

A M/S. ANDROMEDA FOUNDATION INDIA P. LTD.

v.

D.G.H.S. AND ORS.

(Civil Appeal No.3620 of 2008)

MAY 16, 2008

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[TARUN CHATTERJEE AND HARJIT SINGH BEDI, JJ.]

Customs Act, 1962 – Notification dated 1.3.1988 and 10.8.1993 – Import of medical equipment availing concession in terms of exemption Notification – Authorities called upon importer to furnish specific details but it failed to do so – Withdrawal of exemption certificate – Propriety of – Held:

Proper as the conduct of the importer was not satisfactory – Having imported medical equipment on concessional terms, it was incumbent on importer to have scrupulously observed the condition of imports and follow guidelines designed to ensure that equipment was properly utilized and furnish information required by authorities.

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Appeal – Representation filed by respondent before Authorities – Pending decision of representation, respondent filed writ petition – Writ petition dismissed – In appeal, request for direction to authorities to decide the representation first – Held: Not tenable.

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The appellant was established for the purpose of conducting diagnostic tests and treating patients with specific Andrological problems. On 1st March 1988, a Notification was issued by the Government of India whereby medical equipment imported for specified purposes, was exempted from the payment of customs duty. Taking ad-

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vantage of the aforesaid Notification, the appellant imported three machines. Respondent No.1 asked the appellant to furnish some additional information, which was supplied but, Respondent No.1 was not satisfied, despite

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being called upon to furnish specific details time and again, appellant did not do so. On 6th October 1997 the appellant was refused the installation certificate for the imported medical equipment. The appellant wrote to respondent No.1 that the required information had been supplied. On 9th December 1997 respondent No.1 replied that the requisite information had not been furnished and in particular referred to the details of the use of the "Hand Held Recording Doppler" and the details of the free services which had to be given to the poorest individuals, and thus withdrew the Customs Duty Exemption Certificate which had been issued to the appellant. The appellant submitted a detailed Memorandum to respondent No.1 on 6th February 1998 but to no effect. The appellant filed the Writ Petition challenging the order dated 9th December 1997 and praying for direction to respondent No.1 to issue the Installation Certificate with respect to the imported equipment. High Court dismissed the writ petition. Hence the present appeal.

Dismissing the appeal, the Court

HELD: 1. Undoubtedly, the representation dated 6th February 1998 had been filed by the appellant before the concerned respondent and the same has not yet been decided. The plea of the appellant that it would be proper to set aside the order of the High Court and to issue a direction that the representation be first decided, cannot be accepted at this belated stage as the appellant had filed a writ petition seeking the courts' intervention in the matter and having failed he cannot now claim a decision on the representation. S.124 of the Customs Act has absolutely no applicability to the facts of the present case as this provision deals with the confiscation of goods, which is not the case before this Court. On the contrary, appellant's the conduct has been most unsatisfactory, as despite being called upon to furnish specific details, time and again, it had not done so. The information furnished

- A by the appellant on 20th July 1997 does not even remotely fulfill the requirement as per proforma that had been laid down in the Notification dated 10th August 1993. Having imported medical equipment on concessional terms, it was incumbent on the appellant to have scrupulously observed the conditions of the import and to follow the guidelines designed to ensure that the equipment was being properly utilized. [Paras 6,7] [80-C-H, 81-A]

- 2. The extract of the OPD register furnished by the appellant in its own format with regard to the provision of free facilities to the poor, hides more than it reveals. [Para 8] [84-A]

- 3. It was observed in **Mediwell Hospital and Health Care's case* that the competent authority, should continue to be vigilant and check whether the undertakings given by the applicants are being duly complied with after getting the benefit of the exemption notification and importing the equipment without payment of customs duty and if on such enquiry the authorities are satisfied that the continuing obligations are not being carried out then it would be fully open to the authority to ask the persons who have availed of the benefit of exemption to pay the duty payable in respect of the equipments which have been imported without payment of customs duty. There is large scale misuse of the medical equipment imported under the exemption notification, and in the light of the observations in *Mediwell's case*, it is essential that the authorities regularly monitor the use of the equipment. [Para 7 and 9] [81-B,C, 84-B]

- G **Mediwell Hospital & Health Care Pvt. Ltd. v. Union of India & Ors. (1997) 1 SCC 759; Commissioner of Customs (Import), Mumbai v. Jagdish Cancer & Research Centre (2001) 6 SCC 483 – relied on.*

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From the final Judgment and Order dated 8.11.2005 of A the High Court of Judicature Andhra Pradesh at Hyderabad in Writ Petition No. 14754 of 1999

Rana Mukherjee, Siddharth Gautam and Goodwill Indeevar for the Appellant.

