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**(1992) 60 ELT 232**

**Calcutta High Court**

**Case No:** Matter No. 109 of 1988

Opal Exports Pvt. Ltd.

APPELLANT

Vs

Collector of Customs

RESPONDENT

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**Date of Decision:** March 1, 1991

**Acts Referred:**

Constitution of India, 1950 " Article 14, 19(1), 226#Customs Act, 1962 " Section 108, 111, 112#Imports and Exports (Control) Act, 1947 " Section 3(2)

**Citation:** (1992) 60 ELT 232

**Hon'ble Judges:** Ajit K. Sengupta, J

**Bench:** Single Bench

**Final Decision:** Allowed

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**Judgement**

Ajit K. Sengupta, J.

In this application under Article 226 of the Constitution the petitioners have challenged the validity and legality of the

purported show cause notice dated 13th November, 1987 issued by the respondents as also their actions in refusing to allow the petitioners to

clear the consignments in question imported from foreign suppliers.

2. The petitioner No. 1 (hereinafter called the Company) is a registered Export House and is engaged, inter alia, in the importation of various

commodities. The company was the holder of Import Licence No.

P/W/3141848/C/XX/98/C/80 subsidiary dated 18th March, 1986 which was

issued to the company on prior export basis and against the main licence No.

P/W/3141610/C dated 26th December, 1985. By this subsidiary

licence the company was authorised to import spares as permissible under paragraph 265(6) of the Import and Export Policy for 1985 to 1988.

3. The company imported two consignments, one containing spare parts for combination square sets, vernier height gauges, micrometers etc. and

the other containing spares of measuring instruments of diverse amounts from the same foreign suppliers viz. Messrs. Mitutoyo Manufacturing Co.

Ltd., Japan by virtue of the aforesaid subsidiary licence. Both the consignments were shipped from Yokohama per ""JANIKA"" Rotation No.

502/87, Line Nos. 100 and 103 and the same arrived at the Port of Calcutta on or about 15th September, 1987.

4. Thereafter Bills of Entry were presented for assessment of Customs duty by the Clearing Agents for clearance of the subject goods against the

aforesaid licence. The Customs authorities however, refused to clear the goods on the plea that the Shed Appraiser was directed to open the cases

of the two consignments covered by the two Bills of Entry for appraisement and to examine them side by side and ascertain if the goods imported

under these two Bills of Entry make for complete micrometers/combination square sets/vernier height gauges. The said Appraiser allegedly opened

the case for appraisement and after an examination of the two consignments came to the purported conclusion that the goods included under the

two Bills of Entry made for complete micrometers/combination square sets/vernier height gauges.

5. Thereafter the Assistant Collector of Customs, Dock Intelligence Unit, issued a Show Cause Notice dated 13th November, 1987 which is

under challenge in this application.

6. It is necessary to set out the said show cause notice dated 13th November, 1987.

Sub: Importation of 2 cases said to contain spares of measuring instruments per vessel JANIKA, Rot. No. 502/87 Line No. 100 and 103, CIF

Value Rs. 1,17,271.11 and Rs. 86,302.22 respectively, imported by M/s. Opal Exports Pvt. Ltd., 4, Little Russel Street, Calcutta-71.

M/s. Opal Exports Pvt. Ltd. submitted two Bills of Entry serial No. 949 dated 18-8-1987 and serial No. 1680 dt. 27-8-1987 for above

mentioned consignments through Clearing Agent M/s. United Traders and sought its clearance under additional licence No.

P/W/3141848/C/XX/98/C/86 dated 18-3-1986 under para 265(6) of the policy which allows permissible spares only.

Goods of both the Bills of Entry were examined side by side on the 23-9-1987. On examination it is seen that putting together both the

consignments goods are complete measuring instruments which are Micrometers (133 pcs.) combination square sets (123 pcs.) and vernier height

gauges (26 pcs.). One consignment contains only the missing parts of other. It is also seen that the goods are complete with specialised Mitutoyo

brand wooden instrument Box and instructional manual. Nos. of instrument boxes are exactly equal to the complete instruments.

The licence submitted by the importer covers only spares under para 265(6) of the Import Policy 1985-88.

On examination, the goods are found as complete measuring instruments and not spares for the measuring instruments putting together both the

consignments. The measuring instruments are specifically covered under Appendix 8 of the Import Policy 1985-88 and these are not covered

under the licence submitted by the Importer.

The importer has imported 282 sets complete measuring instruments in two consignments to misguide the Customs authority and to prove the

goods as spare parts only. As per the condition of the licence submitted by the importer, the importer is eligible to import spares only as stipulated

in the subject licence under the policy. In the present case the importer has imported a complete measuring instrument including the specially

designed instrument boxes for keeping the said precision instrument and instruction manual in the said two consignments.

