

COMMISSIONER OF CUSTOM, NEW DELHI

v.

M/S BROOKS INTERNATIONAL AND ORS.

MAY 24, 2007

[DR. ARIJIT PASAYAT AND LOKESHWAR SINGH PANTA, JJ.]

Customs Act, 1962; ss. 76 & 113 (c) & (d):

Duty drawback—Export of goods—Seizure of consignment by Revenue authorities ordering confiscation of all the goods under s.113(d)—Appeal allowed by Tribunal holding that the authorities had no power of confiscation of the goods in question and no material placed to show that the goods did not correspond to the description of the goods as disclosed in the bills—On appeal, held: Tribunal is directed to consider the matter afresh keeping in view the principles set out by its larger bench and approved by the Supreme Court on similar issues in the matter of Om prakash Bhati v. C.I.T. Delhi

The question arose for determination in these appeals was that in case the market value of goods under export is much less than the amount of drawback claimed, whether such goods can be confiscated by the authorities for violation of the provisions of the Customs Act, 1962.

Revenue contended that Section 113(1)(c) and (d) of the Customs Act apply as they deal with three types of goods i.e. excisable goods, prohibited goods and goods entered for exportation; that the assessee attempted to export old and used readymade garments which is not permissible under Rule 3 of the Drawback Rules; that the market value was less than duty drawback which was not admissible under Section 76(1) (b) of the Act; and that CEGAT has erroneously interpreted the provisions of Section 113(c) and (d) of the Act and the contents of the show-cause notice were not properly analysed.

Allowing the appeals, the Court

HELD: 1. It would be appropriate for the CEGAT which had not considered the effect of the larger bench judgment, which had approval of this Court in the matter of *Om Prakash Bhati v. CIT, Delhi*, to rehear the appeals keeping in view the principles set out in the said case.

[Para 8] [798-G; 799-A]

A *Om Prakash Bhati v. Commissioner of Customs, Delhi [2003] 6 SCC 161, relied on.*

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4559-4561 of 2002.

B From the Final Judgment and Order No. A/242-244/2002/NB-D dated 06.02.2002 of the CEGAT, New Delhi in Appeal No. C/171-173/01-NB.

P. Vishwanatha Shetty, Sr. Adv., S.J Aristotle and B. Krishna Prasad for the Appellant.

C Joseph Vellapally, Sr. Adv., Mukesh Verma, Manish Shanker, M.R. Shamshad, Pravesh Thakur, Yash Pal Dhingra and Ashish Mohan for the Respondents.

The Judgment of the Court was delivered by

D **DR. ARIJIT PASAYAT, J. 1.** Since all these appeals relate to identical question, they are taken up for disposal by this common judgment.

E 2. The basic issue is when the market value of goods under export is much less than the amount of drawback claimed, whether such goods can be confiscated for violation of the provisions of the Customs Act, 1962 (in short the 'Act'). In the matters relating to CA No.4559-4561 of 2002, the respondent had sent a consignment to the export shed of ICD, TKD, New Delhi for exporting the same under claim for duty drawback. On the basis of intelligence, Directorate of Revenue, Intelligence (in short 'DRI') detained the consignment. **F** It was, prima facie, noted that the goods did not appear as per description, quantity and value disclosed in the bills. The consignments of the respondents were examined on different dates by DRI.

G 3. Consignment of R1 was examined by DRI on 7.1.1999 & 12.1.1999, Consignment of R2 was examined by DRI on 18.1.1999 & 25.1.1999, Consignment of R3 was examined by DRI on 14.1.1999 & 08.02.1999.

H 4. The Commissioner of Customs directed confiscation of all the goods under Section 113(d) and (i) of the Act and allowed to redeem of the same on payment of fine of Rs.10,00,000/-, disallowed the export of readymade garments and claim of drawback. No penal action was invoked as DRI contemplated to seek separate adjudication in respect of the penal clause

provided under the Act. Appeals were preferred before the Customs, Excise and Gold (Control) Appellate Tribunal (in short 'CEGAT') which allowed the appeals holding that there was no power of confiscation and there was no material placed to record to suggest that the goods did not correspond to any material entry made in the bills and the correctness of the FOB and description of the goods specified in the bills had not been disputed.

5. In support of the appeal learned counsel for the appellant submitted that Section 113(1) (d) and (c) apply as they deal with three types of goods i.e. excisable goods, prohibited goods and goods entered for exportation. Respondents attempted to export old and used readymade garments etc which is not permissible under Rule 3 of the Drawback Rules. The market value was less than duty drawback which was not admissible under Section 76(1)(b) of the Act. CEGAT has erroneously interpreted the provisions of Section 113(d) and (c) of the Act. The contents of the show-cause notice were not properly analysed.

