

Pepsico India Holdings Pvt. Ltd. Vs Commr. of Cus. (Imports), Chennai

Court: Madras High Court

Date of Decision: March 1, 2011

Acts Referred: Customs (Attachment of Property of Defaulters for Recovery of Government Dues) Rules, 1995 "Rule 4

Customs Act, 1962 "Section 124, 142, 142(1), 28(2), 28(B)

Finance Act "Section 72

Citation: (2011) 272 ELT 172

Hon'ble Judges: R. Sudhakar, J

Bench: Single Bench

Advocate: L. Maithili, for the Appellant; S. Yashwanth, SCGSC, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

R. Sudhakar, J.

This writ petition is filed to call for the records of the first respondent culminating in his communication bearing Ref. No.

F.No. RRU 33/2004, Appg. Sea dated 7-4-2006 issued by the 2nd respondent and quash the same.

2. This writ petition challenges the notice issued by the Tax Recovery Officer, Revenue Recovery Unit of the Commissioner of Customs, (Import).

3. The brief facts, which led to passing of the impugned proceedings are as follows :-

In 1986, one M/s. Falcon Beverages India (P) Ltd., imported certain goods under Project Import Scheme on concessional rate of import duty. On

9-8-1986, bond was executed by M/s. falcon Beverages India (P) Ltd., for a sum of Rs. 1,91,000/-. On 16-8-1986, M/s. Lalcon Beverages

India (P) Ltd., filed an application to the Customs Department for registration of the contract under Project Import (Registration of Contracts

(Regulations) 1965. On 26-12-1986, M/s. Falcon Beverages India (P) Ltd., were duly informed by the Customs Department that the application

for registration has been registered under Project Contract Import Regulations. They were asked to keep the bond and bank guarantee alive till the

finalisation of the project contract. In January 1987, the Customs Department calls upon M/s. Falcon Beverages India (P) Ltd., to confirm whether

the imports under project contract is completed and were asked to furnish documents for finalisation of the contract. On 30-11-1987, the importer

viz., M/s. Falcon Beverages India (P) Ltd., informed the Customs Department that all the machineries imported were erected and they will start

commercial production and by stating so, they requested the Customs Department to release the bond so as to enable them to withdraw the Bank

Guarantee submitted by them. Thereafter on 21-1-1988, M/s. Falcon Beverages India (P) Ltd., informs the Customs Department that they have

started commercial production as on 7-1-1988. Again on 4-3-1992, i.e. four years after the information as above was sent by M/s. Falcon

Beverages India (P) Ltd., regarding the commencement of commercial production, the company requested for release of the bond and withdrawal

of the bank guarantee to the Customs Department stating that they have submitted all the documents to the Customs Department for finalisation of

the project contract. At that point of time, the Assistant Collector of Customs (Imports) wrote a letter on 12-3-1992 to M/s. Falcon Beverages

India (P) Ltd., asking them to file a Bill of entry relating to import of 7th machine viz., Bottle Inspector Machine stating that it is not available with

the Department. This was followed by reminders dated 10-2-1993 and 2-9-1993.

4. It will be pertinent to point out that the communications dated 12-3-1992, 10-2-1993, 2-9-1993 have not been served on M/s. Falcon

Beverages India (P) Ltd. as could be seen from the narration of facts by the Department in the order in Original No. 2425/2004. dated 23-6-2004

in file No. S37/380/86 Gr.6. While the matter stood thus, on 12-1-1994, the importer M/s. Falcon Beverages India (P) Ltd., entered into an

agreement with M/s. Aradhana Beverages Foods Company Ltd., for sale of land and machinery, which included the Bottle Inspector Machine.

