

## East Jamuria Co. (P) Ltd. Vs Collector of Customs and Another

**Court:** Calcutta High Court

**Date of Decision:** Sept. 27, 1977

**Acts Referred:** Constitution of India, 1950 " Article 226(1), 226(1)  
Customs Act, 1962 " Section 11, 112, 130, 130(1), 152  
Evidence Act, 1872 " Section 101, 102, 106  
Imports and Exports (Control) Act, 1947 " Section 1, 3, 3(1), 3(2), 4A

**Citation:** 82 CWN 156

**Hon'ble Judges:** Mitra, C.J; S.K. Dutta, J

**Bench:** Division Bench

**Advocate:** Somnath Chatterjee, Subas Chandra Sen and Tapan Mitra, for the Appellant; G.P. Kar, Asoke Kumar Banerjee and N. Lahiri, for the Respondent

**Final Decision:** Dismissed

### Judgement

Salil Kumar Dutta, J.

This is an appeal against the judgment and order of Sabyasachi Mukharji, J. dated September 1, 1977 dismissing the application filed by the appellant under Article 226 (1) of the Constitution on contest. The appellant carries on business or execution of contracts

involving construction and site preparation including earth moving operations. For the purpose, of his business, the appellant, according to his case

requires various type of machinery and equipment including inter alia drills, pumps, bulldozers, tractors, trucks, jeeps and other vehicles. The

appellant has a branch office at Nanpara in United Provinces.

2. The appellant was granted an import licence on August 31, 1964 to import construction equipment as per two lists. The first list comprised of

(1) Crawler Tractor with bulgrader and necessary accessories and spare parts. (11) Ball bearings for motor other than banned/restricted items.

The second list consisted of Pionjer petrol driving rock drills and pavement breaker etc., the total c. i. f. value in all allowed to be imported was

Rs. 2 lacs.

3. The appellant imported Crawler tractor which was duly cleared for home consumption through licence. Thereafter the appellant imported ball

bearings, pistons and piston rings as par particular below :

PARTICULARS.

Name of Ship. Goods. Quantity. Dt. of arrival.

1. S. S. Maidan Ball Bearings. 6 cases.
2. S. S. Magdala -do- 12 cases. Already cleared.
3. S. S. Mansar -do- 4 cases.
4. S. S. Indian Strength -do- 3 cases.
5. S. S. Jalazad -do- 8 cases. Already cleared.
6. S. S. Indian Strength -do- 6 cases. March, 1966.
7. S. S. Maskeliya Piston & Piston 8 cases. August, 1965

rings.

8. S. S. Mangala -do- 1 case. February, 1965
9. S. S. Vishvaprabha -do- 2 cases. February, 1966

4. The goods under serials 1 to 5 were duly entered for home consumption and the proper customs officer, on being satisfied that the import in

respect thereof was permitted under the said import licence, permitted clearance of the goods for home consumption on payment of the import

duty. The orders at Nanpara and various article include dates of 20th, 23rd and 25th November 1965. The goods of serials 6 to 9 were yet to be

cleared for which show cause notices referred hereafter were issued.

5. On or about 30th and 31st July, 1966 a search was conducted by the authorities at the appellant's premises at Nanpara and various articles

including more than 8000 ball bearings of various specifications were seized. Thereafter the appellant was served with four show cause notices by

the Collector of Customs, Calcutta in respect of above imports alleging that the pistons, piston rings and ball bearings had been imported in

contravention of the provisions of Section 3(1) and 3(2) of the Imports and Exports (Control) Act, 1947 (hereinafter referred to as I & E (C) Act)

read with Government of India, Ministry of Commerce and Industry Order 17/55. The appellant was required to produce valid import licence for

such goods or alternatively to show cause why the said goods (including ball bearings already cleared for home consumption) should not be

confiscated and why penal action should not be taken against the appellant. Two earlier show cause notices were partially modified by addendum

dated January 25, 1967 calling upon the appellant to show cause why the order releasing the ball bearings by the Customs Officer should not be

reviewed by the Collector of Customs u/s 130 of the Customs Act, 1962 and why penal action should not be taken u/s 112. The appellant

showed cause to the same followed by prolonged correspondence and the proceedings under all those notices came up for hearing before the

Collector of Customs, Mr. M. G. Abrol on September 1, 1967. One N. I. Ramanathan, stated to the Principal Appraiser of the Government with

considerable experience was present at the hearing. It is alleged that in course of proceeding Ramanathan made statements of fact recorded as

expert evidence interspersed with his arguments. The appellant's counsel was asked to cross-examine him at once on his statement of facts which

was done under protest and compulsion but no portion of his statement in the cross-examination was recorded. All these were done in gross

violation of the principles of natural justice. On the Collector's insistence again, the appellant was compelled to adduce his own evidence though

the burden of proof was on the Customs authority in the quasi-criminal proceedings before him.