6. Learned counsel for the respondent on the other hand supported the order of the CEGAT.

7. It is to be noted that in view of the divergence of opinion between the several benches of the CEGAT, matter was referred to a larger bench and the larger bench decision was assailed by the assessee in the concerned case. Before this Court in *Om Prakash Bhati v. Commissioner of Customs, Delhi*, [2003] 6 SCC 161 it was, *inter alia*, observed as follows:

"6. At the outset, we would state that the learned counsel for the appellant has not pressed for the drawback in view of specific provision of Section 76 which *inter alia* provides that no drawback shall be allowed "(b) in respect of any goods the market-price of which is less than the amount of drawback due thereon". Therefore, for the purpose of getting drawback, relevant consideration is *the market price* of the goods prevailing in the country and not the price of the goods which the exporter expects to receive from the overseas purchaser.

7. Next—as the order for confiscation of goods is passed by referring to Section 113(d) of the Act, we would refer to the same. It reads as under:—

"113. Confiscation of goods attempted to be improperly exported etc.— The following export goods shall be liable to confiscation:—

A (d) any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, *contrary to any prohibition imposed by or under this Act or any other law for the time being in force.*"

B 8. The aforesaid Section empowers the authority to confiscate any goods attempted to be exported contrary to any 'prohibition' imposed by or under the Act or any other law for the time being in force. Hence, for application of the said provision, it is required to be established that attempt to export the goods was contrary to any prohibition imposed under any law for the time being in force.

C 9. Further, Section 2(33) of the Act defines "prohibited goods" as under:--

D "prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with."

E 10. From the aforesaid definition, it can be stated that (a) if there is any prohibition of import or export of goods under the Act or any other law for the time being in force, it would be considered to be prohibited goods; and (b) this would not include any such goods in respect of which the conditions, subject to which the goods are imported or exported, have been complied with. This would mean that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. This would also be clear from Section 11 which empowers the Central Government to prohibit either 'absolutely' or 'subject to such conditions' to be fulfilled before or after clearance, as may be specified in the notification, the import or export of the goods of any specified description. The notification can be issued for the purposes specified in Sub-section (2). Hence, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods. This is also made clear by this Court in *Sheikh Mohd. Omer v. Collector of Customs, Calcutta and Ors.*, [1970] 2 SCC 728 wherein it was contended that the expression

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'prohibition' used in Section 111 (d) must be considered as a total prohibition and that the expression does not bring within its fold the restrictions imposed by Clause (3) of the Import Control Order, 1955. The Court negated the said contention and held thus:--

"...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. From item (I) of Schedule I, Part IV to Import Control Order, 1955, it is clear that import of living animals of all sorts is prohibited. But certain exceptions are provided for. But nonetheless the prohibition continues."

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15. Apart from the aforesaid provision, for finding out the true export value of the goods, Section 14 of the Act provides relevant procedure. Section 14 is to be read along with Section 2(41), which defines the word 'value'. Section 2(41) reads as under:--

"Section 2(41)—"value", in relation to any goods, means the value thereof determined in accordance with the provisions of Sub-section (1) of Section 14."

Thereafter, relevant part of Section 14 reads thus:--

"14. *Valuation of goods for purposes of assessment.*—(1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975) or any other law for the time being in force whereunder a duty of customs is chargeable on any goods by reference to their value, the value of such goods shall be deemed to be--

A *the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation or exportation, as the case may be, in the course of international trade, where the seller and the buyer have no interest in the business of each other and price is the sole consideration for the sale or offer for sale:*

B Provided that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under Section 46, or a shipping bill or bill of export, as the case may be, is presented under Section 50;

C (1A) Subject to the provisions of Sub-section (1), the price referred to in that sub-section in respect of imported goods shall be determined in accordance with the rules made in this behalf.

D (2) Notwithstanding anything contained in Sub-section (1) or Sub-section (1A) if the Central Government is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value.

E (3) ...”

