value had to be accepted. According to CEGAT question of acceptance of transaction value would not arise where the goods are supplied free of charge, as clear from the provisions of Rule 4 of Valuation Rules which makes applicable as transaction value the price actually paid or payable for the goods when sold for export to India. Where the goods have not been sold, the question of applying the transaction value

would not arise. It was accepted by the appellant before the Commissioner that the goods were received free. The CEGAT recorded a conclusion that the goods were mis-declared both with regard to their identity and their value deliberately solely in order to avoid their liability to confiscation and to pay duty. So redemption fine and penalty were not reduced. The penalty was reduced to rupees twenty five lakhs so far as the appellant Jayant Maru is concerned. The other appeal filed by Himant Tank was allowed, as he is residing in U.S. and therefore the provisions of the Act would not apply to him.

The CEGAT found that only those goods which were already subjected to adjudication i.e. respirators cannot be subjected to confiscation once again.

The stands taken before the CEGAT are re-iterated before us by learned counsel for the appellants. It was submitted by the appellants that CEGAT had erroneously come to the conclusion that only part of the consignment was confiscated. The consignment was cleared as one consignment. There was consignment as a whole. It is also submitted that the so called admission could not have been utilized as the same was subsequently retracted.

The only question which needs to be adjudicated is whether there was confiscation of the whole consignment or part of it earlier.

The confiscation of the goods was ordered on two counts. The first is that they are consumer goods usable as such and the second is that their value has been grossly under declared. It is not possible to accept the contention that because these goods were supplied free of charge from an exporter from United States of America, because they did not conform to standards of the U.S. Federal Government, they are in fact not earplugs and not usable as such. The fact that the earplugs did not conform to a particular standard does not render them unusable as such goods, or unsuitable for such use. All that it shows is that in the particular country to those standards of which they cannot conform, they cannot be put to such use. There is nothing to prevent that they are being capable of use as such elsewhere. This, in fact, has been the stand that manufacturer of these goods took. They were manufactured by Moldex Metric Inc, California. That company, in its certificate dated 15.9.1992 signed by Albert Mintz, Vice President has taken the stand that the goods did not conform to United States of America's Federal regulations or the earplugs did not conform to the company's standards, the products are either trashed or given away for use outside USA. It further explained "In the past we have also given these products to other countries like Mexico, Columbia etc Enclosed documents shows these approval" The documents enclosed to this certificate contain the record of disposition by the Material Review Board of this company to give away consignment of respirators and earplugs in one case as a charitable contribution for the Guadalajara (in Mexico) explosion tragedy through Red Cross, and in another case to "give away the respirators for use in India". Thus it is clear that the goods in question were by no means capable of use. Respirators and earplugs could not be put to use in the rescue work following the Mexican tragedy, unless they were capable of being so used. Similarly, the manufacturer himself has specifically indicated that the other consignment of respirators was for use in India. It is thus clear that the goods were capable of being used and intended to be put to use as earplugs. In other

words, they might have been sub standard in the U.S.A. but were identifiable as earplugs and capable of use as such. It is not as if they were incapable of such use, and they could only be used as scrap. In that case, one would expect them to be so described. On the contrary, they have been described as moulded plastic goods and classification is claimed, not under heading relating to scrap, but as parts of plastic under chapter 34 of the tariff; nor is there any claim that the goods were in fact put to use as scrap, and not sold or made use of as earplugs. Allegation in the show cause notice that it was as a result of the adjudication again that the importer faced as a result of an earlier import in which goods were correctly described, that they were ambiguously described in the present consignment that has not been disputed. That being the case, the goods were in fact earplugs and deliberately declared to be plastic moulded cups, so as to mislead the authorities into not treating the goods as consumer goods. The view of the Collector that they are consumer goods because they were not parts but they were items capable of use without further processing and they protect from noise has been rightly confirmed by CEGAT. The categorization of the goods as consumer goods was also correct, and was not challenged in the appeals before CEGAT. The contention that the goods were life saving equipment and were freely importable has not been substantiated by evidence to the provision of the import policy. The confiscation of these goods under clause (d) of Section 111 of the Act was rightly upheld by CEGAT.

In para 8 of its judgment the CEGAT recorded as follows:

"It is contended that the value of the goods has been correctly declared and transaction value has to be accepted. The question of acceptance of transaction value would not arise in a case where the goods are supplied free of charge. This is clear from the provisions of Rule 4 of the Valuation Rules which makes applicable as transaction value the price actually paid or payable for the goods when sold for export to India. Where the goods are not sold the question of applying the transaction value would not arise. It was in fact the contention of the importer before the Commissioner that the goods were received free. The manufacturer gave them away to Silkat, New York. That company in its certificate signed by Subhash Patel, General Manager, has said that the amount charged to the appellant was towards recovering our expenses such as packaging, storage, shipping, handling, insurance, nominal profits etc. It further certified that it had not paid any money to the manufacturer. In effect, therefore the goods have been supplied free of cost and the provisions of Rule 4 will not apply. Jayant Maru, in his statement dated 8.9.1992 said that the correct CIF value of earplug would be around 6.99 cents i.e. US \$ 0.69 per plug. He has confirmed this in his statement of 14.9.1992 where he has said that he has purchased the earplug at US \$ 138 per 2000 pairs. Maru has affirmed an affidavit dated 22.9.1992 before a notary retracting the admission made on the ground that they were obtained by threat or assault. There is no explanation for the delay of 15 days with regard to the first statement and 8 days with regard to the second statement. It is therefore not possible to accept that the value that has been applied is

incorrect. It is therefore not possible to accept that the admissions made in his statement were not true or voluntary. This being the position, confiscation of the goods under clause (m) of Section 111 has also to be confirmed. It is clear that the goods were misdeclared both regard to their identity and their value deliberately solely in order to avoid their liability to confiscation and to pay duty. We have noted that Maru has accepted on an earlier occasion in a case of import in the name of another company, goods were rendered liable to confiscation having incorrectly declared. This is therefore not a case where the imports made were declared unknowingly or innocently but deliberately. We therefore do not think any reduction in the redemption fine that would apply to these goods or to the penalty for their mis-declaration and unauthorised importation".

Mohan Meakin's case (supra) was rendered in entirely different conceptual background. Para 6 of the judgment it was noted as follows:

"In the instant case, it is an admitted fact that after issuing a notice as contemplated under Section 124 of the Act, to the importer of the goods in question and adjudication proceeding under Section 125 had been conducted and the goods in question were released on payment of redemption fine, in such an event it matters little whether the adjudication was under which sub clause of Section 111 because whichever is the sub clause, there was an obligation on the adjudicating authority to find out the market value of the goods so imported and to collect all duty and other charges payable on the goods in question before releasing the goods on payment of redemption fine."

In the instant case, a categorical finding has been recorded by the CEGAT that there was confiscation of only one part and not the whole consignment. The effect of Section 28 of the Act also cannot be lost sight of, prima facie when there is case of fraud made out. In Mohan Meakin's case (supra) there was no notice to the original importer under Section 124. Mohan Meakin was found to be the ultimate bona fide purchaser.

Looked at from any angle, the order of CEGAT is irreversible. The appeals are sans merit and deserve dismissal which we direct. Costs made easy.