Supreme Court of India
Jain Exports Pvt. Ltd. And Anr. vs Union Of India (Uoi) And Ors. on 14 July, 1993
Equivalent citations: 1993 (44) ECC 189, 1993 ECR 225 SC, 1993 (66) ELT 537 a SC, JT 1993 (4) SC 126, 1992 (1) SCALE 7
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Bench: M V Ahmadi, J Verma
JUDGMENT A.M. Ahmadi, J.

1. Two separate consignments of Refined Industrial Coconut Oil were imported by the appellants/ petitioners M/s. Jain Exports Private Ltd., hereinafter called 'the importers', on the 10th and 22nd of September 1982 at Kandla Port from Colombo weighing about 3002. 552 M.Tons and 5342. 369 M.Tons of the GIF value of Rs. 1,63,67,050 and Rs. 2,91,21,450, respectively. Different Bills of Entry for clearance of the said consignments for home consumption were filed with the concerned authorities. The importers claimed the benefit of preferential rate of duty in terms of Customs Notification No. 431 dated 1st November, 1976 as amended from time to time. Permission to discharge the cargo from the vessels to the shore tanks was allowed in terms of Section 49 of the Customs Act, 1962 after obtaining representative samples. After the cargo was thus discharged the shore tanks were sealed. Now under the import policy of 1980-81 whereunder the two consignments were imported, 'coconut oil' was mentioned under Entry 5 of Appendix 9 thereof as a canalised item which could be imported through the the State Trading Corporation (STC) only. Admittedly, these imports were not made through STC. Even though the imports are stated to have been made under the import policy of 1980-81, the Letter of Credit was opened on 31st July, 1982. The importers being merely holders of Letters of Authority were expected to import the goods and deliver them to the licence holders who in turn would dispose of the goods to actual users. Indisputably the goods were sold on high-seas basis. The importers contended that only the edible variety of coconut oil was a canalised item, a contention which was disputed by the department. Giving detailed reasons the Customs Collectorate, Ahmedabad, issued notices dated 24th and 26th November, 1982 requiring the importers to show cause why the said two consignments should not be confiscated under Section 111(d) of the Customs Act since the import was illegal, in that, it was in contravention of Section 3(1) of the Imports & Exports (Control) Act, 1947 read with Section 11 of the Customs Act. The notices also threatened imposition of penalty under Section 112 of the said Act besides recovery of leviable duty. The importers were given 15 days to show cause, supported by documentary evidence on which reliance may be placed, and to indicate if a personal hearing was desired. The importers sent detailed replies dated 30th November, 1982 and 2nd December, 1982 to the said show cause notices wherein it was averred that the import was legal and valid and in any case bona fide and the various grounds on which the show cause notices were based were totally misconceived and ill-founded. The importers, therefore, prayed that the threatened action may be dropped. Two separate adjudication orders, bearing Nos. 6 and 7 of 1982, were made by the Collector of Customs & Central Excise, Ahmedabad, whereby he ordered confiscation of both the consignments under Section 111(d) of the Customs Act with an option to redeem the goods on payment of a fine of Rs. 2,00,00,000 (Rupees two crores only) and Rs. 3,00,00,000 (Rupees three crores only), respectively. No penalty was levied under Section 112 of the said Act even though the Collector found that the 'import policy and its provisions were deliberately flouted' as in his view the redemption fine imposed in lieu of confiscation of the impugned goods was sufficient to meet the ends of justice. Lastly, it was said that

if the importers exercise their option to redeem the goods they may clear the goods on payment of duty at preferential rates applicable to goods of Sri Lanka origin. Both these orders passed on 17th and 18th December, 1982, respectively, were issued on 20th December, 1982. Both these orders were challenged by way of Writ Petitions Nos. 4037 and 4038 of 1982 under Articles 226/227 of the Constitution of India in the High Court of Delhi which petitions were referred to the Full Bench of the High Court and were disposed of by a common judgment dated 20th December, 1984. The High Court by majority dismissed the writ petitions but permitted the importers to approach the Central Excise and Gold Control Tribunal, hereinafter called 'the Tribunal', by way of appeals insofar as the order in regard to the redemption fine was concerned. The judgment of the High, Court is .