The importers placed the order and L/C (at sight) on the same date and the goods were supplied by the foreign supplier by the same vessel under

two line numbers. The date of the invoice and B/L are also same. It appears that the importer has imported the goods making two consignments

only to hoodwink the Customs authority and to prove the goods as spares only to evade the govt. duty and licensing provision.

The duty rate of the complete measuring instrument is 40% + 40% + 15% C.V. whereas the importer filed the bill of entry claiming the goods as

parts of measuring instruments and tried to release the goods paying duty at the rate of 45% + 40% + C.V. Nil only. In this case the attempted

duty evasion is Rupees 45,234.00.

The importer could not produce any price list for the parts of imported MITUTOYO measuring instrument, on the other hand they have submitted

a price list for the complete measuring instrument which shows the price at the lower side. This is probably due to the dismantling charges taken by

the manufacturer. It is clear that the price for the so called parts is higher as the supplier loaded the dismantling charges.

Shri Uday Mukundlal Shah, authorised representative of M/s. Opal Export Pvt. Ltd., has admitted in his statement recorded in this department that

there is no doubt combining both the Bill of Entry the imported goods will become a complete instrument. He has also admitted that the licence

submitted by them will not cover the goods if these are treated as complete instrument.

M/s. Opal Export Pvt. Ltd., 4, Little Russel Street, Calcutta-71 are therefore, called upon to show cause in writing to the Collector of Customs,

Custom House, 15/1, Strand Road, within 10 days from the date of receipt of this notice as to

(a) Why the imported goods should not be considered as complete measuring instrument falling under Appendix-8 of the Import Policy 1985-88.

(b) Why the imported goods valued Rs. 2,03,573.33 should not be considered as unauthorised u/s 111(d) of the Customs Act, 1962 read with

Section 3(2) of the Imports & Exports (Control) Act, 1947 and hence not confiscated.

(c) Why the goods should not be considered as liable to confiscation u/s 111(m) of Customs Act, 1962 and hence not confiscated on the grounds

of misdeclaration of the description of the goods.

(d) Why penalty should not be imposed on them u/s 112 of the Customs Act, 1962.

If they wish to be heard in person before the case is adjudicated they may state so in written representation. If they fail to give reply before the

expiry of the aforesaid period of 10 days and/or if they fail to appear for hearing when the case is posted for hearing, the case will be adjudicated

ex parte on the basis of available evidences on record.

This notice is issued without prejudice to the right of the department to amend/modify or supplement this notice at any time if felt necessary.

7. In reply to the said show cause notice, the petitioner submitted, inter alia, as under:

(i) We imported spares of measuring instruments in the above two consignments and sought clearance of the same against Subsidiary Licence No.

P/3141848/C/XX/98/C/80 issued against the main Licence No. P/W/3141610/C dt. 20-12-1985. The licence in question was issued in our name

for import of spares as permissible under Para 265(6) of AM"85-88 Import & Export Policy.

(ii) The Assistant Collector of Customs had both the consignments examined together, side by side by the Shed Appraiser to ascertain the

contents. On examination the Shed Appraiser reported that the goods imported against the two Bills of Entry when combined together make

complete Micrometer, Combination Squares and Vernier Height Gauge. On the basis of the Shed Appraiser"s report, the learned Assistant

Collector of Customs of D.I.U. held the view that the goods covered by the two Bills of Entry are complete instruments and not spares covered

separately by the two Bills of Entry and as such were not covered by the licence issued under Para 265(6) of AM"85-88 Import & Export Policy

as that licence covers only spares of the instruments and not complete instruments themselves.

(iii) We, however, most respectfully submit that it has been the established practice of the Custom Houses both Calcutta and Ors. for the last 8-9

years to allow clearance against Export House Additional licence import of spares in different consignments which when combined together make

a complete instrument. In support of this statement, we enclose herewith copies of Bills of Entry and Invoices of spares of instruments allowed

clearance by this Customs House as spares which when combined together would form complete instrument against the same type of licences

(Annexure-A). Even, consignments of two parties imported by the same Vessel Manika" (particulars enclosed as Annexure-B) have been allowed

clearance by this Custom House as spares against the similar Licences.

(iv) From the above, your honour will kindly observe that in importing the subject goods, we have merely followed the established practice of these

Custom Houses and have not imported the goods unauthorisedly. For the reasons stated, there has been no misdeclaration in respect of the

description of the goods in each Bill of Entry as the goods covered by each Bill for Entry are only parts of the instruments and not complete

instrument. Our action is bona fide and we have not tried either to evade Customs duty or to hoodwink the Customs authorities as they themselves

have allowed this practice to develop and continue.