5. Subsequently, on 25-7-1994, the Department sent a reminder to M/s. Falcon Beverages India (P) Ltd., asking them to file a triplicate copy of

Bill of entry for Bottle Inspector Machine followed by reminders dated 25-7-1994, 22-5-1996, 22-7-1996. and 1-1-2004. On 1-6-2004, a

show cause notice in terms of Section 124 of Customs Act was issued on M/s. Falcon Beverages India (P) Ltd. It is on record that no reply to the

show cause notice was filed and there was no appearance by the party. It is also on record that the show cause notice was admittedly not served

on the importer viz., M/s. Falcon Beverages India (P) Ltd., The order-in-original referred to earlier came to be passed on 23-6-2004. Thereafter,

the Deputy Commissioner of Customs Gr.VI, issued a certificate in terms of Section 142(1)(c) of the Customs Act for realisation of the customs

duty from M/s. Falcon Beverages India (P) Ltd., in a sum of Rs. 43,07,526/-. Based on this certificate, the impugned proceedings dated 7-4-

2006 is issued by the Tax Recovery Officer of the Revenue Recovery Unit against the present petitioner. The substance of the impugned

proceedings is as follows :-

1. Please take notice that certificate u/s 142(1)(c)(ii) of the Customs Act, 1962 (Act 52/1962) was issued in F.No. S37/380/86 Gr.6 dated 26-

10-2004 by the Dept. of Customs (Gr.6) pursuant to order-in-original No. 2425/2004, Job No. 2624, dated 23-6-2044 passed by the Deputy

Commissioner (Gr.6) confirming customs duty demand of Rs. 43,07,526/-under Section 28(2) of Customs Act 1962 on M/s. Falcon Beverages

India (P) Ltd., No. 19 Ranganathan Road, Nungambakkam, Chennai, 34. It has been brought to the notice of the undersigned that the assets and

the liabilities of the said company were sold to M/s. Aradhana Bottling Co. No. 3 Madha Church Road, Mandavellipakkam, Madras. 28 vide

agreement dated 28-3-1994, which happens to be a subsidiary of M/s. Pepsico India Bottling Co., Madurai. It is also understood that the assets

and the liabilities of the said company were sold to M/s. Aradhana Bottling Co., No. 3 Madha Church Road, Mandavellipakkam, Madras 28 vide

agreement dated 28-3-1994, which happens to be a subsidiary of M/s. Pepsico India Holdings Pvt. Ltd., Madurai. It is also understood that the

assets of the said M/s. Aradhana Bottling Co., including the Double Code Plant of Carbonated soft drinks that were imported vide Bill of Entry

No. 2999/20-1-87, 3000/20-1-87, 3001/20-1-87 and 29147/1-6-88 against which import, the above said demand of Customs Duty of Rs.

43,07,526/- was confirmed were also taken over by M/s. Pepsico India Holdings Pvt. Ltd., due to the entry of Pepsico International, USA into

the Indian Market in the year 1994.

2. Therefore, an amount of Rs. 43,07,526/- with applicable interest is to be recovered from you as per the above said Order-in-Original.

3. The Asst. Commissioner of Customs (Gr.6) has sent the said certificate to the undersigned who has been authorized u/s 142(1)(c)(ii) of the

Customs Act, 1962 read with Rule 4 of the Customs (Attachment of Property of Defaulters for Recovery of Customs Dues) Rules, 1995,

specifying that an amount of Rs. 43,07,526/- (Rupees forty three lakh seven thousand five hundred and twenty six only) is to be recovered.

Therefore :-

(1) You are hereby required to pay the amount aforesaid within seven days from the date of service of this notice.

(2) A copy of the Challan in Form TR 6 is enclosed for the purpose.

(3) You are hereby informed that in case of default, steps would be taken to realize the amount in accordance with the provisions of the Customs

(Attachment of Property of Defaulters for Recovery of Customs Dues) Rules, 1995.

(4) In addition to the amount aforesaid, you will also be liable for:-

(a) Such interest as is payable in accordance with Section 28AA of the said Act, for the period commencing immediately and

(b) All cost, charges and expenses incurred in respect of the service of this notice and of warrants and other processes and of all other proceedings

taken for realizing the arrears.

6. The Tax Recovery Officer while referring to the certificate dated 26-10-2004 referred to earlier and the order-in-Original No. 2425/2004,

dated 23-6-2004 passed against M/s. Falcon Beverages India (P) Ltd., states that it has been brought to the notice of the Tax Recovery Officer

that the Assets and Liabilities of the Company were sold to M/s. Aradhana Bottling Company, a subsidiary company of M/s. PepsiCo India

Holding Private Ltd., Madurai. He also states that the goods covered by Bill of entry relating to payment was taken over by the present petitioner

viz., M/s. PepsiCo India Holding Private Ltd., Madurai. Therefore, in accordance with the authorisation issued by the Deputy Commissioner of

Customs Gr.VL by certificate dated 26-10-2004 invoking power u/s 142(1)(c)(ii), the said sum was sought to be recovered from the petitioner.

