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**(1988) 06 CAL CK 0008**

**Calcutta High Court**

**Case No:** Matter No. Nil of 1988

Rishi Exports

APPELLANT

Vs

Collector of Customs

RESPONDENT

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**Date of Decision:** June 24, 1988

**Acts Referred:**

- Customs Act, 1962 - Section 11, 111, 112, 118, 125
- Imports and Exports (Control) Act, 1947 - Section 3

**Citation:** (1988) 17 ECC 310 : (1988) 37 ELT 7

**Hon'ble Judges:** Ajit Kumar Sengupta, J

**Bench:** Single Bench

**Advocate:** ;Lala, for the Respondent

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**Judgement**

Ajit Kumar Sengupta, J.

In this application the petitioners have challenged the decision of the Customs Authority to withhold the delivery and clearance of P.V.C. Leather Lining covered by Bill of Lading No. CU-21 dated 13th December, 1986.

2. The facts of the case leading to this writ application are stated hereinafter:

3. The petitioners carry on business of manufacture of leather goods at their factory in Calcutta. The factory of the petitioner is permanently registered as a Small Scale Industry with the Directorate of Cottage and Small Scale Industries, Government of India. The petitioners export leather bags, inter alia, to the European Economic Community. The first petitioner was granted permission for export of leather goods in the European Economic Community during the year 1983-84. The first petitioner was also granted Export House Certificate by the Government of India under the provisions of Export Policy for 1982-83. For the purpose of carrying on the business of manufacture and export of leather bags, inter alia, the first petitioner imports various types of lining cloth such as Rock Cotton Lining and P.V.C. Leather lining.

4. In accordance with the Import and Export Policy framed by the Government of India the petitioners made application for grant of advance licence with the benefit of. custom duty exemption for import of diverse items including the aforesaid Rock Cotton Lining and P.V.C. Leather lining. Pursuant to the application filed by the first petitioner the concerned authority issued an Advance General Licence to the first petitioner being No. P/L/3021306/XX/95/C/85 dated 19th June, 1985, inter alia, permitting to import 38180 metres of P.V.C. Lining and 38180 metres of Flock Cotton Lining.

5. For the purpose of importing, inter alia, P.V.C. Leather Lining and Flock Cotton Lining under the said Advance Licence, the petitioners on or about 6th November, 1986 obtained a proforma invoice from Messrs HSIN - L.I. Chemical Industrial Corporation, Taipei, Taiwan. From the said proforma invoice it appeared that the said foreign supplier was in a position to supply 20000 metres of Flock Cotton Lining and 22500 metres of P.V.C. Leather Lining valued at U.S.\$ 63750 inter alia, against 100% acceptable Letter of Credit within 15th December, 1986. In or about November, 1986 the petitioners opened an irrevocable Letter of Credit for U.S.\$ 63750 for import of the aforesaid Flock Cotton Lining and P.V.C. Leather Lining.

6. The foreign supplier consigned the aforesaid 20000 metres of Rock Cotton Lining and 22500 metres of P.V.C. Leather Lining per SS Vessel Benokov and forwarded the concerned packing list and the commercial invoice to the petitioner. The said foreign supplier duly certified that the goods were as per order dated 6th November, 1986. The said documents were negotiated by the petitioners' banker by making payment under the Letter of Credit as aforesaid.

7. In or about the first week of February 1986 the said goods arrived at the port of Calcutta and the petitioners thereafter submitted the Bill of Entry along with the aforesaid licence the duty exemption entitlement certificate and the invoice for clearance of the said goods without payment of any duty. The concerned Customs Authorities, however, refused to allow clearance of the said goods without drawing samples thereof from chemical test. In that view of the matter the petitioners' clearing agents requested the concerned Customs Authorities to draw sample for chemical test. The concerned respondents, however, refused to allow clearance of the goods and as such the said goods were kept in the Bonded Warehouse in accordance with Section 49 of the Customs Act, 1962.

8. In or about the last week of March 1987 the petitioners' representative was given to understand from the concerned Group Appraiser that the Rock Cotton Lining imported by the petitioners had been found to contain polyester and Viscose contents. However, no copy of the test report was furnished and/or supplied to the petitioners The petitioners' representatives was further informed that a show cause notice was likely to be issued by the concerned Customs Authorities calling upon the petitioners to show cause why the goods should not be confiscated.