R. Basant, Rekha Pandey and Sushma Suri for the Respondents.

The Judgment of the Court was delivered by

HARJIT SINGH BEDI, J. 1. Leave granted.

2. This appeal is directed against the judgment of the Andhra Pradesh High Court which, while exercising its writ jurisdiction under Article 226 of the Constitution, has dismissed the Writ Petition questioning the validity of the order dated 9th December 1997 issued by the Director General Health Services, New Delhi. The facts of the case are as under:

3. The appellant herein, is a private limited company established for the purpose of conducting diagnostic tests and treating patients with specific Andrological problems. On 1st March 1988, a Notification was issued by the Government of India whereby medical equipment imported for specified purposes, was exempted from the payment of customs duty. Taking advantage of the aforesaid Notification, the appellant got sanction to import four machines (though only three were imported) and also furnished the necessary documents to the authorities. Respondent No.2, the Director, Medical Education submitted a report to respondent No.3, Secretary to the Government, Health, Medical & Family Welfare Department, Govt. of A.P., intimating that he had conducted an inspection of the appellant's hospital with respect to the use of the imported equipment and the free services that were to be provided to the poor in accordance with the terms of the exemption Notification. Taking note of the report aforesaid, respondent No.3 forwarded the recommendation to respondent No.1 for the issuance of an installation certificate. It appears that respondent No.1 thereaf-

A ter asked for some additional information which too was collected and conveyed to the said officer vide letter dated 29th March 1996. The appellant, however, received two letters dated 18th June 1997 and 14th July 1997 requiring it to furnish yet more information with respect to the use of the "Hand Held Recording Doppler" for which an authorization for import had been issued. The appellant in its reply dated 28th July 1997 pointed out that this equipment had not been imported, but gave the other details to the respondent. Respondent No.1, however, wrote another letter dated 6th October 1997 to the appellant giving 10 days time to furnish the information that had been sought. Some additional information was supplied but it appears that respondent No.1 was not satisfied on which, vide annexure P5 dated 6th October 1997 the appellant was refused the installation certificate for the imported medical equipment. The appellant once again wrote to respondent No.1 that the required information had been supplied on which a reply dated 9th December 1997 was received from respondent No.1 that the information had, in fact, not been furnished and in particular referred to the details of the use of the "Hand Held Recording Doppler" and the details of the free services which had to be given to the poorest individuals. Vide order dated 9th December 1997, respondent No.1 thereupon withdrew the Customs Duty Exemption Certificate which had been issued to the appellant. The appellant submitted a detailed Memorandum to respondent No.1 on 6th February 1998 but to no effect. Being aggrieved thereby, the appellant filed the present Writ Petition challenging the order dated 9th December 1997 and praying for a direction to respondent No.1 to issue the Installation Certificate with respect to the imported equipment. A counter affidavit was filed in response to the Writ Petition and on a consideration of the matter, the Division Bench of the High Court dismissed the Writ Petition by the impugned judgment dated 8th November, 2005. It is in these circumstances that the present matter is before us.

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4. Mr. Rana Mukherjee, the learned counsel for the appellant, has raised several arguments in the course of the hearing.