Challenging the same, the present writ petition has been filed.

7. The writ petition was admitted, the respondents have been noticed, a counter affidavit has been filed and the respondents have been called upon

to produce relevant records and the correspondence based on which, the facts as narrated above has been set out.

8. The contention of the counsel for the petitioner is as follows :-

(i) On the date of agreement of sale entered into between M/s. Falcon Beverages India (P) Ltd., and M/s. Aradhana Bottling Company i.e. on 1-

11-1994, there was no show cause notice issued by the Customs department demanding duty. There is no order demanding customs duty as due

and payable by the importer. Therefore, on the date of transfer of the Bottle Inspector Machine, the transferor or the goods did not suffer customs

duty liability and it could not have been passed on to M/s. Aradhana Bottling company or the petitioner.

(ii) Even as per the documents of the department, the importer viz., M/s. Falcon Beverages India (P) Ltd., has imported and started commercial

production and have a request for release of the bond and withdrawal of the bank guarantee and informed the Customs Department as early as

21-1-1988 followed by a letter dated 4-3-1992 seeking finalisation of the project contract. The respondents did not take any action thereafter.

Subsequently, the department has been sending notices and reminders to the importer but there is no effective service. The Order-in-Original No.

2425/2004 dated 23-6-2004 was also passed exparte. In any event, based on the order-in-original passed against the importer, the authorities

have to proceed by issuing the recovery certificate against the original importer only. The department can only proceed against the importer and

not the petitioner, The impugned notice against the petitioner without a certificate in terms of Section 142(1)(c)(ii) of the Act cannot be enforced as

it will be without jurisdiction and bad.

(iii) Assuming without admitting that the petitioner is a transferee of the Bottle Inspector Machine, and the respondents while trying to recover the

dues from the importer in terms of Section 142(1)(c)(ii) of the Act and the proviso thereunder, cannot invoke the said provision insofar as the

petitioner is concerned, as the proviso was amended by Section 72 of Finance Act No. 2 Act 23/2004 only on 10-9-2004. Therefore, the

amended proviso to Section 142 of the Act will be applicable prospectively and not retrospectively and in that event the liability if any cannot be

fastened on the petitioner on account of delay and laches.

9. In support of this preposition as above, the learned counsel for the petitioner relied upon the following decisions :-

(1) CCE Vs. Press Fab Precision Components Pvt. Ltd.,

(2) Valley Velvet P. Ltd. and Another Vs. Union of India (UOI) and Others,

(3) T.C. Spinners Pvt. Ltd. v. Union of India - 2009 (243) E.L.T. 31 (P & H).

10. Per contra, the learned counsel for the respondents/ Department contended that the original importer were intimated as early as on 26-12-

1986 to keep the Bank Guarantee alive till the finalisation of the project contract. Thereafter, from March 1992, they have been informing the

importer M/s. Falcon Beverages India (P) Ltd., to submit documents for finalisation of the project contract. Series of Correspondence viz., letters

dated 12-3-1992, 10-2-1993, 2-9-1993, 25-7-1994, 23-12-1994, 22-5-1996, 22-7-1996 and the show cause notice dated 1-6-2004 were

sought to be served on the importer viz., M/s. Falcon Beverages India (P) Ltd., but were returned undelivered. Therefore, the Order-in-Original

dated 26-3-2004 came to be passed confirming the demand of Rs. 43,07,526/- and consequently, the Department proceeded to recover the

amount in accordance with the provisions of Section 142 of the Act against the petitioner, who steps into the shoes of the importer.

11. According to the learned counsel for the respondents, obligation to pay duty is cast upon the importer as well as the subsequent purchaser of

the equipment.