6. There was further hearing on September 29, 1967 when the appellant's witness his engineer C. M. Agarwal, who gave evidence, disclosed that

ball bearings had been ordered upon on basis of lists prepared by the appellant. On requisition, it was said that the original list was untraced and its

solicitor forwarded a statement containing a reconstructed list. Thereafter the Collector passed the following four orders in respect of the said

notices, one order each for serials 1, 2 and 6, and the fourth order in respect of serials 3, 4, 5 together, confiscating the goods with option to pay

compensation in lieu of confiscation as also personal penalty indicated in the statement set out below :--

Notice. Goods. C.I.F. Order No. Penalty in Personal

Value lieu Penalty.

confiscation.

1. S 45/248/66A 4797 Pcs. 45555.334 dt. 9.10 Rs. 46000/- 46000/-

with addendum for Ball 67, in

review. bearings. revision

2. S 45/249/66A 3247 Pcs. 10688.575 dt. 9.10 20000/- 20000/-

with addendum for Ball 67, in

review. bearings, revision

3. S 45/302/66A 750 Pcs. 26249.67153 dt. 26000/- 26000/-

Piston rings 24.10.76

60 sets. 67, in

revision

4. S 45/304/66A 156 set 14820.00-do- 7500/- 7500/-

Piston

rings.

145 set 13775.00-do- 7000/- 7000!-

Piston

5. S 45/305/66A rings.

6. S 45/303/66A FAG 11032.91154 dt. 11000/- 11000/-

bearings 24.10.67.

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7. The appellant failed and neglected to pay the amount of personal penalty, and notices were issued by the Customs Authorities on the appellant

in January/February 1968 informing that the goods in their control would be sold without prejudice to other modes of recovery of the dues. On

receipt of this notice, the appellant, on service of demand of notice, moved this Court on April 23, 1968 under Article 226(1) of the Constitution

praying for the issue of a writ in the nature of certiorari quashing the aforesaid show cause notices as also the orders thereon, praying further for the

issue of a writ in the nature of prohibition and/or mandamus forbearing them from proceeding with the demands. This application giving rise to

Matter No. 281 of 1968 was heard as a contested application on affidavits and was dismissed on September 1, 1972. The appeal is against this

decision.

8. Before we proceed to consider the respective contentions of the parties, it will be necessary to consider the factual position in the context of the

existing law. The Import Trade Control was first introduced in May 1940 as a war-time measure under Rule 84 of the Defence of India Rules

primarily for conserving India's foreign exchange resources. The control was originally limited to certain commodities but was expanded to ensure

economic stability of the country. With the cessation of hostilities the Defence of India Rules lapsed in September 1946 but the import and export

control was kept alive by Emergency Provisions (Continuance) Ordinance, 1946 for a period of one year and was replaced by the Imports and

Exports (Control) Act, 1947 to continue for a limited period with powers to prohibit, restrict and otherwise control imports and exports. By

statutes enacted from time to time the life of the Act was extended lastly to March 31, 1971. By an amendment Act (Act 7 of 1971), the words in

respect of the Act ""to continue for a limited period powers"" in the long title and preamble as also the words ""and shall remain in force until the 31st

day of March, 1947"" in Section 1 of the principal Act were omitted. So that the Act is now a permanent statute of the country.

9. Section 3 Sub-section (1) provides that Government may by order make provision for prohibiting, restricting or otherwise controlling import,

export or carriage of goods of any specified description. Sub-section (2) of Section 3 provides :--

(2) All goods to which any order under Sub-section (1) applies shall be deemed to be goods of which the import or export has been prohibited

u/s 11 of the Customs Act, 1962 and all the provisions of that Act shall have effect accordingly.

10. The Central Government by Order No. 17/55 in exercise of the powers conferred by sections 3 and 4A (which provides for fees for

applications for, and issue or renewal of, licences) provided under Rule 3 prohibiting import of any goods of the description specified in Schedule 1

except under and in accordance with licence granted by the General Government. Items 19 and 293, 295 and 297 of part II of, the schedule of the

said order as amended respectively cover the ball bearings, pistons and pistons rings which thus cannot be imported without import licence granted

under the aforesaid order. There is in fact no dispute over this position. It is also obvious that if any goods are imported in violation of the

provisions of Section 3 of Imports and Exports (Control) Act, 1947, they would be deemed to be imported in violation of Section 11 of the

Customs Act, 1962 and all the provisions of the Customs Act would be applicable as held by us in Collector of Customs and Central Excise,

West Bengal and Others Vs. Hindustan Motors Ltd. and Another, .