He has first and foremost submitted that as the representation filed by the appellant was still pending decision, it would be appropriate that a direction be issued for a decision in that matter. He has also submitted that from the impugned judgment it appeared that the exemption granted to the appellant had been cancelled due to the following reasons: (1) that the data with respect to the use of the "Hand Held Recording Doppler" had not been supplied, (2) that the data pertaining to the OPD/IPD cases had not been supplied, (3) free OPD for one equipment had been found to be less than 40% for one year and (4) that information furnished by the institute did not clarify the OPD/ IPD free facilities, that were required to be given to those whose income was less than Rs.500/- per month and the information required had not been furnished in the prescribed format. He has pleaded that as per the information given to the respondents, the Hand Held Recording Doppler had not been imported and as far as point Nos. 2 and 3 are concerned, there was only a marginal deviation with respect to the facilities provided to the poorer sections of the population and the required information had, in fact, been supplied to the respondents as per their direction. He has in this connection referred us to extracts of the OPD register which has been appended with the reply. It has accordingly been pleaded that in the light of the judgments of this Court in *Commissioner of Customs (Import), Mumbai vs. Jagdish Cancer & Research Centre (2001) 6 SCC 483*, a marginal deviation would not involve penal consequence. It has also been submitted that as per the provisions of section 124 of the Customs Act, 1962, it was incumbent to have given the appellant a show cause notice before making the impugned order and as this procedure too had not been adopted, the High Court judgment was not maintainable.

5. The learned counsel for the respondent has, however, pointed out that as per the guidelines issued by the Ministry on 10th August 1993 superceding the earlier ones, a proforma for the more effective monitoring of the use of the equipment had been devised and as these guidelines had not been followed

- A by the appellant, despite being called upon to do so, and as the necessary information had not been furnished by the appellant in the prescribed format, there was no merit in the petition. For this plea, the learned counsel has also relied upon *Jagdish Cancer & Research Centre's case (supra)*. It has also been
- B pleaded that in the light of the judgment in *Mediwell Hospital & Health Care Pvt. Ltd. vs. Union of India & Ors.* (1997) 1 SCC 759, the submission of the necessary information in the prescribed format was a continuing obligation and as such it was incumbent on the appellant to have furnished the information as
- C per the guidelines and on its failure to do so, the action that had been taken was fully justified.

6. We have considered the arguments advanced by the learned counsel for the parties. Undoubtedly, the representation dated 6th February 1998 had been filed by the appellant

- D before the concerned respondent and the same has not yet been decided. It has accordingly been submitted by Mr. Mukherjee that it would be proper to set aside the order of the High Court and to issue a direction that the representation be first decided. We are unable to accept this plea at this belated stage as the
- E appellant had filed a writ petition seeking the courts' intervention in the matter and having failed he cannot now claim a decision on the representation. We also find that section 124 of the Customs Act has absolutely no applicability to the facts of the present case as this provision deals with the confiscation of
- F goods, which is not the case before us.

7. On the contrary, we are of the opinion that the appellant's general conduct has been most unsatisfactory, as despite being called upon to furnish specific details time and again, it had not done so. We have seen the information furnished by the

- G appellant on 20th July 1997, a copy appended as annexure P4 to the SLP Paper Book. We find that it does not even remotely fulfill the requirement as per proforma that had been laid down in the Notification dated 10th August 1993. We have no doubt that having imported medical equipment on concessional terms,
- H it was incumbent on the appellant to have scrupulously observed

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the conditions of the import and to follow the guidelines designed A
to ensure that the equipment was being properly utilized. In
Mediwell Hospital & Health Care's case (supra) this is was
what the Court had to say:

"The competent authority, therefore, should continue to be B
vigilant and check whether the undertakings given by the
applicants are being being duly complied with after getting C
the benefit of the exemption notification and importing the
equipment without payment of customs duty and if on such
enquiry the authorities are satisfied that the continuing D
obligations are not being carried out then it would be fully
open to to the authority to ask the persons who have E
availed of the benefit of exemption to pay the duty payable
in respect of the equipments which have been imported F
without payment of customs duty. Needless to mention the
Government has granted exemption from payment of
customs duty with the sole object that 40% of all outdoor
patients and entire indoor patients of the low income group
whose income is less than Rs.500 per month would be
able to receive free treatment in the Institute. That objective
must be achieved at any cost, and the very authority who
have granted such certificate of exemption would ensure
that the obligation imposed on the persons availing of the
exemption notification are being duly carried out and on
being satisfied that the said obligations have not been
discharged they can enforce realization of the customs
duty from them.