12. According to the respondents, the proviso to Section 142 of the Customs Act provides for recovery of duty from the subsequent purchaser,

which is relevant for deciding this case, reads as follows :-

13. Section 142 of the Customs Act, 1962 reads as follows :-

Recovery of sums due to Government: (1) (Where any sum payable by any person) under this Act (including the amount required to be paid to the

credit of the Central Government u/s 28B) is not paid,

(a) the proper officer may deduct or may require any other officer of customs to deduct the amount so payable from any money owing to such

person which may be under the control of the proper officer or such other officer of customs; or

(b) the (Assistant Commissioner of Customs or Deputy Commissioner of Customs) may recover or may require any other officer of customs to

recover the amount so payable by detaining and selling any goods belonging to such person which are under the control of the (Assistant

Commissioner of Customs or Deputy Commissioner of Customs) or such other officer of customs; or

(c) if the amount cannot be recovered from such person in the manner provided in clause (a) or clause (b) -

(i) the (Assistant Commissioner of Customs or Deputy Commissioner of Customs) may prepare a certificate signed by him specifying the amount

due from such person and send it to the Collector of the District in which such person owns any property or resides or carries on his business and

the said Collector on receipt of such certificate shall proceed to recover from such person the amount specified thereunder as if it were an arrear of

land revenue; or

(ii) the proper officer may, on an authorisation by (commissioner of Customs) and in accordance with the rules made in this behalf, distrain any

movable or immovable property belonging to or under the control of such person, and detain the same until the amount payable is paid; and in

case, any part of the said amount payable or of the cost of the distress or keeping of the property, remains unpaid for a period of thirty days next

after any such distress, may cause the said property to be sold and with the proceeds of such sale, may satisfy the amount payable and the costs

including cost of sale remaining unpaid and shall render the surplus, if any, to such person.)

(Provided that where the person (hereafter referred to as predecessor), by whom any sum payable under this Act including the amount required to

be paid to the credit of the Central Government u/s 28B is not paid, transfer or otherwise disposes of his business or trade in whole or in part, or

effects any change in goods, materials, preparations, plants, machineries, vessels, utensils, implements and articles in the custody or possession of

the person so succeeding may also be attached and sold by the proper officer, after obtaining written approval from the Commissioner of

Customs, for the purposes of recovering the amount so payable by such predecessor at the time of such transfer or otherwise disposal or change.)

(2) Where the terms of any bond or other instrument executed under this Act or any rules or regulations made thereunder provide that any amount

due under such instrument may be recovered in the manner laid down in sub-section (1), the amount may, without prejudice to any other mode of

recovery, be recovered in accordance with the provisions of that sub-section.

The respondents therefore, justified the impugned proceedings.

14. The learned counsel for the respondents relied upon the decision of the Karnataka High Court in Karnataka State Industrial Investment and

Development Corporation Limited Vs. The Secretary Government of India and Others, wherein the provisions of Section 142 of the Customs Act

came to be considered and it held that the Department is entitled to recover all the dues of the importer from the subsequent purchaser in terms of

Section 142(1) of the Customs Act. He therefore pleaded for dismissing the writ petition.

15. In view of the above stated facts, the following issues arise for consideration.

(i) Whether the respondents are entitled to proceed against the petitioner u/s 142(1)(c)(ii) of the Act in the instant case?

(ii) Whether the certificate in terms of the order-in-original issued against the importer M/s. Falcon Beverages India (P) Ltd., can be used to

recover the amount from the present petitioner, who is the subsequent purchaser?

(iii) Whether the Department is barred from collecting the amount from the present petitioner only on account of delay and laches?

16. The admitted fact in this case is that the agreement of sale between M/s. Falcon Beverages India (P) Ltd., and M/s. Aradhana Bottling

company is dated 12-1-1994. On this date, the proviso to Section 142(1)(c)(ii) of the Customs Act was not in force. It came into effect only on

10-9-2004 i.e. 10 years after signing the agreement and the sale. Therefore, the applicability of the above provision has to be considered.

