Madras High Court
H.D. Exporters vs Union Of India (Uoi) And Ors. on 27 November, 1997
Author: K Sampath
Bench: K Sampath
JUDGMENT K. Sampath, J.

1. The petition is for the issue of a writ of certiorari to call for the records of the proceedings of the second respondent in Section 8/311/87-GR.2-AP, dated 1.12.1987. and quash the same.

2. The writ petitioner is a partnership firm and the allegations in the affidavit filed in support of the writ petition are as under:

The petitioner imported one consignment of sodium cyanide and sought clearance of the same under bill of entry bearing No. IGM-1007/87, dated 6.10.1987 against REP licence bearing No. P/L/3082561, dated 12.9.1987. Clearance was sought of the goods as electroplating salt figuring under entry Sl. No. C (in Col. 4) relevant to the export products Group-A.82 of Appendix-17. The Customs Authorities were of the tentative view that the goods were imported in contravention of the Import Rate Control Regulation and issued a show cause notice dated 24.11.1987. to the petitioner. The show cause notice stated that,

(i) there was a general condition bearing No. 5 to Appendix-17 of ITC Policy AM 85-88 to the effect that no import of an item appearing in Appendix-2 Part-B should be allowed against REP licences, except of an item appearing in Appendix-2 Part-B was specifically described for import either under Col.4 or under Col.5;

(ii) the item sodium cyanide figured at Sl. No. 86 of Appendix-2 Part-B and therefore for release under REP licence a specific description thereof was necessary under Col.4 or Col.5, that is to say the entry "electroplating salt" under which release of the goods imported was claimed being in the nature of a generic description would not cover the goods;

(iii) by issue of public notice No. 124 ITC P.II.85-88 dated 8.10.1986, it had been made amply clear that the entry "electroplating salts and brighteners" figuring against entry Sl. No. A. 82 excluded sodium cyanide from its purview;

(iv) despite the position having been clarified by issue of an ITC public notice, the importers ought not to have opened a letter of credit at a time much later to the issue of public notice which could only point out the importer's mala fide intention to import the item knowing fully well that it was prohibited for import against the REP licence in question;

(v) the condition, viz. "The licence was granted under the Government of India, Ministry of Commerce and Industry Order No. 17/55 dated 7th December, 1955, as subsequently amended issued under the Imports and Exports (Control) Act, 1947 (Act XVIII of 1947) and was without prejudice to the application of any other prohibition or regulation affecting the importation of the goods which may be in force at the time of their arrival" also indicated that the Policy applicable to

the goods imported under the licence was the policy as prevalent at the time of import subject to prohibitions and regulations in force at the time of arrival of the goods; and

(vi) the Chief Chemist, Central Revenue Laboratory, New Delhi, in his letter No. C. 13-Cus./87, dated 6.11.1987 opined that sodium cyanide could not be considered as an electroplating salt.

The petitioner submitted its reply dated 23.11.1987 to the following effect:

(i) The expression "any other prohibition or regulation" in the licensed condition on the face of the licence referred to prohibition or regulation under laws other than the imports and Exports (Control) Act.

(ii) The I.T.C. public notice No. 124, dated 9.10.1986 did not effect the licence already-issued for the following reasons:

(a) Conditions to the effect that it was subject to the relevant condition in the policy hand book of Import-Export Procedures and Imports (Control) Order, 1955, as amended upto and including the date of issue of the licence, unless otherwise specified.

(b) Clarifies as follows:

Import Licences were without prejudice to other prohibitions. An import licence was issued without prejudice to the operation of other prohibitions or laws to which the imported goods might, be subject. For instance, if, under the Drugs Control Act, the Arms Act, the Explosives Act, the Excise Act and such other Acts, as may apply to the goods sought to be imported, will have to be strictly followed.

The petitioner referred to the decision of the Bombay High Court in Jaint Veg. Oils and Chemicals v. Union of India . It also relied on the judgment of the Supreme Court in Bharat Barrel and Drum Manufacturing Co. v. The Collector of Customs, Bombay on a similar issue.

(c) The public notice No. 124/dated 9.10.1986 contained on amendment to the entry relating to electroplating salts in the policy against Export Product A. 82 and the stand taken by the department that sodium cyanide was not allowable under REP licences of A.82 category issued prior to the above amendment was to give retrospective effect to the said amendment which was not otherwise permissible by settled law.

(iii) As regards the Chief Chemist's opinion that sodium cyanide could not be considered as an electroplating salt, reference was invited to the Condensed Chemical Dictionary (page 938-10th Edition) which would show that one of the uses of sodium cyanide was "electroplating.