2. Against the judgment of the High Court insofar as it related t6 the validity of the import, the importers approached this Court by way of Special Leave. The two appeals being Civil Appeals Nos. 2705 and 5383 of 1985 were disposed of by a common judgment on 5th May, 1988, vide Jain Exports (P) Ltd. and Anr. v. Union of India and Ors. (1988) 3 SCR 953. Before this Court the following four points were raised:

(1) The import policy of which year would be applicable to the facts of the present case - the period during which the licences were issued or the time when import actually took place.

(2) Whether "coconut oil" appearing in para 5 of Appendix 9 of the Import Policy of 1980-81 was confined to the edible variety or covered the individual variety.

(3) Whether in the face of the decision of the Board and Central Government as the statutory appellate and revisional authorities, it was open to the Collector functioning in lower ties to take a contrary view of the matter in exercise of quasi judicial jurisdiction; and (4) Whether the order of the Collector was vitiated for breach of rules of natural justice, and collateral considerations in the making of the orders.

It may be noticed that the importers did not challenge that part of the High Court order whereby the importers were permitted to approach the Tribunal in regard to the redemption fine. This Court noted that that part of the High Court's order had become final. In fact in response to that order the importers had preferred two appeals to the Tribunal, being appeals Nos. 863 and 864 of 1985. On the four questions raised before this Court, this Court held (i) the terms of the import policy of 1980-81 applied to the facts of the case; ii) under the said import policy of 1980-81, all varieties of coconut oil, edible as well as non-edible, were included in Paragraph 5 of Appendix 9 and hence there was no warrant for the assumption that it covered the edible variety only; (iii) on a true interpretation of Entry 5 of Appendix 9 of the import policy in question, if it is found that the entry 'Coconut Oil' covered both the edible and non-edible variety, the letter of the State Trading Corporation was of no avail and the fact that the Collector of Customs was bound by the decision of the Board and Central Government could not alter the situation since the matter had crossed that stage and this Court was free to place its own interpretation on the concerned entry; and (iv) the Collector's order does not suffer from vice of breach of principles of natural justice. In this view of the matter the appeals were dismissed.

3. The two appeals arising in consequence of the majority judgment of the Delhi High Court on the question of the quantum of the redemption fine came up for hearing before a two member bench of the Tribunal at Bombay. The Technical Member by his judgment and order dated 4th April, 1986 took the view that the appeals deserved to be dismissed both on merits and as barred by limitation. The judicial Member by his judgment and order dated 4th June, 1986 took the view that the appeal should be partly allowed by reducing the redemption fine to 35% of the landing cost of the two consignments. In view of this difference of opinion between the two members, the matter was placed before the President of the Tribunal in terms of Section 129C(5) of the Customs Act. Thereupon, on the directions of the President, the appeals were placed for disposal before a three-member Bench at New Delhi. The Bench by its order dated 5th December, 1986 took the view that since the Delhi High Court had remitted the matters to the Tribunal for consideration of the question of quantum of redemption fines levied by the Collector of Customs, it was not open to the Tribunal to dismiss the appeals as barred by limitation. However, on the merits of the matters the Tribunal concurred with the view of the Member (Technical) that both the appeals should be dismissed. In other words the three-member Bench of the Tribunal did not, in the facts and circumstances of the cases, favour any reduction in the redemption fine in either case. In view of the opinion so expressed by the larger Bench, the appeals were ultimately dismissed by the Tribunal.

4. The importers feeling aggrieved by this decision rendered by the Tribunal preferred a Writ Petition No. 568 of 1989 in this Court under Article 32 of the Constitution of India which came to be finally disposed of on January 23, 1990. Taking note of the observations of the Tribunal that it was faced with a Hobson's choice because no material was placed before it by the department or by the importers on the question of quantum of the redemption fine, this Court felt that the conclusion of the Tribunal that the onus lay on the importers to show that the redemption fine which was within the range of Section 125 of the Customs Act was excessive was misconceived. This Court pointed out that the contention of the importers that their action was bona fide had not received due consideration by the Tribunal even though it was supported by documentary evidence as well as the observations of this Court in the earlier round of litigation. Since the question of the import being bona fide or otherwise was relevant as held by this Court in. D. Navinchandra & Co. and Ors. v. Union of India and Ors. and B.Vijay Kumar v. Union of India , the Tribunal should have considered all the facts and circumstances of the case to determine if the importers were right in contending that their action was bona fide, a fact which had a direct bearing on the question of the quantum of the redemption fine. So holding this Court set aside the Tribunal's order dated 5th December, 1986 and remitted the appeals to the Tribunal for reconsideration in the light of the observations of the Court in the judgment. The parties were given liberty to place additional material relevant to the question of quantum of the redemption fine on record if they so desired and the Tribunal was directed to dispose of the appeals within three months which time was extended upto 31st August, 1990.