11. Mr. Suhas C. Sen, learned counsel for the appellant, firstly contended that the burden of proof to establish violation of the provisions of I & E

(C) Act lies on the customs authority which must be discharged by positive evidence. Such burden cannot be deemed to be discharged on the

ground of inadequate explanation by the alleged delinquent. In support he relied on the decision in Ambalal vs. Union of India AIR 1961 S.C. 264

in which the Court observed that the provisions of the Sea Customs Act and the Land Customs Act are penal in character and accordingly :--

To such a situation, though the provisions of the Code of Criminal Procedure or the Evidence Act may not apply except in so far as they are

statutorily made applicable, the fundamental principles of criminal jurisprudence and natural justice must necessarily apply. If so, the burden of

proof is on the custom authorities and they have to bring home the guilt to the person alleged to have committed a particular offence under the said

Acts by adducing satisfactory evidence.

It was further held in that case that where the accused contended that the goods were imported from Pakistan before the customs barrier was

established the onus is on the customs authorities to prove that they were imported after the barrier was put up.

The Privy Council in AIR 1949 278 (Privy Council) observed.

What is called the burden of proof on the pleadings should not be confused with the burden of adducing evidence which is described as ""Shifting"".

The burden of proof on the pleadings never shifts, it always remains constant (See *Pickup vs. Thomas Insurance Co.* (1878) 3 Q.B.D. 594....)

Referring to sections 101 and 102 of the Evidence Act, it was further observed:--

This section shows that the initial burden of proving a prima facie case in his favour is cast on the plaintiff; when he gives such evidence as will

support a prima facie case, the onus shifts on the defendant to adduce rebutting evidence to meet the case made out by the plaintiff. As the case

continues to develop, the onus may shift back again to the plaintiff. It is not easy to decide at what particular stage in the course of the evidence the

onus shifts from one side to the other. When after the entire evidence is adduced, the tribunal feels it cannot make up its mind as to which of the

versions is true, it will hold that the party on whom the burden lies has not discharged the burden; but if it has on the evidence no difficulty in

arriving at a definite conclusion then the burden of proof on the pleading recedes on the background.

12. Mr. G. P. Kar and later on Mr. Asoke K. Banerjee, learned counsel appearing for the respondents, the customs authorities, contended that

the burden of proof was duly discharged by the Customs authorities. The importation of the seized goods as also goods uncleared were prima

facie cases of illegal importation, when such commodities could not be imported without a valid import licence covering the said goods. In this state

of affairs, it was incumbent on the appellant to establish that the import of commodities made by them were covered by a valid licence. Reliance

was placed on the decision in *Collector of Customs, Madras and Others Vs. D. Bhoormall*, in which the Court following other decisions laid down

the law relating the burden of proof and onus on the parties in respect of alleged illegal importation, while at the same time referring that *Ambalal's*

case stands on its own facts. The Court observed :--

It cannot be disputed that in proceedings for imposing penalties under clause (8) of section 167 (of the Sea Customs Act, 1878 for confiscation of

goods) .....the burden of proving that the goods are smuggled goods is on the Department. This is a fundamental rule relating to proof in all

criminal and quasi-criminal proceedings, where there is no statutory provision to the contrary.

The Court then referred to the other kindred principle, no less fundamental, of universal application observing that:

One of them is that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable degree.

.....All that it requires is that establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the

fact in issue. Thus legal proof is not necessarily perfect proof. Often it is nothing more than prudent man's estimate as to the probabilities of the

case.

.....Smuggling is clandestine conveying of goods to avoid legal duties, Secrecy and stealth being its covering guard"s. It is impossible for the

Preventive Department to unravel every link of the process. Many facts relating to this illicit business remain in the special or peculiar knowledge of

the person concerned in it. On the principle underlying section 106, Evidence Act, the burden to establish those facts is cast on the person

concerned, and if he fails to establish or explain those facts, an adverse inference of facts may arise against him, which coupled with presumptive

evidence adduced by the prosecution or the Department would rebut the initial presumption of innocence in favour of that person and in the result

prove him guilty.....However this does not mean that the special or peculiar knowledge of the person proceeded against will relieve the

prosecution or the Department altogether of the burden of producing some evidence, in respect of that fact in issue. It will only alleviate that burden

to discharge which very slight evidence may suffice.