9. In the aforesaid facts and circumstances, by a letter dated 27th March, 1987 the petitioner requested the concerned Assistant Collector of Customs not to issue any show cause notice and to allow a personal hearing before passing any order. The concerned Assistant Collector of Customs was further informed that no test was conducted prior to the placement of the order and in any event, the said Flock Cotton Lining was to be consumed for the purpose of manufacturing bags which were to be exported in accordance with the conditions of licence. On 9th April, 1987 the Collector of Customs gave a personal hearing in connection with the release of the aforesaid goods.

10. Inasmuch as no order had been passed by the concerned Customs Officer until 19th May, 1987 the petitioners by its letter dated 19th May, 1987 requested the concerned Collector to intimate the order in as much as the petitioners had to fulfil their obligations in respect of the said licence. By the said letter the petitioners also requested the concerned Customs Officer to release the Duty Exemption Entitlement Certificate Book and the original licence which had been seized by them.

11. On or about 28th May, 1987 the petitioners received an order bearing No. S 60/DL (Sec 49.)/24/87A dated 1st May, 1987 whereby the concerned Collector inter alia, held that the importation of polyster lining and viscose Flock worth Rs. 3,95,517.47 c.i.f. without a proper licence is prohibited u/s 11 of the Customs Act read with Section 3 of the Import and Export Control Act 1947 as amended and Government of Inc Ministry of Commerce and Industries 17/55 dated 7th December, 1955 and according confiscated the goods u/s 111(d) and 111(n) of the Customs Act, 1962. In I of confiscation, the petitioners were given the option u/s 125 of the Customs Act to dear the goods on payment of fine of Rs. 3,00,000/- within one month from the d thereof and on payment of duty leviable. The concerned Collector of Customs a imposed a personal penalty of Rs. 5.000/- u/s 112 of the Customs Act, 1962.

12. Inasmuch as the concerned Collector of Customs had only confiscated Re Cotton Lining, by a letter dated 15th June, 1987 the petitioners requested the concern Collector to release 22500 metres P.V.C. Leather Lining inasmuch as there had been allegation of violation of any conditions in respect thereof.

13. Although under the order dated 1st May, 1987 the petitioner had been grant three months" time to file an appeal from the date of communication, by letters dated 3C June, 1987 and 23rd July, 1987 addressed by the Controller of Imports and Exports the petitioners, the petitioners were called upon to intimate whether payment of the fine at penalty had been made in terms of the said order. The aforesaid letters were replied to I the petitioners vide their letter dated 25th July, 1987.

14. By a letter dated 3rd July, 1987 addressed by the petitioners to the concern Collector the petitioners once again requested for clearance of the P.V.C. Leather

Lining as a part delivery of Break Bulk System. On or about 21st July, 1987 the Deputy Collect<sup>r</sup> of Customs informed the petitioners that clearance of part consignment was not possible since both the items were declared in the same Bill of Entry. The petitioners were requests to clear the offending goods on payment of duty, fine and penalty.

15. In order to prefer an appeal against the said order dated 1st May, 1987 on (sic) about 28th August, 1987 the petitioners deposited a sum of Rs. 5.000/- with the Assistant Collector and thereafter filed an appeal before the Customs, Excise and Gold (Control Appellate Tribunal on 28th August, 1987.

16. By a letter dated 9th September, 1987 addressed by the petitioners to the concerned Collector, the petitioners called upon the concerned Customs authorities to release the said P.V.C. Leather Lining, in respect whereof there has been no complaint of any nature whatsoever.

17. On 24th September, 1987 the petitioners' representatives held a person, meeting with Deputy Collector (DEEC) and impressed upon him the urgency of release of the said goods. The said Deputy Collector requested the petitioner to furnish copies of all the relevant papers and documents for consideration. Pursuant to the said request under cover of a letter dated 25th September, 1987 the petitioners furnished copies of relevant papers and requested him to direct immediate release of the P. V. C. Leather Lining in respect of which there was no complaint by the Customs authorities.

18. On or about 2nd November, 1987 in accordance with the directions of the Customs authorities the petitioners filed a Bill of Entry for release of the P.V.C. Leather lining after proper assessment. The said Bill of Entry however was not assessed and no clearance of the goods permitted by the concerned Customs authorities.

19. By a letter dated 4th December, 1987 the petitioners placed the aforesaid facts on record and requested the concerned Collector of Customs to personally intervene in the matter and pass appropriate order allowing clearance of P.V.C. Leather Lining.

20. By a letter dated 21st December, 1987 the concerned Customs authorities called upon the petitioners to clear the entire consignment on payment of fine and duty thereon, inter alia, on the ground that the entire goods were covered by the said order dated 1st May, 1987.