The second respondent did not agree with the explanation offered by the petitioner and ordered confiscation of the goods covered by bill of entry IM-1007/87 dated 6.10.1987 valued at Rs. 2,91,524.31 (CIF) under Section 111(d) of the Customs Act read with Section 3(2) of the Imports and

Exports (Control) Act, 1947, but allowed redemption on payment of a fine of Rs. 2 lakhs.

Even before the adjudication, the second respondent permitted the petitioner to keep the goods in bond. The second respondent further insisted upon the petitioner paying the duty amount of Rs. 4,33,000/-approximately.

Immediately after receipt of the order of the second respondent, the petitioner filed an appeal before the Customs, Excise and Gold Control Appellate Tribunal at Madras and at the time of filing of the writ petition the said appeal had not been numbered. The said appeal had been filed by way of abundant caution. The present writ petition has been filed questioning the order of the second respondent as, according to the writ petitioner, there was no other adequate, alternative and effective legal remedy available.

3. The grounds raised in the writ petition are as under:

The second respondent adjudicating authority had to consider whether sodium cyanide was an electroplating salt and brightener, that is to say whether it got the characteristics of an electroplating salt and brightener. But, the second respondent took up for consideration the issue whether the REP licence issued against A. 82 category of Appendix-17 was valid for the import of sodium cyanide which was specifically figuring against Sl. No. 86 of Appendix-2 Part-B. If sodium cyanide was an electroplating salt and a brightener, the REP licence granted against the export of items in A. 82 of Appendix -17 would certainly permit the import of sodium cyanide, notwithstanding its occurrence in any other part of the policy. The relevant consideration of the issue in question not having been done by the second respondent on the relevant factor, the resultant order dated 1.12.1987 was a nullity. The petitioner was therefore not bound to file an appeal to the Customs, Excise and Gold Control Appellate Tribunal, Madras. Again, instead of enumerating all varieties and kinds of electroplating salt and brighteners, Col.4 of Appendix-17 referred only to electroplating salt and brighteners and that had to be understood not in its technical sense, but in its commercial sense as to how the trade understood it. The appearance of a specified item of electroplating salt and brighteners in Appendix-2 Part-B was not considered by the policy makers as sufficient for prohibiting the import of that item appearing in Appendix-2 Part-B, unless it was so stated in Col.5 of Appendix-17. As an instance in point, sodium cyanide though it appeared in Appendix-2 Part-B, still the policy makers had made it not eligible for import under REP licence by a public notice by introducing sufficient remarks under Col.5 of Appendix-17. Therefore, what ultimately determined the permissibility of import of items in Col.4 of Appendix-17 was the remark in Col.5 of the same Appendix. That it was the scheme of the policy makers for denying import of some of the items under Col.4 which were specifically appearing in Appendix-2 Part-B would be clear from public notice No. 124, dated 9.10.1986. Thirdly, the general condition No. 5 of Appendix-17 in the policy for the year 1988-91 read as follows:

No import of an item appearing in Appendix-2 or Appendix-5 Part-B should be allowed against REP licences, except if an item appearing in Appendix-2 Part-B or Appendix-5 Part-B was specifically described for import under Col.4.

There was no reference to Col.5 of Appendix-17 in para 5 of the currency policy. This would also make the position clear that the remarks in Col.5 under the previous policy were felt necessary to deny import of items in Col.4 of Appendix-17. The subject goods were specifically excluded by the issue of an ITC public notice No. 124 dated 9.10.1986. The REP licence under which clearance was sought was issued prior to the notice. Therefore, it was manifest that import of sodium cyanide subsequent to 9.10.1986 was not permissible under REP licence of the category mentioned above. The petitioner, on this ground also was entitled to have the subject goods cleared.

4. Respondents 1 to 3 have filed a common counter through the Assistant Collector of Customs, Legal Section, Custom House, Madras1, contending as follows:

