

A M/S. POLYGAS ACRYLIC MFG. CO. LTD.
v.
COMMISSIONER OF CUSTOMS, VISHAKHAPATNAM

MARCH 31, 2003

B [M.B. SHAH AND ARUN KUMAR, JJ.]

Customs Act, 1962: Section 138-E.

C *Classification—Misdeclaration of imported goods—Import of Methyl Methacrylate Monomer (MMM) regenerated second grade—Show cause notice for misdeclaration of goods—Testing of sample of goods by both Revenue as well as assessee—Test reports confirming the goods as regenerated second grade MMM—Commissioner of Customs dropped proceedings—Appeal allowed by CEGAT rejecting test reports as sample was not fit for testing—On appeal,*
D *held: Tribunal has rejected cogent evidence of test reports in respect of sample of goods on grounds which are not germane to the issue under consideration—Tribunal ignored test report obtained at the instance of Revenue but accepted a not so relevant report from another institution on superfluous grounds—Since test reports clearly established that imported goods are regenerated*
E *second grade MMM, there is no misdeclaration of goods by the assessee.*

Appellant-assessee had imported raw material Methyl Methacrylate Monomer for its manufacturing activity. In the invoice as well as packing list the goods were classified as “MMM regenerated second grade”. Revenue did not accept such declaration of quality of goods, therefore,
F provisional clearance was allowed on payment of import duty on the declared price of the goods and on furnishing bank guarantee for the higher assessed value of goods. Samples were taken and sealed for testing quality of goods. Some samples were given to the assessee as well. Samples were sent by the department to the Central Revenue Control Laboratory/
G IIT. On the basis of test report from CRCL, a case of misdeclaration of goods was set up by the department as according to them the goods were not regenerated second grade MMM but were of prime quality and a show cause notice was issued to the assessee. Assessee refuted the stand of the department on the basis of test reports of samples obtained from IIT/other institutions confirming the goods as MMM regenerated second grade;

sample test was also conducted at the instance of assessee by a Professor of IIT before the Commissioner who was satisfied with the test report and directed dropping of the show cause notice. CEGAT allowed the appeal of the department rejecting the test reports holding that sample was unfit for testing the quality of goods. Hence the present appeal.

It was contended for the appellant that Tribunal did not accept test reports from IIT/other institutions in favour of appellant but accepted the test report of CRCL though CRCL had earlier denied about having facilities to conduct such test and moreover the report was not clear and even did not support the stand of the Department in unequivocal terms; and that it was incumbent upon the Department to establish misdeclaration of goods by the appellant.

On behalf of the Department, it was submitted that test sample was sent to test laboratories after a long lapse of time when sample became unfit for testing.

Allowing the appeal, the Court

HELD: 1.1. The fact that the test reports of the samples were sent by the laboratories/other institutions, shows that they were able to conduct the tests. These were Government institutions and presumably there was no reason for them to give a wrong report. The delay in sending the sample for examination by the appellant was explained on the basis of the fact. Issuance of the show cause notice gave a clear indication that the department was not accepting the stand of the appellant. This occasioned the need for the appellant to get test reports with respect to the quality of goods. [194-A, B]

1.2. The Tribunal has rejected cogent evidence produced by the appellant on grounds which are not germane for the issue under consideration. The reasoning of the CEGAT is contradictory in as much as it accepts the report of the CRCL while ignoring a report from the IIT, New Delhi which was also obtained at the instance of the department. The reports in favour of the appellant by Government departments have been rejected on superfluous grounds. [194-D, E]

1.3. The test was conducted in the presence of the Commissioner and other departmental representatives. It shows that the test was possible. The Tribunal has not given any cogent reason for rejecting the reports

A submitted on behalf of the appellant according to which the goods in question are established to be regenerated second grade MMM. [195-B]

B 1.4. The burden of proof was on taxing authority to show that imported goods were not regenerated second grade MMM. Mere assertion by the department was of no avail as heavy burden was on the department to lay evidence that the test reports which were given by the Government institutions were incorrect or erroneous. No such attempt was made and the test carried out before the Commissioner (Appeals) by IIT Expert revealed that the contention of the appellant was justified. [195-D, E]

C *Union of India and Ors. v. Garware Nylons Ltd. and Ors.*, [1996] 10 SCC 413, relied on.