It is needless to reiterate that all the persons including the G
appellant who had the benefit of importing the hospital
equipment with exemption of customs duty under the
notification should notify in the local newspaper every
month the total number of patients they have treated and
whether 40% of them are the indigent persons below H
stipulated income of Rs.500 per month with full particulars
and address thereof which would ensure that the condition
to treat 40% of the patients free of cost would continuously

A be fulfilled. In the event of default, there should be coercive official action to perform their obligation undertaking by all such persons. This condition becomes a part of the exemption order application and strictly be enforced by all concerned including the police personnel when complaints of non-compliance are made by the indigent persons, on denial of such treatment in the hospital concerned or diagnostic centres, a the case may be."

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C 6. It has been fairly pointed out by both the learned counsel that this judgment has been overruled in a subsequent matter on a different point, but the observations hereinabove quoted still hold the field. In *Jagdish Cancer & Research Centre's case (supra)*, this Court was again called upon to consider the implications of the non-compliance with the conditions of import and it was observed thus:

D "Learned counsel for the respondent has next urged that looking to the total picture of the free treatment provided by the Centre, it is to be noticed that shortfall in providing free treatment is marginal. The percentage of persons provided free treatment cannot be precise. During a certain period, it may be a little less or a little higher. He has also drawn our attention to a chart prepared by the respondent and filed with an affidavit before CEGAT, showing that the treatment provided to outdoor patients is 39.8 per cent and instead of 10 cent indoor patients it is 8.9. per cent.

E In connection with this submission, it may be observed that this aspect of the matter has been considered by the Commissioner as well as CEGAT in some details and ultimately it has been found that there was a shortfall which is also not disputed by the respondent. A perusal of the condition in the notification indicates that on an average, at least 40 per cent of all outdoor patients should be provided free treatment. It is, thus, at least 40 per cent or maybe above. It is submitted that the condition nowhere indicates that within what period the prescribed percentage is to be achieved. It is submitted that it should be during

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the life of the equipment imported. Thus, shortfall of a particular year may be made good in the following year. We are not impressed by this argument. It would, not at all, be necessary to prescribe any period to achieve the given percentage of patients treated free. It should generally be all through the period. It being at least 40 per cent, there is hardly any occasion to say that in case there is more than 40 per cent in a given period, that may make good the deficiency in the previous or the following year. In any case, over and above all, it has not been in dispute that the Centre did not have inpatient facility. According to the condition of notification, 10% of the total beds in the hospital are to be kept reserved for patients of families having an income of less than Rs.500 per month. The case of the Centre, in this connection, is that they had an arrangement with another hospital in the proximity which is a sister concern of the Centre, with whom the Centre had entered into an agreement for reserving 10 per cent beds. Payments in respect of these inpatients is to be made by the Centre. We feel that 10 per cent of the total number of beds are supposed to be reserved for patients of such families in the hospital where the equipment is installed. The purpose of the notification for grant of exemption from payment of customs duty would not be served by making payment of expenditure incurred on some inpatients in some other hospital as alleged. It has also not been shown that the alleged arrangements had the approval of the authority concerned or that it was brought to their notice at all."

8. It has been contended by Mr. Mukherjee that as per the information provided by the appellant in his proforma, there was only a marginal deviation in the provision of free facilities to those having an income of less than Rs.500 per month. We see from a perusal of the record that this was not the only factor which had led to the action against the appellant as several cumulative factors had been taken into account, the primary one

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- A being the non-submission of the information in the prescribed format. We have also perused the extract of the OPD register furnished by the appellant in its own format with regard to the provision of free facilities to the poor. We cannot but remark that it hides more than it reveals.
- B 9. We are also conscious of the large scale misuse of the medical equipment imported under the exemption notification, and in the light of the observations in *Mediwell's case supra* , it is essential that the authorities regulatory monitor the use of the equipment. We accordingly find no merit in this appeal. Dismissed.

D.G.

Appeal dismissed