

CASE NO.:
Appeal (civil) 4958 of 1994

PETITIONER:
Collector of Customs, Bombay

RESPONDENT:
M/s Elephanta Oil and Industries Ltd., Bombay

DATE OF JUDGMENT: 31/01/2003

BENCH:
M.B. SHAH & ARUN KUMAR

JUDGMENT:
J U D G M E N T

Shah, J.

The question involved in this appeal is whether import of Beef Tallow under Open General Licence (hereinafter referred to as 'OGL') was permissible after issue of Import Trade Control Public Notice No.29-ITC (PN/81) on 5th June, 1981 clarifying that existing description 'Mutton Tallow' in Entry No.44 shall be read as 'Tallow of any animal origin including Mutton Tallow'?

Appendix to Import Policy 1981-82 provides for list of items, import of which is canalised through public sector agencies. Item 44 provides that import of tallow of any animal origin including mutton tallow was canalised through State Trading Corporation of India.

It is contended by the respondent that OGL item was imported against licence dated 29.6.1981 which was an impress licence issued to M/s B. Arun Kumar and Co., Bombay under the import-export policy for the period 1981-82 and that respondent entered into a contract for import which was notorised on 6.6.1981. Subsequently, the written contract signed by the supplier was submitted to the New Bank of India for issuing letter of credit. However, as Bank refused the same and as on 3rd February 1983 notice was issued by the supplier for cancellation of the contract, Writ Petition No. 313 of 1983 was filed in the High Court of Delhi for various reliefs including the directions to the Bank to open letter of credit. On 30th March, 1983, letter of credit was actually opened. On 16th June, 1983 and 1st July, 1983, bills of entries for import of beef tallow were filed.

It is to be stated that before respondent could enter into alleged contract, it was clarified by the Import Trade Control Public Notice dated 5th June, 1981 that existing description 'mutton tallow' under Entry 44 Appendix 8 is to be read as 'tallow of any animal origin including mutton tallow'.

Hence, on 15.7.1983, the Department issued show-cause notice to the respondents. After receiving the reply and after hearing the respondents, the Collector of Customs, Bombay on 20th December, 1983 passed an order relevant part of which reads thus:

"I order that the consignments of beef tallow imported by M/s Jain Shudh Vanaspati Ltd. for which they had presented the Bills of Entry listed in Annexure-I to this order, be confiscated under Section 111(d) of the Customs Act, 1962 read with Section 3(2) of Imports and Exports (Control) Act, 1947 and Section 11 of the

Customs Act, 1962. I, however, permit them to re-export the goods within fifteen days of the receipt of this order or such extended time as may be allowed by the adjudicating authority. I impose a penalty of Rs.5 Crores (Rupees five crores only) on M/s Jain Shudh Vanaspati Ltd. under Section 112 of the Customs Act, 1962."

Aggrieved by the said order, respondents preferred Appeal No.C/247/84-C before the Customs Excise and Gold (Control) Appellate Tribunal, New Delhi (hereinafter referred to as 'the Tribunal'). The Tribunal held that the question involved was considered in detail by it in its earlier judgment in Jain Sudh Vanaspati Ltd. v. Collector of Customs, Bombay [1990 (29) ECR 321 (Cegat SB-C)]. In the said decision, the Tribunal held that the right to import the goods under OGL is a statutory right and cannot be over-ruled by a public notice and that the import of Beef Tallow which ceased to be an OGL item when it was canalised by the public notice is governed by the Import Policy when the licence was issued and not by the public notice. Public notice has no statutory force under Section 3 of the Imports and Exports (Control) Act, 1947. The Tribunal also noted that the said decision was challenged before this Court by filing SLP Nos.14605-06 and those SLPs were summarily dismissed by order dated 10th November, 1990. The Department's reference application against the said order was also dismissed. The Tribunal by its Final Order No.52/92-C dated 18th February, 1992 allowed the appeal and held that the import of beef tallow under OGL was not unlawful and, therefore, question of confiscation or redemption fine or imposing personal penalty under Section 112 of the Customs Act will not arise.

That order is challenged by filing this appeal.

We would first deal with the contention raised by the learned senior counsel Mr. Sanghi appearing on behalf of the respondent that once the imported article is re-exported as directed by the department, there is no question of levying any penalty or redemption fine. In our view, this submission is without any substance because confiscation of goods and thereafter permitting the respondent to re-export the same would not mean that penalty under Section 112 of the Customs Act cannot be levied. The power to levy penalty under Section 112 for improper importation of goods is different from the power of confiscation of goods under Section 125 and giving an option to pay in lieu of confiscation such fine as authority thinks fit which are exercised under Section 125 of the Act. Relevant part of Section 112 reads thus:

"112. Penalty for improper importation of goods, etc.
Any person,

(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or

(b) .

shall be liable,

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding the value of the goods or five thousand rupees."