2. It has been decided by the Customs, Excise and Gold (Control) Appellate Tribunal 1987 (12) ECR 1150 (CEGAT NRB) that confiscation is

not justified when Custom House has previously treated identical goods as valid imports (Annexure-C). It has further been decided by CEGAT

1987 (13) ECR 685 (CEGAT SBA) that penalty cannot be imposed when mens rea has not been established (Annexure-D).

3. Since in the instant case the goods have been imported against a licence in pursuance of the established practice of the Customs House, there

being no mala fide intention, it is prayed that the goods be released to us at an early date without imposition of any fine or penalty.

8. Thereafter on or about 25th November, 1987 one Uday Mukundlal Shah, authorised representative of the company received a purported

summons u/s 108 of the Customs Act summoning him to appear before the Appraisers, Docks Intelligence Unit in connection with the importation

of the subject goods, and Shri Shah made a statement before the Appraiser, Docks Intelligence Unit.

9. It is contended on behalf of the petitioners that the company imported spare! of measuring instruments and not complete measuring instruments

as alleged by the Customs authorities. The mere fact that such spares when combined together constitute a complete measuring instrument cannot

be sufficient ground for holding that the company intended to import complete measuring instruments. As the subject goods imported by the

company were spare parts, correct declaration were made in the Bills of Entry regarding the description and classification of the goods in question,

spares of measuring instruments being covered by Tariff Item 9806.00 read with Notification No. 69/87-Cus. and 205/87-Cus. and spares for

combination square sets, vernier height gauges and micrometers being classifiable under Tariff Item No. 9806.00 read with Customs Notification

No. 69/87-Cus. and 205/87-Cus. attracting the Customs duty at the rate of 45% ad valorem and 40% auxiliary respectively.

10. It is also contended that in the past the Customs authorities have allowed import of spares of measuring instruments imported in the same

Vessel or in different Vessels which when combined together would make a complete instrument, on the basis that the same were spares and had

levied customs duty at the rate of 40% ad valorem Basic Duty, 40% Auxiliary Duty and 15% C.V.D. which is the Customs duty chargeable in

respect of complete instruments. In fact, spares of measuring instruments, combination square sets, vernier height guages, micrometers etc. have

always been charged with customs duty at the uniform rate of 45% ad valorem Basic duty and 40% Auxiliary duty.

11. It is further contended that in the very same vessel similar spares of measuring instruments were carried for delivery to Birla Jute Company Ltd.

which were cleared by the customs authorities on the basis that the same were spares. The actions of the Customs authorities in refusing to allow

the petitioners to clear the consignments in question on the basis of the licence produced by them as spares of measuring instruments, while

allowing other importers to do so, result in hostile discrimination against the petitioners in violation of the guarantee of equal protection contained in

Article 14 of the Constitution.

12. It is contended that the Customs authorities in allowing spares of measuring instruments to be cleared as spares in the past made categorical

and unequivocal representation and/or promises to the world at large including the petitioners that they would allow clearance of such spares on the

basis that they are spares irrespective of the fact whether such spares when combined together would make a complete instrument. The

respondents are now precluded by the doctrine of promissory estoppel and/or other equitable estoppel from going back on their said promise

and/or representation.

13. It is also contended that the plea for detaining the goods as stated in the said purported show cause notice, namely, that the spares together

would make complete measuring instrument is a specious plea and the said purported show cause notice is thus perverse and without or in excess

of jurisdiction. There has been no misdeclaration of description or value of the goods imported and as such the Customs authorities have no

power, authority or jurisdiction to invoke the provisions of Section 111 or Section 112 of the Customs Act, 1962.

14. In any event the petitioners imported the consignments under the bona fide and correct belief that the subject goods were spares of measuring

instruments and there was no mala fide motive or any motive to evade payment of Customs duty on the part of the petitioners. The allegations

contained in the said purported show cause notice do not disclose, even prima facie, violation of any offence under the Customs Act, 1962.

15. Further it is contended that the said show cause notice imposes unreasonable restrictions on the petitioner No. 2 who is ft shareholder of the

company and carries on business through the agency of the company and in turn on his fundamental rights to carry on trade, business, occupation

and/or profession guaranteed by Article 19(1)(g) of the Constitution.