21. This order dated 21st December, 1987 is under challenge in this application) On 8th March, 1988 this application was moved. Direction was given to file Affidavit-in-opposition by 19th March, 1988 and affidavit in reply by 26th March, 1988. The (sic) matter was adjourned to 28th March, 1988.

22. The Customs authorities did not file any affidavit by 19th March, 1988. The matter appeared on 31st March, 1988, when the affidavit-in-opposition was affirmed and handed over to this Court. This was objected to by the petitioner.

23. The contentions which have been raised In the affidavit in opposition are as follows:-

"It is difficult If not impossible to release part consignment because the said consignment If allowed to be cleared should be allowed without payment of any duty and It Is very difficult to segregate one item from the other because of having the similar packing numbers. It Is almost impossible to give break bulk open delivery, i.e. opening of all the cartons of packages to see whether the goods are polyster lining or PVC Leather Lining. In that event also If the writ petitioners fall and neglect to take delivery of the offending item ultimately, the revenue will suffer.

It is also not desirable to release the goods In part consignment because If the writ petitioner ultimately fail in the appeal they may not take delivery of the confiscated goods and thereby the duty, fine levied thereon cannot be collected and the price of the goods will not be equal of the amount of the fine, penalty and duty of the goods.

According to the Section 118 of the Customs Act, 1962 where any goods imported In any package are liable to be confiscated, the package and any other goods imported In that package Is also be liable to confiscation. In view of the said provisions the entire consignments Is liable for confiscation even If the part of the consignments are prohibited and the other part Is allowable to be imported, the confiscation as envisaged u/s 118 is also fully operative in this case and by operation of law the entire goods are liable to confiscation and as such confiscated."

24. On the other hand the contention of the writ petitioners is that the order of confiscation was confined to Rock Cotton Lining and the petitioners were given option to dear Flock Cotton Lining upon payment of fine and duty nave any jurisdiction to retain that part of the goods which had not been confiscated.

25. I have considered the rival contentions.

26. In the Adjudication order dated 1st May. 1987 the Collector of Customs, inter alia, held as follows:

"Test Result indicates that the goods under description of "Rock Cotton Lining" to actually Woven Fabrics of polyester staple fibre one side of which is coated with viscose flocks. Therefore the goods declared as Flock Cotton Lining are actually polyester lining with Viscose Flock. The other Item i.e. P.V.C. Leather Lining was confirmed by foe test report.

The licence and DEEC are very specific which permits flock cotton lining. The goods Imported i.e. polyester lining with viscose flock is not covered by the said licence and DEEC. Moreover, such item is not also covered by open General Licence of

Import Trade Control Order. Therefore, such import is "Illegal import" without a valid licence."

"I have carefully gone through the case records and the submission of Shri Gulati and the documents submitted by him. The contract shows the goods are flock cotton lining, but the goods are polyester lining with viscose flock on one side. The Importer has also the knowledge that the goods were not flock cotton lining, but polyester lining with viscose flock in one side.

#### ORDER

The Importation of the polyester lining with viscose flock worth Rs. 3,95,517.47 OF without proper licence is prohibited u/s 11 of the CA read with Section 3 of the Imports & Exports (Control) Act, 1947 (as amended) and Govt. of India, Ministry of Commerce and Industry's Order No. 17/55 dt. 7.12.55.1 accordingly confiscate the goods u/s 111(d) and 111(m) of the GA" 62. In lieu of confiscation the importers are, however, given the option u/s 125 ibid to clear the goods on payment of fine of Rs. 3,00,000/- (Rupees three lakhs) within one month from the date hereof and on payment of duty leviable.

I also impose a personal penalty of Rs. 5,000/- (Rupees five thousand) only u/s 112 of GA"62 which should be paid forthwith". (Emphasis Supplied)

27. Thus it will be evident that the Collector of Customs held that the importation of PVC Leather Lining was in order. The order of confiscation was confined to Rock Cotton Lining and the petitioners were given option to clear Flock Cotton Lining upon payment of fine as well as payment of duty involved and personal penalty.