13. In this case before us there were importations of ball bearings for motor vehicles (notices S 45/248 and 249) and pistons complete and piston

rings for motor vehicles (notices S 45/302, 304 and 305) and also ball bearings for motor vehicles and industrial ball bearings (notice S 45/303).

In the show cause notices, in respect of ball bearings, it was stated that the import licence granted to the appellant was valid for ball bearings

neither banned nor restricted, adapted for use on motors while the ball bearings imported according to manufacturer"s catalogues were adapted

for mounting in motor vehicles or were industrial bearings. As to piston and pistons rings specific licence for import of subject goods under Sl. No.

293, 295 and 297 of Part IV of I. T. C. schedule was necessary. Accordingly the show cause notices indicated that the importations which were

of the type indicated above were not covered by the licence granted to the appellant and the appellant was asked to produce import licences

covering the said commodities.

14. On the principles laid down in the authorities cited above, it is obvious that the burden of proof supporting a Prima facie case on the face of

such admitted importations being without licence was duly discharged by the Customs authority. In fact the appellant was fully aware of the

position disclosed in the show cause notices and their contention was that they were fully covered by the import licence, but, as the records

indicate, the matters being within his special knowledge, he failed to establish that the Importations were covered by the import licence and thus to

discharge their onus which shifted on him in spite of ample opportunity afforded for the purpose. We accordingly hold that the initial burden of

proof; for the prima facie case against the appellant was duly discharged by the Customs authorities.

15. Mr. Sen next submitted that the show cause notices and the impugned orders were at variance, inasmuch as the offences alleged in the show

cause notice had not been sustained in the orders passed which thus vitiated the entire proceeding. The show cause notices called upon to the

appellant to produce satisfactory evidence to prove that the ball bearings in question were adapted for use on motor as provided in the licence or

to produce valid import licence for the importations. In respect of piston and piston rings for motor vehicles as imported, the show cause notice

stated that the importations were not covered by the import licence and accordingly the appellants were asked to produce valid import licence for

import of the subject goods.

16. In respect of the ball bearings; the relevant orders are order Nos. 4 and 5 both dated October 9, 1967 as also order No. 154 dated October

24, 1967. The two earlier orders were passed in revision of the order of the officer of customs clearing the goods, by the Collector u/s 130 of the

Customs Act, 1962. It was contended that as the officer of customs cleared the subject consignment by a mark, there was no scope to examine

the record of any proceeding for revision by the Collector as a delegated authority for the Board in terms of order of the Central Government u/s

152 (over which there is no dispute) while exercising functions u/s 130 (1). It may be that there was no other record except the respective bills of

entry on which, it is said, the mark of clearance was put. The bill of entry and mark of clearance thereon constituted in such cases the record of

proceeding before the officer of customs.

17. In respect of the impugned order passed on evidence adduced in personal hearing, it appears that the Collector came to the finding that the

appellants failed to establish that the ball bearings imported in the subject consignments were adapted for use in motors used in the construction

equipments by the importers. It was observed that the appellant's contention that the licence covered all types of ball bearings including those for

motor vehicles was not acceptable as the word "motor", it was held, meant electric motor and not a motor vehicle. The question of provision for,

spare parts and accessories did not arise, even in the context of huge and disproportionate imports, as the appellant failed to prove that the ball

bearings imported were for use on motors in the crawler tractor or in the machines used by them.

18. The Collector called upon the appellant to produce satisfactory evidence to prove the ball bearings in question were adapted for use on motor

in their machines. It was said that a list of such bearings was prepared by the appellant's engineers at the time of placing the order for import and



the appellant was directed to produce such list. After completion of hearing a list was furnished by the appellant's solicitor. The Collector found

that the list was incomplete in many respects, no catalogue or particulars there of was produced as would show that the ball bearings imported in

the subject consignments were adapted for use on motors used in the construction equipments by the importers. Since the appellant's case was not

proved nor it was the appellant's case that there were valid licences for such importations, the impugned orders of confiscation and personal

penalty were passed. We accordingly do not find any variance between the allegations of offences in the show cause notices and in the orders

passed in the said proceedings on the case made out by the appellant.