The main issue was whether sodium cyanide could be allowed against a REP licence, when it figured as a specific item under Appendix-2, Part-B, Sl. No. 86 of 1985-88 policy. There was a general condition under para 5 in Appendix-17 in the Import and Export Policy 1985-88 to the effect that no import of an item appearing in Appendix2, Part-B, should be allowed against REP licence except if an item appearing in Appendix-2 Part-B was specifically described for import either under Col.4 or under Col.5 of Appendix-17 of the Import and Export Policy 1985-88. Since sodium cyanide was not mentioned under Col.4 of Appendix-17 the import was unauthorised. Even if sodium cyanide was considered as an electroplating salt as per interpretation of Rule (c) of para 21, an item with a specific description in Appendix-2 Part-B or Part-3A will prevail over an item with a generic description in any of these appendices. Sodium cyanide being a specific item under Appendix-2 Part-B it could not be allowed to be imported under Appendix-17 under a generic description as electroplating salt. The import was therefore unauthorised and as such the orders passed by the adjudicating authority were lawful and binding. When the policy makers had specifically listed sodium cyanide under Appendix-2 Part- B making it a restricted item for import, there was no need for further elaboration. It was done to bring it out of the purview of the generic description of electroplating salt under Appendix-17. The public notice issued either for clarification or for confirmation did not take out the basic fact that sodium cyanide was more specific than electroplating salt. The purpose of the public notice might be to preclude any change of misinterpretation of the policy on the part of the importer. It was only clarificatory in nature. A remark under Col.5 was not a must to deny import of an item when such an item was specifically mentioned under Appendix-2 Part-B as a restricted item and it needed specific licence for import. Sodium cyanide was a specific item and had precedence over generic electroplating salt in terms of para 21(c) of interpretative rules. Sodium cyanide could not be allowed against on REP licence even earlier to the public notice. The importers also opened the Letter of Credit much after the public notice and the condition laid down on the fact of the licence also prohibited the import.

5. In the affidavit in support of the writ petition, the petitioner had made another submission that though the goods were bonded, the petitioner was compelled to pay a sum of Rs. 4,33,000/- by way of duty. This bonding was permitted after the goods had incurred demurrage. Even after bonding the goods were incurring heavy rental charges. In the circumstances, the petitioner prayed for direction from the court for the release of the goods and the issue of necessary detention certificate by the Customs Authorities for the period for which the petitioner could not clear the goods. In the counter filed on behalf of respondents 1 to 3 it was contended that the petitioners had violated the

ITC regulations and no detention certificate could be issued, for the sodium cyanide was imported unauthorisedly without a specific licence.

6. The fourth respondent in its counter through its Docks Manager confirmed its answer to the requests made by the petitioner for the release of the consignment for issuance of necessary detention certificate and for stay of the operation of the order of the second respondent.

7. The petitioner also filed an application W.M. P. No. 23210/88. This Court by order dated 16.12.1988 directed the second respondent to consider the question of issuance of a detention certificate and pass orders expeditiously. The fourth respondent pointed out that it could act on a detention certificate issued by the Customs Department only if the same was certified due to analytical test or Import Trade Control formalities in accordance with Clauses 13(a) and (b) of Scale-A Chapter-IV, Book I of the Scale of Rates of the Madras Port Trust. In all cases of detention, Customs Department should certify that the detention was not due to any fault or negligence on the part of the importer and that the detention was due to analytical test or for Import Trade Control formalities. If the goods were to be cleared from the Customs on payment of redemption fine, the detention by Customs if any, of the goods whilst in Port Trust's transit area and custody could not be deemed as not attributable to any fault or negligence on the part of the importer. If the Customs issued a detention certificate not falling under the above said provisions already referred to, the fourth respondent could not act upon such certificate under its rules. The FCL container relating to the petitioner was landed ex.m. v. Isar Express on 25.10.1987. The free days for the goods expired on 4.11.1987 and demurrage accrued from 5.11.1987. M/s. A.P. Srinivasan & Sons, the clearing agents of the petitioner filed import application No. 962/253, dated 10.2.1988 for the clearance of the said consigement. They produced the bill of entry No. Section 49/4/88 Group-2, dated 2.2.1986 with the Customs Order for passing the consignment into bond under Section 49/59 of the Customs Act, 1962 on 11.2.1988. Accordingly, the said consignment was, allowed to be cleared on 11.2.1988 from the Trust's transit area on recovery of the undermentioned Trust on the said import application.

wharfage ...	Rs. 250.00
Demurrage (from 5.11.1987 to 12.2.1988)	Rs. 66,625.00
	Rs. 66,875.00

8. It is brought to my notice by the learned Counsel appearing for respondents 1 to 3 that the petitioner, pursued--the appeal filed by it before the Customs, Excise and Gold Control Appellate Tribunal in Appeal No. C/460/88/MAS and by order dated 12.1.1990 the Tribunal dismissed the appeal on merits, though it reduced the fine from Rs. 1 lakh to Rs. 77,000/-. It is the submission on behalf of respondents 1 to 3 that having pursued the remedy and courted an order, it is not open to the petitioner to challenge the order of the second respondent under Article 226 of the Constitution before this Court.

9. Countering this contention, Mr. R. Thiyagarajan, learned Senior Counsel, submitted that the order passed by the Collector was a nullity and it was open to the petitioner to challenge the order, notwithstanding the petitioner having filed a statutory appeal before the Tribunal.