D 1.5. An important fact overlooked by the Tribunal is that because of an earlier report of the CRCL with respect to the similar consignment, to the effect that it was unable to test the sample for regenerated second grade MMM. The IIT report left no scope to sustain the stand of the department. The report obtained at the instance of the department itself had great force and it should not have been ignored. [195-E, G]

E 1.6. The report of the CRCL relied upon by the department does not unequivocally state that the goods were not regenerated second grade MMM. The report is carefully worded and gives an impression that something is sought to be concealed rather than truth being revealed. The onus is on the department to establish that it is a case of misdeclaration of goods. The department has miserably failed to discharge that onus in the instant case. Hence the stand of the department cannot be sustained. [195-G; H; 196-A]

F CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1648 of 2001.

G From the Judgment and Order dated 24.8.2000 of the Central Excise, and Custom Gold (Control) Appellate Tribunal, New Delhi in A. No. C./203/99-A in F.O. No. 691 of 2000-A.

Joseph Vellapally, Ramakrishna Reddy and Mrs. D. Bharathi Reddy for the Appellant.

Ms. Nisha Bagchi for B. Krishna Prasad for the Respondent.

H The Judgment of the Court was delivered by

ARUN KUMAR, J. This civil appeal under Section 138E of the Customs Act, 1962 is directed against an order dated 24.8.2002 passed by the Customs, Excise & Gold (Control) Appellate Tribunal (hereinafter referred to as "CEGAT").

Briefly the facts are that the appellant is engaged in the manufacture of acrylic sheets. The appellant imported raw material for its said manufacturing activity from Japan. The raw material is known as Methyl Methacrylate Monomer (regenerated) [for short 'MMM']. A contract in this behalf was entered into by the appellant on 17.3.1996 with a Hongkong firm for supply of 106.40 metric tonnes of MMM regenerated second grade at the rate of US \$ 300 per metric tonne CIF. The goods had been dispatched vide a Bill of Lading dated 29.5.1996. The Invoice and Packing List both dated 18.6.1996 accompanied the consignment. The Bill of Lading mentions the words "RMA" i.e. Regenerated Methyl Methacrylate. Likewise in the invoice as well as in the packing list it is stated that the goods were MMM regenerated second grade. The invoice further mentions quantity of goods as 106.40 metric tonnes and price at the rate of US \$ 300 per metric tonne. The said goods were cleared at ICD Ludhiana. Since the Department was not accepting the declaration regarding quality of goods there was difficulty in clearance as a result of which provisional clearance was allowed. Import duty was paid as per the declared price of the goods in the invoice while a bank guarantee was furnished for the rest of the amount by the importer. Fifteen samples were taken and sealed in the presence of both sides at the time of delivery of the goods. Out of fifteen samples, four were given to the importer, one sample was sent by the department to the Central Revenue Control Laboratory ('CRCL' for short). Ten samples were retained by the department. A show cause notice dated 3.7.1997 was issued by the Commissioner of Customs to the appellant to which the appellant sent reply on 5.12.1997. In the show cause notice the department set up a case of misdeclaration of goods resulting in the declared value of the goods being kept low. According to the department the goods were not regenerated second grade MMM, but were of prime quality. The price of prime quality was stated to be US \$ 1700 per metric tonne. This stand was taken by the department mainly on the basis of a test report dated 22.7.1996 said to have been obtained from the CRCL, New Delhi which reads as under:

"The sample is in the form of colourless liquid and has the characteristics of methyl methacrylate monomer. The physico chemical properties of the same in respect of boiling point, refractive index,

A specific gravity and purity are in agreement with that of chemically pure methyl methacrylate monomer in the literature.”

This report does not indicate whether the goods could be said to be regenerated second grade MMM. Since the report was not very clear, the CRCL was requested by the department vide letter dated 17.5.1997 to specify
B “whether the material can be described as Methyl Methacrylate Monomer regenerated second grade or virgin grade”. The CRCL responded to the above vide its letter dated 23.5.1997 as under:

C “Keeping in view of physico chemical properties, the samples under reference do not have any basis to be considered as ‘methyl methacrylate monomer regenerated second grade’.”