19. As to piston and piston rings, the Collector noted that the licence permitted the appellant to import necessary accessories and spare parts for

the Crawler tractor imported by them. The appellant in spite of opportunities given failed to produce any evidence, which was within their special

knowledge, that the pistons and piston rings were for the tractor imported by them. The Collector found that the tractor is powered by a Caterpillar

engine having the bore size 4.5 whereas the parking engine of which the imported pistons and rings were components had a bore of 3.5. The

Collector accordingly came to the conclusion that the imported pistons and piston rings in the three consignments were obviously unsuitable to be

used as accessories of the tractor in question apart from the fact that the manufacturers of the tractors themselves did not use parking engine. In

this case also we do not find any variation between the allegations in the notice and the impugned orders passed by the Collector.

20. Mr. Sen further contended that the licence was for import of ball bearings for motor which included ball bearings for use in the machines the

appellant had. This contention rightly rejected by the Collector as also by the learned Judge as the licence was an actual user's licence for ball

bearings for motor of a submersible pump forming auxiliary unit of Crawler tractor even though it was not clearly mentioned. The licence was for

ball bearings on motors for the machines and did not cover ball bearings used in other parts of the machines or motor vehicles. No evidence as

already indicated, was adduced to establish that the ball bearings were meant for use on the motors of the machines. We accordingly do not find

any substance in this contention raised on behalf of the appellant.

21. The last contention raised on behalf of the appellant relates to the observance of the principles of natural justice in the proceedings before the

Collector of Customs. Mr. Chatterjee submitted that the administrative authorities deciding cases involving rights of parties and penal

consequences are enjoined by accepted norms of fundamental justice and fair play to follow the principles of natural justice. It has been said that

the authorities under the Customs Act conduct themselves in most arbitrary and high handed manner, ignoring the basic principles of natural justice

to the grave prejudice of parties. The evidence given by witnesses in examination and cross-examination in such proceeding is not always recorded

or if recorded, it is not done correctly, entirely depending on the discretion or caprice of such authorities. In this case also, evidence of witnesses

had not been recorded at all and had only been stated in the impugned orders when dealing with any particular point. There is no recording of

cross-examination of Ramanathan, the witness on behalf of the Customs, which would otherwise establish the invalidity of the charges against the

appellant, while his ipse dixit was accepted as evidence. Mr. Chatterjee desired the court to condemn such practice and to direct the authorities to

act in proceedings before them in accordance with the fundamental concepts of justice and fairplay. It was further submitted that in the instant case,

there has been gross violation of the principles of natural justice, as the Collector relied on evidence given by Ramanathan without recording his

evidence in particular the cross-examination.

22. Administrative Tribunals or officers of statutory powers are features of present day administration and they have to decide rights of parties

within spheres limited by law. The determination of such rights involves at times penal consequence in addition and such cases accordingly should

be heard and decided in judicial spirit in accordance with the fundamental concepts of justice. In such proceeding though the Evidence Act is not

applicable by its own force except as otherwise provided the principles as to burden of proof and onus as also of the procedure for examination of

witnesses, though not always on oath, are inevitably followed as the basis for judicial determination. Such procedure ensures observance of the

principles of natural justice though they are not inflexible rules of universal application. It may not always be necessary to record evidence in the

context of particular issues before the Tribunal or authority, but when serious question of rights of parties are involved and the determination may

involve penal consequences like confiscation of goods and personal penalty, it is necessary that the Tribunal or authority in such cases discharge its

functions in proper judicial manner and spirit. In such proceedings where decision is dependent on existence of facts to be established by evidence

and the order passed is subject to further scrutiny departmentally, and also by the Court on proper grounds, it is only fit and proper that the

Tribunal or authority should record the evidence produced through witnesses by parties in examination as also in cross-examination. This will

ensure substantial justice while affording the basis for the decisions of the Tribunal or the authority through speaking orders which are subject to

further scrutiny. No evidence has been recorded in this case but in the circumstances of the case, that has not caused any miscarriage of justice in

violation of the principles of natural justice. The question before us was one of scope and extent of the licence for importation and the other

question was whether the importations were covered by the licence. The scope and extent of the licence was determined on its terms by the

Collector as not covering the importations with which the learned Judge as also this Court is in agreement. The other question was whether the

appellant had been able to establish by evidence that the subjects of importations were covered by any other licence which even was not the

appellant's case and accordingly he did not adduce any relevant evidence to support such case, as a result where of orders adverse to him were

passed which have been challenged in this proceeding. In the facts and circumstances of the case, we feel that there has been no violation of the

principles of natural justice.

As all contentions raised by the appellant fail, this appeal is dismissed, without any order for costs in the circumstances.

Sankar Prasad Mitra, Chief Justice

I agree.