16. In or about August, 1990 another application was made by the petitioner for release of the goods on the ground that such goods have been

cleared by Customs Authorities on earlier occasions. No affidavit-in-opposition has been filed in spite of the opportunities given. It has not been

disputed before me that the contentions raised by the petitioner are not correct. Records have been produced. From the records it appears that the

following order was passed by the Collector on 6th January, 1988.

I have gone through the case records and the submissions made by the party. In the instant case, the goods have been imported in two separate

line numbers but when combined together make a complete instrument in SKD condition. This has not been disputed by the party. However, it has

been urged that in view of a decision of the Tribunal reported in 1987 (12) ECR 1 150 confiscation is not justified. They have also further referred

to the practice relevant in this Customs House where similar goods have been allowed importation. They have also relied upon the decision of the

CEGAT reported in 1987 (13) ECR 685 (CEGAT SBA) that penalty cannot be imposed when mens rea has not been established. It is urged that

the goods have been imported in pursuance to a valid licence and there is no mala fide and as such they have requested for release of the goods

without imposition of fine or penalty.

The contention advanced is not acceptable. As has been admitted, the goods as imported though in two different line numbers when combined will

make into one. The declaration given in the Bill of Entry however refers to as spares. Thus what has been going on due to mis-declaration and mis-

statement of facts was to allow clearance in the Custom House such items as spares probably because it was not possible for the Assessing Officer

to co-relate between the two and find out that the goods which have been imported in SKD condition were as such imported as a whole. Thus the

practice which is prevalent in the Custom House due to lack of proper co-relation and also which could be due to non-declaration of the full facts

by the Importers, cannot be considered as an established practice.

Considering these facts, the contention advanced by the party is rejected and I pass the following orders.

The goods are liable for confiscation and therefore the same is confiscated. However, the same may be redeemed on payment of a confiscation

fine of Rs. 60,000/- (Rupees sixty thousand) only. The M.O.P. indicated in the Note Sheet as percent is based on mere estimation and not on any

investigation. Considering the nature of the goods and other related factors, the redemption fine has been fixed. I also impose a penalty of Rs.

20,000/- (Rupees Twenty thousand) only.

17. I have considered the contention raised by the parties. There is no dispute that the Petitioner No. 1 is a registered export house. It holds

subsidiary licence under which it is authorised to import spares as permissible under Paragraph 265(6) of the Import & Export Policy for 1985-88.

18. The petitioner imported spare parts for combination square sets, vernier height gauges and micrometers etc. from M/s. Mitutoyo

Manufacturing Company Limited of Japan. Against the licence No. 3141848, the petitioner imported spares of measuring instruments of diverse

amounts from the said foreign suppliers M/s. Mitutoyo Manufacturing Company Limited of Japan.

19. Both the consignments imported on the basis of the aforesaid original licence and the subsidiary licence were shipped from Yokohoma, Japan

in vessel JANIKA, Rotation No. 502/87, Line Nos. 100 and 103 and arrived at the Port of Calcutta on or about 15th September, 1987.

20. The Customs Authorities, however, refused to clear the goods on the plea that the Shed Appraiser was directed to open the cases of the two

consignments covered by the Bills of Entry for appraisement and examine them side by side and to ascertain if the goods imported under those two

Bills of Entry make complete micrometers/combination square sets/vernier height gauges. The said Appraiser allegedly opened the cases for

appraisement and after a purported examination of the two consignments came to the purported conclusion that the goods included under the two

Bills of Entry made complete micrometers/combination square sets/vernier height gauges.

21. In my view, the contention raised by the respondents cannot be accepted.. The petitioner company imported spares of measuring instruments

and not complete measuring instruments as alleged by the Customs authorities. That being the position, correct declarations were made in the Bills

of Entry regarding the description and classification of the subject goods, spares of measuring instruments being covered by T.I. No. 9806.00 read

with Notification No. 69/87-Cus. and No. 205/87-Cus. and spares for combination square sets, vernier height gauges and micrometers being

classifiable under T.I. No. 9806.00 read with Customs Notification No. 69/87-Cus. and No. 205/87-Cus.

22. On the basis of the aforesaid classifications, spares of measuring instruments and spares for combination square sets etc. attracted Customs

duty at the rate of 45% ad valorem and 40 per cent auxiliary respectively.

23. It is the contention of the Customs authorities that since spares combined together constitute complete measuring instruments, the same cannot

be classified for the purpose of determining customs duty liability on the basis that they are spares, but the proper classification should be as

complete measuring instruments. It is contended on behalf of the respondents that the rate of duty applicable for such complete measuring

instruments should be the applicable rate in the instant case.

24. The mere fact that such spares combined together constitute complete measuring instruments cannot be a sufficient ground for holding that the

petitioner intended to import complete measuring instruments.