16(i). The petitioner is the subsequent purchaser of the goods imported, The assets and liabilities, that will have to be taken into account is relatable

to the date when the agreement was entered into and the sale was effected. As stated above, on the date when the agreement and the sale was

effected, the proviso to Section 142(1)(c)(ii) of the Act was not in the Statute. The proviso states that recovery from the person succeeding to the

goods, materials etc. by way of attachment will be based on a written approval of the Commissioner of Customs for the recovery of amount

payable by such predecessor at the time of such transfer or disposal or change. This liability has not arisen on the date of transfer (i.e.) on 12-2-

1994. Hence, the proviso will not be applicable at all.

Further on the date of transfer (i.e.) 12-1-1994 there was no demand by the Department claiming duty in respect of imports. The show cause

notice itself was issued only on 1-6-2004 i.e. after more than 10 years on the sale of goods. The Order-in-Original is passed much later.

Therefore, the purchaser in this case i.e. the petitioner was under no obligation to bear the duty liability as the goods, which was sold, did not suffer

any duty liability on the date of sale. The proviso to Section 142 after the amendment does not provide for recovery retrospectively. It will be

applicable in respect of the transaction on and after 10-9-2004 when the amendment was made to Section 142 of the Customs Act. Hence, the

first issue is answered against the respondents.

16(ii). The impugned proceedings on the face of it is bad as the certificate dated 26-10-2004 issued by the Deputy Commissioner of Customs u/s

142(1)(c)(ii) is against the importer viz., M/s. Falcon Beverages India (P) Ltd., and not against the present petitioner. Proviso to Section 142(1)(c)

(ii) of the Act provides for obtaining written approval from the Commissioner of Customs for the purpose of recovering the amount so payable by

the said purchaser at the time of transfer or otherwise disposal by change. In this case, there is no certificate issued by the Commissioner of

Customs, the competent authority under the Act for recovery of the amount as against the petitioner. Therefore, the impugned proceedings

contrary to the certificate issued by the Deputy Commissioner of Customs is bad and without authority of law. In the absence of specific order by

the Commissioner of Customs as prescribed under the Act, the Tax Recovery officer has no authority to issue the impugned proceedings against

the petitioner. Hence, the second issue is also answered against the respondents.

16(iii). The factual details submitted by the Customs Department clearly shows that the original importer viz., M/s. Falcon Beverages India (P)

Ltd., has informed the Department as early as on 30-11-1987 that they have erected machineries. On 21-1-1988 they informed that they have

commenced commercial production on 7-1-1988 and requested for release of bond and withdrawal of the Bank guarantee. The importer sought

for finalisation of project contract on 4-3-1992. The Department, slept over the issues for more than twelve long years. Except sending series of

letters, which were not served on the importer, no effective steps appears to have been taken to serve on the importer and adjudicate the case.

The laches on the part of the concerned authority stares on the face of the records. Admittedly, the department letters were returned as

undelivered as is evident from the Order-in-Original passed by the competent authority. It is, therefore, clear that the concerned officer of the

respondents has wasted his time sending notices time and again without proper service and slept over the issue for more than a decade. Armed

with the exparte order-in-original passed by the competent authority, the recovery proceedings have been initiated against the petitioner. In this

case, having failed to recover the amount from the importer, as rightly pointed out by the Division Bench of Gujarat High Court in *Ani Elastic*

Industries Vs. Union of India (UOI) and Others, the Department seems to have woken up from the slumber and proceeded to recover the duty

from the subsequent purchaser on the specious plea that the proviso to Section 142 of the Customs Act gives them the power to recover the

amount from the subsequent purchaser. The delay and laches remain unexplained. The claim for duty against the petitioner is not justified as the

inordinate delay and laches on the part of the department further disentitles them to take action against the petitioner.

The decision of Apex Court in *Macson Marbles Pvt. Ltd. Vs. Union of India (UOI)*, relied upon by respondents will not apply to the facts of the

present case for the reason that the effect of amendment to Section 142(1)(c)(ii) of the Act or similar such provision is not the case before the

Apex Court. Further, in the said decision the issue that was considered was the power of the Central Excise Department to recover certain amount

from the subsequent purchaser, which power cannot be disputed so long as the department satisfies the legal requirements. In this case, I have

clearly held that proviso to Section 14(1)(c)(ii) will not apply and therefore, the above stated decision is of no avail. Hence, the third issue is also

answered against the respondents.

17. For all the above reasons, this Court has no hesitation to set aside the impugned proceedings. Accordingly, the same is set aside. This writ

petition is allowed. There will be no order as to costs.