5. Pursuant to the above directions both the appeals were reheard by the Tribunal on the limited question regarding the quantum of the redemption fine. The Tribunal, after taking note of the observations in the judgment of this Court in the aforesaid writ petition and after examining the material placed before it, came to the conclusion that the importers' action could not be said to be bona fide as contended by them and dismissed both the appeals by its order dated 12th June, 1990.

Against the said decision of the Tribunal the importers approached this Court under Article 136 of the Constitution. On this Court granting leave to appeal, the Special Leave Petitions Nos. 9955 & 9956 of 1990 came to be numbered as Civil Appeals Nos. 4917 & 4918 of 1991. Both the appeals were allowed by the Court's order dated 29th November, 1991. This Court took note of the fact that the question whether industrial coconut oil was canalised item was finally set at rest by the decision of the Delhi High Court against which this Court had refused to interfere in appeal under Article 136 of the Constitution and hence the only question which survived related to the bona fides of the appellants in importing the said commodity as it would influence the Courts decision on the quantum of the redemption fine. On the question of fixation of the quantum of the redemption fine, five circumstances were relied upon in support of the plea of bona fides. These had not weighed with the Tribunal. This Court, however, felt that the first four circumstances were relevant and having regard to the view taken in the case of M/s. Jayant Oil Mills Pvt. Ltd., it would appear that the Customs Collectorate was guilty of hostile discrimination. So hold the redemption fine was reduced to 35% of Rupees Five crores. Excess payment was ordered to be refunded within six months failing which, interest at 15% per annum was ordered. No order was passed as to costs. The respondents preferred review petitions -R.P.Nos. 75-76 and 635 of 1992 which were allowed on 21st October, 1992 and these appeals and Writ Petition were directed to be reheard. Hence this Court's earlier order dated 29th November, 1991 in these appeals and order and order dated 23rd January, 1990 in Writ Petition ceased to be operative.

6. Since the question regarding the legality and the validity of the imports has been finally concluded by this Court in the appeal arising from the decision of the Delhi High Court, the only point which remains for our consideration is whether the importers had acted bona fide, in that, they had in good faith assumed that the non-edible variety of coconut oil was not a canalised item and could, therefore, be imported under Open General Licence (OGL). As stated earlier the importers' contention that Refined Industrial Coconut Oil was not a canalised item under item 5 of Appendix 9 of the relevant import policy has already been negatived by this Court. Therefore, there can be no dispute that the import of the two consignments in question was illegal and liable to confiscation under Section 111(d) of the Customs Act. Ordinarily, therefore, the Collector of Customs was entitled to impose a redemption fine in lieu of confiscation, apart from penalty under Section 112 of the Customs Act. The quantum of the redemption fine would depend on the facts and circumstances of each case and no hard and fast rule can be laid down in that behalf. So also the mere fact that the importers had acted in good faith and bona fide will not entitle them to claim that the entire redemption fine must be waived. Even in such cases the fixation of the quantum of the redemption fee will depend on the totality of the facts and circumstances of the case. Therefore, even if in a given case the importers show that their action was bona fide, that by itself will not entitle them to a waiver of the full redemption fine unless the totality of the facts of the case so warrant. We must, therefore, at the outset clarify that we do not read the decision in D. Navinchandra & Co. and B. Vijay Kumar (supra) as laying down any such absolute rule.

7. We now come to the question whether on the facts and in the circumstances of this case there is warrant for waiving the redemption fine, wholly or partly. The learned counsel for the importers placed reliance on the following facts to make good his submission that the importers had acted bona fide in believing that the non-edible variety of coconut oil was not a canalised item and could,

therefore, be imported under the OGL. The import was made against the additional licences issued during the policy period 1980-81 and hence the fact that the Letters of Credit were opened on 31st July, 1982 and the imports were actually made in September 1982 was of no consequence. The further fact that the edible variety of coconut oil was a canalised item under the 1982-83 policy period should not weigh in judging the bona fides of the importers. The importers believed in good faith that the non-edible variety was not canalised as they were so informed by the Chief Marketing Manager of STC by his letter dated 30th October, 1980.