F 16. The aforesaid Section would be applicable for determining the value of goods for the purpose of assessment of tariff under the Act or any other law for the time being in force whereunder a duty of customs is chargeable on any goods by reference to their value. In the present case, on export of goods in question, no duty was payable under the Act. It was, therefore, contended that there is no scope of application of Section 14 for determining the value of goods by applying the criteria laid in the said Section. In our view, this submission cannot be accepted. For determining the export value of the goods, we have to refer to the meaning of the word 'value' given in Section 2(41) of the Act, which specifically provides that value in relation to any goods means the value thereof determined in accordance with the provisions of Sub-section (1) of Section 14. Therefore, if the export value of the goods is to be determined, then even if no duty is leviable, the method (mode) for determining the value of the goods provided under Section 14 is required to be followed. Section 14

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specifically provides that in case of assessing the value for the purpose of export, value is to be determined at the price at which such or like goods are ordinarily sold or offered for sale at the place of exportation in the course of international trade, where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for sale. No doubt, Section 14 would be applicable for determining the value of the goods for the purpose of tariff or duty of customs chargeable on the goods. In addition, by reference it is to be resorted to and applied for determining the export value of the goods as provide under Sub-section (41) of Section 2. This is independent of any question of assessability of the goods sought to be exported to duty. Hence, for finding out whether the export value is truly stated in the shipping bill, even if no duty is leviable, it can be referred, to for determining the true export value of the goods sought to be exported.

17. It is true that Section 50 of the Act *inter alia* provides that before exporting the goods the exporter shall make entry thereof by presenting to the proper officer in the case of goods to be exported, a shipping bill and a bill of export in prescribed form. The Shipping Bill & Bill of Export (Form) Regulations, 1991 *inter alia* prescribes the said form. After that form is amended w.e.f. 15.6.2001, it is stated that exporter shall stated "*Value - FOB/PMV where applicable*". We are not required to deal with this aspect in this appeal as the goods were sought to be exported in the year 1998.

18. From the aforesaid provisions, mainly, Section 2(41) read with Section 14 of the Act and Section 18 of the Foreign Exchange Regulation Act, 1973, it is crystal clear that:--

(a) Exporter has to declare full export value of the goods (sale consideration for the goods exported).

(b) Exporter has to affirm that the full export value of the goods will be received in the prescribed manner.

(c) If the full export value of the goods is not ascertainable, the value which the exporter expects to receive on the sale of the goods in the overseas market.

(d) Exporter has to declare true or correct export value of the goods, that is to say, correct sale consideration of the goods.

A Criterion under Section 14 of the Act is the price at which such or other goods are ordinarily sold or offered for sale in the course of international trade where the seller and buyer have no interest in the business of each other and the price is the sole consideration for sale or offer for sale.

B 19. To the same effect, Rule 11 of the Foreign Trade (Development and Regulation) Rules, 1993 provides. This Rule is to be read along with Section 11(1) of the Foreign Trade (Development & Regulation) Act, 1992, which *inter alia* provides that no export or import shall be made by any person except in accordance with the provisions of this act, the rules and the orders made thereunder and the export and import policy for the time being in force. Rule 11 reads thus:--

C *"11. Declaration as to value and quality of imported goods.-*
D *-On the importation into, or exportation out of, any customs*
E *ports of any goods, whether liable to duty or not, the owner of*
F *such goods shall in the bill of entry or the shipping bill or any*
G *other documents prescribed under the Customs Act, 1962 (52 of*
H *1962), state the value, quality and description of such goods to*
the best of his knowledge and belief and in case of exportation
of goods, certify that the quality and specification of the goods
as stated in those documents are in accordance with the terms
of the export contract entered into with the buyer or consignee
in pursuance of which the goods are being exported and shall
subscribe to a declaration of the truth of such statement at the
foot of such bill of entry or shipping bill or any other documents."

F 20. Hence, in cases where the export value is not correctly stated, but there is intentional over-invoicing for some other purpose, that is to say, not mentioning true sale consideration of the goods, then it would amount to violation of the conditions for import / export of the goods. The purpose may be money laundering or some other purpose, but it would certainly amount to illegal/unauthorised money transaction. In any case, over-invoicing of the export goods would result in illegal/irregular transactions in foreign currency."

H 8. It would be appropriate for the CEGAT which had not considered the effect of the larger bench judgment, which had approval of this Court in *Om Parkash* case (*supra*) to rehear the appeals. We, therefore, set aside the order of the CEGAT and remit the matter to it for fresh consideration keeping in

view the principles set out in the *Om Parkash* case (supra).

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9. The appeals are allowed to the aforesaid extent.

C.A. Nos. 140-143 of 2004

10. The factual position is almost identical to those involved in C.A. Nos. 4559-4561 OF 2002 except that in the instant case the appellant had filed an application for review which was rejected.

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11. Following the view expressed in the connected civil appeals we allow these appeals and remit the matter to CEGAT for fresh consideration. It is to be noted that CEGAT is presently known as Customs, Excise and Service Tax Appellate Tribunal.

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12. Appeals are allowed.

S.K.S.

Appeals allowed.

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