25. In the past the Customs authorities have allowed import of spares of measuring instruments imported in the same vessel JANIKA or in

different vessels (which when combined together would make a complete instrument) on the basis that the same were spares and customs duty had

been levied at the rate of 40% ad valorem basic duty and 40% auxiliary duty and 5% countervailing duty which is the customs duty chargeable in

respect of spares. In fact, spares of measuring instruments and combination square sets, vernier height gauges and micrometers etc. have always

been charged with customs duty at the rate of uniform 40% ad valorem basic duty and 40% auxiliary duty. The relevant documents in this regard

have been included in Annexure T to the writ petition. Particulars of two instances where various Customs House have all cleared various spares of

measuring instruments and combination square sets etc. have been given in Annexure ""J"" to the writ petition.

26. In the very same vessel by which the goods in question have arrived, namely, vessel JANIKA, similar spares of measuring instruments and

combination square sets, vernier height gauges, micrometers etc. were carried for delivery to Birla Jute Company Limited which were all cleared

by the Customs authorities on the basis that they were spares. The petitioner has made out a specific case in this regard in paragraph 15 of the writ

petition. The petitioner has called upon the respondents to produce the relevant documents in this regard before this Court.

27. But no contrary evidence has been produced or shown. Further this Court by order dated 9th February, 1988, directed the respondents to

produce the records of similar imports including those referred to in paragraph 15 of the writ petition. The respondent Customs authorities have,

however, failed and/or neglected to produce the said records in spite of the specific direction of this Court.

28. The respondent Customs authorities by treating similar imports as imports of spares while adopting a different view in the case of the petitioner

(who is placed in similar circumstances as other importers of similar goods) have discriminated against the petitioner in violation of the guarantee of equal protection contained in Article 14 of the Constitution of India.

29. The discriminatory treatment meted out by the Customs Authorities to the petitioner is also mala fide as is evident from the fact that

subsequently the respondents have allowed import of similar goods and such goods have been treated as spares and customs duty has been levied

accordingly. However, the imports forming the subject matter of the writ petition have been illegally and arbitrarily subjected to discriminatory

treatment.

30. It is not open to the Customs authorities to contend that the subject goods were complete measuring instruments in view of the decision of the

Customs Excise & Gold (Control) Appellate Tribunal, West Regional Bench at Bombay in the case of Sushu Electronic v. Collector of Customs &

Central Excise, Rajkot, in which similar goods have been classified as spares and not as complete instruments. It is a settled law that different

Collectorates of Customs cannot adopt different stands on a particular issue.

31. The petitioner having been allowed import of similar goods in the past on the basis that they are spares, the Customs authorities have made a

categorical representation and/or promise to the petitioner that they would allow import of similar goods in future on the same basis. The petitioner

has made the import in question on the basis of such representation and/or promise and has made huge investments and entered into commitments

with third parties on the basis thereof. The respondents are precluded by the doctrine of promissory estoppel from contending that the imports in

question are not to be treated as spares but as complete measuring instruments.

Reference may be made to the decision of the Supreme Court in

McDowell and Co. Ltd. Vs. Commercial Tax Officer,

32. In view of the above position, namely, that the goods in question cannot be treated as complete measuring instruments, the impugned show

cause notice and the impugned summons are without or in excess of jurisdiction inasmuch as the underlying assumption in respect of the said show

cause notice and the said summons, is that there has been a misdeclaration of the subject goods. The subject goods being spares of measuring

instruments, there has been a correct declaration and the allegation in the show cause is totally perverse. That being the position, both the show

cause notice and the summons are without jurisdiction.

33. The petitioner having imported the consignment in question under the bona fide and correct belief that the subject goods were spare parts of

measuring instruments, (as induced by the Customs authorities) and there being no mala fide motive (even none is alleged) behind the imports

(assuming but without admitting the allegations in the show cause notice to be correct), the provisions of Section 111 of the Customs Act do not

and cannot have any application inasmuch as mens rea is an essential ingredient for an offence contemplated u/s 111 of the Act. The show cause

notice, therefore, does not even prima facie disclose the offence or violation alleged. The show cause notice is, therefore, liable to be quashed.

34. For the reasons aforesaid, the writ petition is allowed; the show cause notice and the proceedings initiated in pursuance thereof are quashed.

The respondents are directed to allow clearance of the subject goods upon assessment by the respondents and upon payment of duty on the basis

that the same are spares which are allowed and as levied in the other cases mentioned in the judgment. Such assessment and release of the goods

shall be effected within seven (7) days from the date of receipt of the signed copy of the operative part of the judgment and order.

35. There will be no order as to costs.