8. Besides, counsel urged, when M/s. Jain Shudh Vanaspati Ltd., a sister concern, imported industrial coconut oil under the 1980-81 policy, the Collector of Customs by his order dated 17th December, 1980 held the import illegal and imposed a redemption fine of Rs. 25 lakhs. This view was reversed by the Board by its order dated 23rd January, 1981 which view was confirmed by the Government of India by its order dated 31st March, 1981. Subsequently, in May-June 1981 clearances were permitted both by the Bombay and Kandla offices of the customs department and hence the importers had every reason to believe that the non-edible variety could be imported under the OGL. The Collector of Customs, Ahmedabad, was bound by this view but he chose to ignore the same which was not proper. Reliance was also placed on certain imports made subsequent to the imports in question under the 1980-81 policy which were cleared vide Bills of Entry of January, 1983 of M/s. Jayant Oil Mills and Allana Impex Pvt.Ltd. Lastly, attention was invited to a letter dated July 12, 1985 of the DGTD to M/s. General Foods Pvt. Ltd., Bombay, stating that the non-edible variety could be imported under the OGL if it related to the 1980-81 policy. Counsel concluded by saying that the importers had paid the redemption fine of Rs. 3 crores and Rs. 2 crores on 24th January, 1983 and 23rd February 1983 to show their bona fides. We now proceed to deal with these submissions.

9. Before we address ourselves to the question whether the facts and circumstances of this case warrant a total or partial waiver of the redemption fine it is necessary to bear in mind the fact that the fixation of the quantum of the redemption is in exercise of the discretionary jurisdiction of the authorities under the Customs Act and ordinarily this Court, while exercising jurisdiction either under Article 32 or under Article 136 of the Constitution, would be slow to interfere with such an order unless it is shown to be thoroughly arbitrary or whimsical resulting in gross miscarriage of justice. As pointed out above, the mere fact that the action of the importers was bona fide will not per se entitle them to a waiver of the entire redemption fine but the Court would have to bear in mind the totality of the circumstances and the benefit, if any, derived by the importers from the illegal import. It is in this background that we must examine the question whether the Collector's order imposing the redemption fine and the tribunal's refusal to interfere therewith require interference at out hands in the present proceedings.

10. At the outset we deem it proper to mention that the importers are an experienced Export House well versed in the policies and procedures in regard to the import and export of goods. Their function in the transactions in question was to import the goods as holders of Letters of Authority and pass them over to the licence holders who in turn would dispose of the goods to actual users in accordance with the terms and conditions of the licence. However, it is well established that the consignments in question were sold on high-sea-sale basis under the cover of the Letters of

Authority and separate agreements with the licence holders. The importers have not, despite the opportunity given to place on record such material as is relevant to the question of bona fides, disclosed information and details regarding the transaction for appreciating why the sale was effected on high seas and the profit, if any, derived there from. The Tribunal has noted:

However, the appellants, despite the direction from the Delhi High Court to produce relevant details for determining the quantum of redemption fine have not given any details regarding the landed costs and other expenses including the sale price on high sea sale basis for arriving at the appropriate quantum of profit.

Even during the course of the hearing before us we repeatedly inquired of counsel for the importers to show us from the record whether or not the transactions in question had yielded any profit and, if yes, the quantum thereof but we did not receive a satisfactory reply. In fact as pointed out by the Tribunal the importers had failed to place the said material on record for reasons not difficult to guess. Therefore, even after two opportunities, the first given by the Delhi High Court and the second by this Court by the order under review, the importers have deliberately failed to place this vital information on record. Counsel for the importers requested us to give him time to procure and place the said material on record but we saw no reason to grant further indulgence and permit the importers to do so belatedly when they had failed to do so for no valid reason. Even at this belated stage no particulars regarding the material proposed to be produced were given. Besides such belated production would prejudice the opposite side. That apart, such evidence can have probative value only if produced promptly and not otherwise. It is thus obvious that the failure to produce such vital and material evidence impinges on the claim that the importers had acted in good faith. This single fact in our view is sufficient to non-suit the importers.