In its reply to the show cause notice the appellant refuted the stand of the department. It was said in the reply that the appellant’s similar consignment was held up at Delhi and opinion was sought from the CRCL by the revenue authorities vide their letter dated 10.6.1996. In reply the CRCL had stated
D vide its letter dated 26.6.1996 that it was not possible for the CRCL to test the sample and to state whether the product was of regenerated second grade or otherwise. The exact words contained in the CRCL reply are “each of 4 samples is in the form of colourless liquid, each is composed of methyl methacrylate (monomer). It is not possible for the laboratory test to state
E whether the products are regenerated second grade or otherwise.”

When the revenue found this inability on the part of the CRCL, a sample from the subject consignment was sent by it to the IIT, New Delhi. The IIT New Delhi opined that the sample of the consignment disclosed that it was regenerated second grade MMM. In its reply to the show cause notice
F the appellant added that it had sent samples of the consignment, subject matter of the show cause notice, to the Punjab Test House which is a laboratory set up by the State Government of Punjab. Another sample had also been sent by the appellant to the Gujarat State Fertilizer Co. Ltd. which was a unit of the Government of India. Reports from both these institutions were in favour
G of the appellant. Both reports stated that the goods were MMM regenerated second grade.

Ultimately the matter came up for consideration before the Commissioner of Customs, Amritsar. The appellant appeared before the Commissioner alongwith a Professor from the IIT, New Delhi who took alongwith him
H necessary equipment to conduct a test in front of the Commissioner to

determine the quality of the goods in question. As per the test conducted before the Commissioner of Customs, it was established by the IIT Professor that the sample was of goods described as MMM regenerated second grade. The learned Commissioner after considering the said test report and other test reports on record came to the conclusion that the stand of the department was unsustainable and therefore directed dropping of the show cause notice vide its letter dated 30.3.1998. Aggrieved by the said decision of the Commissioner, the department went in to appeal before the CEGAT. The CEGAT accepted the appeal of the department vide its order dated 24.8.2002 which is under challenge in the present appeal.

The learned counsel for the appellant argued that the Tribunal did not appreciate the test reports in favour of the appellant which included reports from the IIT New Delhi, the Punjab Test House, Department of Industries, State of Punjab and the Gujarat State Fertilizers Co. Ltd. On the other hand, according to the learned counsel for the appellant the Tribunal had relied on a report of the CRCL which was not clear and which did not in unequivocal term support the stand of the Department. The CRCL report had to be read in the light of an earlier report of the CRCL with regard to sample of identical goods cleared at the ICD, Delhi in which the CRCL has stated that it did not have the facilities to conduct a test so as to find out whether the goods were regenerated second grade or not. This stand of the CRCL completely diluted its subsequent report with respect to the consignment in question and, therefore, the same could not have been relied upon. The said report is the only basis for the department to take a stand that the goods were of prime grade and not regenerated second grade. Therefore, it was contended that the impugned order of the Tribunal proceeded on a totally wrong basis and was, therefore, liable to be set aside.

Relying on *Union of India and Ors. v. Garware Nylons Ltd. and Ors.*, [1996] 10 SCC 413, the learned counsel for appellant contended that it was for the department to establish that there was misdeclaration of goods on the part of the importer. The department had failed to do so in the present case. The department did not have any clear report which could support its stand. It was also pointed out that at various other depots the department had allowed clearance of identical goods as regenerated second grade MMM. The learned counsel appearing for the department was unable to contradict this argument. He only submitted that the samples were sent to the Punjab Test House and the Gujarat State Fertilizers Co. Ltd. after a long lapse of time as a result of which the samples were not fit for testing. This argument does not appeal to

- A reason. If the samples were not fit for testing and it was not possible to give a report based thereon, there was no compulsion for the concerned institutions to give report. The fact that the reports were sent by these institutions, shows that they were able to conduct the tests. These were Government institutions and presumably there was no reason for them to give a wrong report. The delay in sending the sample for examination by the appellant was explained on the basis of the fact that the show cause notice itself was issued by the department on 3.7.1997. Issuance of the show cause notice gave a clear indication that the department was not accepting the stand of the appellant. This occasioned the need for the appellant to get reports with respect to the quality of goods. It was also argued on behalf of the appellant that purity of the material was not determinative of the fact whether it was regenerated second grade or not. Purity was a different aspect altogether. Even regenerated second grade MMM could have very high purity.