As against this, Section 125 empowers the concerned officer to confiscate the goods which are illegally or improperly imported. After confiscation of the goods under the said section, the Collector of Customs is empowered to give an option to the concerned party to get the same back after paying redemption fine. Section 125 (1) reads thus:

"Section 125. Option to pay fine in lieu of confiscation. (1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit."

From the aforesaid two sections, it is apparent that both operate in different fields, namely, one requires imposition of penalty and other provides for confiscation of improperly imported goods. Section 111 provides that goods brought from the place outside India are liable to confiscation if the goods are improperly imported as provided therein. In cases where goods are liable to confiscation, discretion is given to the authority to impose penalty. Further, Section 125 empowers confiscation of such goods and thereafter, confiscated goods vest in the Central Government. The Section further empowers the authority to give an option to the owner or the person from whom goods are seized to pay fine in lieu of such confiscation for return of the goods and the fine is also limited up to the market price of the goods. Therefore, levy of fine in lieu of confiscation is in addition to levy of penalty imposable under Section 112.

Learned senior counsel Mr. Sanghi next contended that there was no bar on import of beef tallow by the respondent. This submission is without any substance as law on this issue is settled. This Court has taken a consistent view that once import of goods is canalised, it is not open to the holder of REP licence to import the goods which are canalised and that goods must be in conformity with the Import Policy at the time of import.

In *Union of India v. M/s Godrej Soaps Pvt. Ltd. and another* [(1986) 3 SCR 771], it was held thus:

"As the importation of canalised items directly by holders of additional licences are banned, it should not be construed to have been permitted by virtue of the order of this Court and the items sought to be imported do not come within List 8 of Part 2 of Appendix 6 of the Import Policy of 1985-88 against additional licences. The goods in question which were sought for by the respondents fall under item 9 Part B of Appendix 5 which is the canalised item and such cannot be allowed to be imported against additional licence granted pursuant to the order of this Court dated 18th April, 1985."

Further, in *D. Navinachandra & Co., Bombay v. Union of India* [(1987) 2 SCR 989] this Court held thus:

"The items had to pass through two tests, firstly, they should have been importable under the import policy 1978-79 and secondly they should also have been

importable under the import policy 1985-88..
Canalised items are those items which are ordinarily
open to import only through a public sector agency.."

The aforesaid aspect was further considered in M/s Darshan Oils Pvt. Ltd. v. Union of India [(1994) Supp. 5 SCR 278], wherein this Court held thus:

"In D. Navinchandra & Co., Bombay and anr. v. Union of India and others [(1987) 2 SCR 989], it was clearly held that the entitlement to import items which were canalised or not, is governed by the Import Policy prevalent at the time of Import. In the present case the import of a canalised item being made after amendment of the Policy by the public notice dated 11.11.1983, in a manner not permitted by the amended Policy, the appellants cannot claim to avoid the logical consequences of the import being made contrary to the Import Policy prevailing at the time of import of the goods..."

It is to be stated that the Tribunal relied upon its earlier decision by observing that the SLP against the said decision was dismissed by this Court summarily. But it is well settled law that in case where SLP is dismissed without assigning any reason, that order would not constitute a binding precedent. [Re: Ajit Kumar Rath v. State of Orissa [(1999) Supp. 4 SCR 302].

For levying of the fine also, it is to be stated that before issuance of licence to the respondent on 29.6.1981 by Import Trade Control Public Notice, it was clarified that existing description 'mutton tallow' in Entry No.44 shall be read as any tallow of any animal origin including mutton tallow. The bills of entry were tendered only on 16.6.1983 and 1st July, 1983 respectively and at that time Import - Export Policy of 1983-84 was in force which prohibited import of beef tallow. Therefore, respondent has imported a prohibited item. It is also to be stated that respondent was experienced Export House well versed in the policies and procedure in regard to the import and export of goods as noted by this court in other matter of respondent. [Re: Jain Export Ltd. and others v. Union of India [(1993) Supp. 1 SCR 185].

Apart from the aspect that respondent was well versed with import and export policy, section 3 of the Import Control Order 1955, inter alia specifically provides that no person shall import any goods of the description specified in Schedule I except under and in accordance with a licence. The Collector has also referred to the conditions of licence and has observed that:

"The first condition on the reverse of the licence states that the import policy in relation to the goods and amendments made thereto up to and including the date of issue will be applicable to the goods. The licence was issued on 29.6.1981 on which date beef tallow was canalised."

Further, in the Import Policy for April 1981 - March 1982 in paragraph 2, it has been specifically stated that "any amendment to this policy which may become necessary in the course of the year will be notified by means of Public Notices issued by the Chief Controller of Imports and Exports, from time to time". Same thing is stated in Import - Export Policy of the year 1982-83.

In this view of the matter, it is apparent that respondent knowing fully well the import policy imported prohibited goods i.e.

import of canalised item namely beef tallow and, therefore, the Collector was fully justified in imposing the penalty under Section 112 of the Customs Act.

In the result, the appeal is allowed. The impugned judgment and order passed by the Tribunal is set aside and the judgment and order passed by the Collector of Customs is restored. There shall be no order as to costs.

JUDIS