11. It is indeed true that in the case of Jain Shudh Vanaspati Ltd., the Board as well as the Government of India had while interpreting the relevant entry in the import policy of 1980-81, taken the view that the non-edible variety of coconut oil was not canalised. Even the Chief Marketing Manager of the STC had by his letter dated 30th October, 1980 conveyed that the non-edible variety was not canalised through them. True it is that an authoritative clarification could have been obtained from the Chief Controller of Imports & Exports who was competent to clarify the position and not the Chief Marketing Manager of the STC. This is also clear from what this Court observed in the decision in appeals arising from the decision of the Delhi High Court. This Court said :

The STC was not competent to bind the customs authorities in respect of their statutory functioning-

But we cannot overlook the fact that the view taken in the case of Jain Shudh Vanaspati Ltd., was that the non-edible variety was not a canalised item. If the matter had rested there it would have lent support to the submission of the importers that they bona fide believed that the non-edible variety could be imported under the OGL since it was not a canalised item. But since the imports in question, though under the 1980-81 policy, took place in 1982 under the Letter of Credit dated 31st July, 1982, the importers who are experienced in handling import and export of goods and well versed with the policies and procedures in that behalf must be assumed to be aware of the subsequent developments. The Chief Controller of Imports & Exports had issued circulars from time

to time clarifying that the non-edible variety was a canalised item and the Collector of Customs, Ahmedabad had placed reliance thereon. This was the precise grievance made by the importers before the Delhi High Court, vide paragraph 48 of the judgment. The Collector has pointed out that while revalidating the additional licence dated 4th November, 1980 it was specifically stipulated that during the period of revalidation items which do not appear in Appendix 5 and 7 of the 1982-83 import policy shall not be imported and since the commodity in question did not figure in either of the appendix it could not be imported under the OGL. The importers who are well versed would have realised that in view of this position the statement in the letter of the STC cannot carry any weight. In this background if the Tribunal felt that the letter of the STC was being used as a cover to put forth the plea that the the imports were made bona fide, it can not be said that inference raised by the Tribunal was unwarranted. In the circumstances it is difficult to believe that the importers were not alive to this changed situation which necessitated import of both varieties of coconut oil through the STC. The letter of the DGTD was issued in 1985 much after the import in September 1982 and hence it could not have influenced the importers in importing the two consignments and, therefore, can be of no avail in determining the mental approach of the importers prior to actual import. For the same reason the decisions in the case of M/s. Jayant Oil Mills and M/s. Allana Impex cannot advance the case of the importers.

12. Before we part we must mention that after counsel for the importers could not secure an adjournment when the matter was taken up for hearing on 23rd April, 1993, he argued the matter at length. It was only during the course of the hearing that we inquired of him if he could point out from the record whether or not the transaction had yielded any profit. When he could not give a satisfactory reply he again asked for an adjournment to produce the relevant material which we declined. The hearing concluded on the same day. Notwithstanding the same their advocate on record filed a letter dated 28th/30th April, 1993 stating that an application was moved for rehearing because a very crucial document having a direct bearing was not brought to the notice of the Court. Even with these applications Nos. I.A.3 & 4 of 1993 the so-called crucial document was not appended. In these applications the rehearing was sought on the very same grounds on which an adjournment was sought earlier. This was followed by yet another communication which included a certificate of the Chartered Accountant to which was appended a statement of accounts showing that the importers had incurred a substantial loss in the sale of high-seas-basis. We are indeed surprised at the attitude of the learned Advocates representing the importers. It betrays a misconception that any document can be produced at any time and stage of the proceedings and the Court can be expected to reassemble to give a fresh hearing or a second innings to fill the gaps left by the importers because of their default merely because they have the means to afford it. We cannot countenance such a demand and must deprecate it strongly. We do so and reject both the applications. To allow them would encourage multiplicity of hearings and create a wrong precedent.

13. For the foregoing reasons we are satisfied that the importers' contention that the redemption fine should be wholly waived or substantially reduced as their action in importing the goods under OGL was bona fide is not well founded. Even if the transaction has in fact resulted in a loss (we cannot deliver into it for the first time in this Court) it will not make any difference. We feel that taking cover under the earlier orders passed in the case of M/s. Jain Shudh Vanaspati Ltd., and the letter of the STC, the importers have tried to create the impression that they were innocent victims

of the subsequent interpretation put on the relevant entry, ignoring the fact that the licences were revalidated on certain terms and conditions which did not permit import except through the STC. We are, therefore, satisfied that the import under OGL was not a bona fide act. We, therefore, dismiss both the appeals as well as the writ petition with costs. Hearing cost quantified at Rs. 10,000/-.