- We have carefully considered the material on record and the contentions advanced on behalf of the parties by their learned counsel. In our view the impugned order passed by the CEGAT is not sustainable and is therefore liable to be set aside. The Tribunal has rejected cogent evidence produced by the appellant on grounds which are not germane for the issue under consideration. The reasoning of the CEGAT is contradictory in as much as it accepts the report of the CRCL while ignoring a report from the IIT, New Delhi which was also obtained at the instance of the department. The reports in favour of the appellant by Government departments have been rejected on superfluous grounds. The reports produced by the appellant which it had obtained from official source clearly establish that there is no misdeclaration of goods and the imported goods are regenerated second grade MMM.

- The Commissioner of Customs had given due weightage to the experiment conducted in his presence by the IIT Professor produced before him alongwith laboratory equipment by the appellant. This was however rejected by the Tribunal stating "how Commissioner ventured into such an exercise, there is nothing on record to show that he is a scientist competent to take any analysis". One need not be a scientist to appreciate a test report based on a test conducted in his presence by an expert from a prestigious institution like the IIT, New Delhi. The test was conducted in the presence of the departmental representatives and the Commissioner of Customs during the course of hearing. From the said test it has been opined that the goods in question were regenerated second grade MMM. The department neither objected to the test nor pointed out any defects in the test. Another reason for

which the test conducted in presence of the Commissioner was decreed by the CEGAT was that by the time the test was conducted on 10.12.1997 the sample would have polymerised. This was said in view of the report of GSFC Ltd. which had given similar opinion regarding a sample sent to it at a late stage. In our view this reasoning of the Tribunal is not correct. If the test was not possible, the testing authority could have said so rather than going ahead with the test. The test was conducted in the presence of the Commissioner and other departmental representatives. It shows that the test was possible. The Tribunal has not given any cogent reason for rejecting the reports submitted on behalf of the appellant according to which the goods in question are established to be regenerated second grade MMM. In fact, it was vehemently argued before us that identical goods were allowed to be cleared by the Customs Department at other ports/ICDs as regenerated second grade MMM. This argument remained unrefuted and undisputed.

Further, as held in *Union of India and Ors. v. Garware Nylons Ltd. and Ors.*, [1996] 10 SCC 413, the burden of proof was on taxing authority to show that imported goods were not regenerated second grade MMM. Mere assertion by the department was of no avail as heavy burden was on the department to lay evidence that the test reports which were given by the Government Institutions were incorrect or erroneous. No such attempt was made and the test carried out before the Commissioner (Appeals) by IIT Expert revealed that the contention of the appellant was justified.

An important fact overlooked by the Tribunal is that because of an earlier report of the CRCL with respect to the Delhi consignment to the effect that it was unable to test the samples for regenerated second grade MMM, the department had sent samples from the Delhi consignment to the IIT, Delhi and the IIT, Delhi vide its report dated 18.7.1996 had opined that the goods were of regenerated second grade quality. This report had been placed on record. The CEGAT accepted the fact that the goods forming part of the Delhi consignment were identical to the goods in question that is goods of the Ludhiana consignment. This IIT report left no scope to sustain the stand of the department. In our view the report obtained at the instance of the department itself had great force and it should not have been ignored.

It is important to note that the report of the CRCL, New Delhi relied upon by the department does not unequivocally state that the goods were not regenerated second grade MMM. The report is carefully worded and gives an impression that something is sought to be concealed rather than truth being

A revealed. The onus is on the department to establish that it is a case of misdeclaration of goods. The department has miserably failed to discharge that onus in the present case. Therefore, we are unable to sustain the stand of the department. The impugned judgment of the CEGAT cannot be upheld. The same is set aside. The appeal is allowed. The order of the Commissioner of Customs, Amritsar, is restored. Parties are left to bear their respective costs.

B

S.K.S.

Appeal allowed.