28. It will appear from the correspondence exchanged by and between the petitioners and the Customs Authorities that in response to the petitioners' request for releasing non-offending goods, namely PVC leather lining, the Customs Authorities were taking different stand at different times. Initially the Customs Authorities alleged that It was not possible to release the non-offending goods "since both items were declared under the same Bill of Entry". In this connection reference may be made to the letter of the Deputy Collector of Customs dated 21st July, 1987 wherein it has been stated as follows:

"This is to inform you that clearance of part consignment Is not possible since both the items are declared in the same of Bill of Entry. You are therefore, requested to clear the offending goods on payment of duty, fine and penalty. However, you may avail the legal remedies as provided under Customs Act, 1962 if you so desire."

29. Subsequently the petitioners on or about 2nd November, 1987 In accordance with the directions of the Customs authorities filed a BUI of Entry for release of the P.V.C. Leather lining after proper assessment. The said Bill of Entry however was not assessed and no clearance of the goods permitted by the concerned Customs Authorities.

30. Ultimately, however, the Customs Authorities took the stand that petitioners have to clear both the offending goods and non-offending goods upon payment of fine and duty.

31. Mr. Lala learned counsel appearing for the respondents referred to Section 150 of the Customs Act and submitted that the non-offending goods, namely PVC Leather Lining should not be released. He also referred to Section 118 of the Customs Act.

32. Section 150 of the Customs Act provides the procedure for sale of goods not being confiscated goods which are to be sold under any provisions of the Act. The only provision of the Customs Act which provides for goods other than confiscated goods to be sold is Section 142 of the Customs Act. The relevant provisions of Section 142 are as follows:

"(1) Where any duty demanded for any person or any penalty payable by any person under this Act is not paid-

(a) ...

(b) the Assistant Collector 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 Collector of Customs or such other Officer of the Customs or

(c) ...

33. Section 142 however will have no application in this case because no duty was demanded from the petitioners. The sum of Rs. 3 lakhs alleged to be payable under the adjudication order dated 1st May, 1987 is on account of fine and not duty.

34. Secondly, penalty of Rs. 5,000/- payable by the petitioners under the adjudication order dated 1st May, 1987 had already been deposited on 28th August, 1987 with the Assistant Collector of Customs as a pre-condition for filing the appeal from the adjudication order dated 1st May, 1987 which is pending before the Tribunal.

35. In short, there is no duty demanded at the moment and the penalty payable has been deposited. As such Section 150 of the Customs Act will have no application in the present case.

36. In my view Section 118 of the Customs Act has no application either the offending goods and the non-offending goods have not been imported in a single package. This will be evident from the packing list. In this connection reference may be made to the letter of the petitioner dated 25.9.1987 addressed to the Deputy Collector (D.E.E.C.) Calcutta Customs wherein it has been, inter alia, stated as follows:

"We are to again draw your kind attention to the fact that we desire clearance of non-offending goods only, which although covered by the same BUI of Entry are packed in separate packages and are easily identifiable."

The fact that the offending and non-offending goods were brought in separate packages has never been disputed by the Customs Authorities in course of correspondence exchanged with them or otherwise.

37. In my view when the importation is made of a single a consignment, a part of which is legally imported and a part illegally and an order of confiscation is made giving option to redeem the illegally imported goods the goods legally imported cannot be detained on the ground that one bill of entry has been filed In respect of the entire consignment. According to the findings of the respondents themselves the PVC Leather goods was validly imported. The respondents cannot detain the said goods on the apprehension that ultimately the illegally imported goods may not be taken delivery of by the petitioners. If the confiscated goods are not redeemed, then in that event it will be for the Customs Authorities to sell the goods and realise its dues. But the respondents cannot compel the petitioners to redeem that part of the goods which were illegally Imported to get other validly imported goods released. This is not enjoined by any provisions of the Act. It is not disputed that the offending and non-offending goods were brought in separate packages. I have already referred to various correspondences passed between the petitioners and the respondents. Although a contention has been raised in the affidavit that it is difficult If not impossible to segregate the goods before delivery, but as a matter of fact the goods are Identifiable and are separately packed. Otherwise adjudication order could not have been passed holding that a part of the subject goods had not been validly imported.

38. In my view the refusal on the part of the Customs authorities to release non-offending goods is arbitrary and without any authority of law.

39. For the reasons aforesaid this application is allowed. The order dated 21st December, 1987 of the Assistant Collector of Customs for Appraisement is set aside. The respondents are directed to release PVC Leather Lining forthwith upon payment of duty and other charges Irrespective of the fact whether the petitioners take delivery of the confiscated goods, upon payments of redemption fine or not

40. Let the assessment be made and the goods be released within a week from the date of communication of this order. Let open delivery be effected.

41. All parties shall act on the signed copy of the minutes of this operative part of this order and judgment.