10. The contention of the learned Senior Counsel on merits may be open to examination if the order of the second respondent is considered to be a nullity. In my view, the order of the second respondent is not a nullity. It was open to the second respondent to consider the question whether the petitioner satisfied the requirements of the terms and conditions of the licence and in so doing, the second respondent found that the import was against the terms and conditions and was therefore illegal. He was well within his rights to decide the question that arose for consideration.

11. The word "Nullity" is defined in Wharton Law Lexicon as follows:

A thing which is null and void; an error in litigation which is incurable.

In P. Ramanatha Aiyar Law Lexicon, the word has been described as follows:

A proceeding that is taken without any foundation for it or that is essentially defective or that is expressly declared to be "nullity" by a statute.

12. In the instant case, ITC public notice had been issued much before the L.C was opened and there was absolutely no reason for the petitioner to have gone ahead with the opening of the L.C. after the issuance of the public notice. All the aspects had been taken into consideration by the Collector in coming to the decision that he did and as already stated, the order of the Collector cannot be considered to be a nullity.

13. When once it is decided that way, then the question is whether the present writ petition would be maintainable. In Jai Singh v. Union of India and Ors. , the Supreme Court held that parallel remedies in respect of the same subject matter could not be pursued at the same time. The Supreme Court also observed that in a petition involving disputed questions of fact, the High Court should not grant remedy when an alternative remedy lay.

14. In Bombay Metropolitan Region Development Authority, Bombay v. Gokak Patel Volkart Ltd. and Ors. , the Supreme Court observed that where there was the existence of an alternative remedy and the party also had availed of that alternative remedy and at the time he filed the writ petition, his appeal before the statutory authority was pending, the writ petition was not maintainable. The situation in the instant case is identical. The writ petitioner had filed an appeal before the Appellate Tribunal, though at the time he filed the writ petition it had not been numbered. After the writ petition was numbered and admitted, the writ petitioner had got the appeal numbered and taken its chance before the Appellate Tribunal. The Appellate Tribunal rejected the case of the writ petitioner on merits and dismissed the appeal, though it reduced the fine. I have already held that the proceeding culminating in the order of the Collector is not a nullity. The appeal was perfectly competent and the petitioner had availed of it, though in the affidavit in support of the writ petition it is stated that the appeal had been filed by way of abundant caution. In my view, the petitioner

ought to have elected his remedy. He ought not to have pursued the appeal if, as alleged by him, it was not an effective alternative remedy. The doctrine of election of remedies generally regarded as being an application of the law of estoppel upon a theory that a party cannot in the assertion or prosecution of the rights take inconsistent positions.

It is a principle conformable to good sense of natural justice that a man cannot, in the language of the law, approbate and reprobate--that he cannot accept a benefit under instrument without adopting the whole of it conforming to all its provisions, and renouncing every right inconsistent with them. His doing so is an implied condition of benefit. This principle or implied condition is the ground of the equitable doctrine of election.

(Strentfield v. Strentfield V.735 Ca.t. Talb. 176 : 25 ER 724; Rogers v. Jones (1876) 3 Ch.D. 688)

15. Having chosen to pursue his remedy by way of appeal, the writ petitioner ought to have either withdrawn the appeal or taken its chance in the writ petition. Having pursued it and having lost it, it is not open to the petitioner to say that he filed the appeal by way of abundant caution and that it was not an effective alternative remedy. The writ petitioner had deliberately chosen to pursue both the remedies. I am therefore of the clear view that the writ petition itself is not maintainable.

16. In Awadh Bihari Yadav and Ors. v. State of Bihar and Ors. , the Supreme Court observed that parallel remedies in respect of the same matter at the same time were not permissible. There should be extraordinary situation or circumstances warranting a different approach. I do not think that any extraordinary situation or circumstance exists in the instant case for making a departure from the established legal position that a person cannot approbate and reprobate.

17. In Swetambar Sthanakwasi Jain Samiti and Anr. v. Alleged Committee of Management Sri RJI College, Agra, and Ors. , the Supreme Court has observed that the writ jurisdiction is meant for doing justice between the parties, where it cannot be done in any other forum.

18. In Executive Engineer, Bihar State Housing Board v. Ramesh Kumar Singh and Ors. the Supreme Court has held that in adjudications involving disputed questions of fact requiring investigation, proceedings under Article 226 of the Constitution can hardly be an appropriate remedy.

19. In view of the discussion above, I hold that the writ petition is bound to fail. It is not necessary to refer to the other decisions cited by the learned Senior Counsel on the merits of the stand of the writ petitioner. The writ petition is therefore dismissed. Rule NISI shall stand vacated. There will be no order as to costs. Consequently, W.M.P. No. 23208/88 is also dismissed.