

A COMMISSIONER OF CUSTOMS, MUMBAI
v.
M/S. VIRGO STEELS, BOMBAY AND ANR.

APRIL 4, 2002

B [S.P. BHARUCHA, CJ., N. SANTOSH HEGDE AND
ARIJIT PASAYAT, JJ.]

C *Customs Act, 1962—Section 28—Notice of payment of duty, interest—
Principle of waiver—Applicability—Whether mandatory requirement of
issuance of notice under the Section can be waived and whether notice under
the Section being a condition precedent to invoke jurisdiction of the officer
concerned, in the absence of such notice proceedings initiated for recovery of
D duty became void—On facts, held right of notice being personal to the person
concerned can be waived by that person—Further the notice being condition
precedent is referable to the procedural requirement of the section and not to
be jurisdictional aspect of the proper officer to recover the escaped duty—
Thus in absence of such notice proceedings initiated for recovery of duty is
not void.*

E A Cement company floated tender inviting supply of steel bars for a
project. Respondents offered to supply steel bars and the company accepted
the offer. Respondents obtained an advance licence under the Deemed Export
Scheme for duty-free importation of steel. Company however abandoned the
work of expansion and the licence for importation of duty-free steel became
F invalid. In spite of this, respondents imported certain quantities of steel duty-
free. Since the import made by respondents after the abandonment of the
project was in contravention of the provisions of the Customs Act, 1962
Commissioner of Customs decided to initiate proceedings against respondents.
Respondents wrote a letter to Assistant Collector of Customs admitting that
the duty-free import was illegal and they were ready to pay the duty
chargeable under the said import as also any other penalty imposed. They
G further stated they did not want any show cause notice and personal hearing.
They also enclosed a cheque as a token of their commitment in the letter.
Collector of Customs after deducting amounts already deposited by them,
made a demand for the balance sum along with a penalty. Collector also
imposed a penalty on the cement company for having abetted the illegal
H import of the said sale. Respondents and cement company filed appeals.

Tribunal partly allowed respondents appeal holding that the non-issuance of show cause notice as required under Section 28 of the Act had vitiated the proceedings initiated by the Collector of Customs. The cement company's appeal was also allowed holding that there was no intentional or otherwise abetment by cement company because they had already informed respondents of their decision to abandon their expansion project.

In appeals before this Court, appellant-revenue contended that the Tribunal has erred in coming to the conclusion that the principle of waiver did not apply to the requirement of notice under Section 28 of the Act. He submitted that by letter, respondents had in specific terms admitted the violation of conditions of the licence granted to it under the Deemed Export Scheme as also the firm's liability to pay duty and penalty. The firm had also expressly waived its right to receive a show-cause notice as also personal hearing.

Respondents contended that a notice under Section 28 of the Act being a condition precedent to invoke the jurisdiction of the officer concerned, in the absence of such notice proceedings initiated for the recovery of duty became void. He also submitted that the principle of waiver does not apply to a mandatory requirement of law. He further contended that the letter was obtained by the customs authorities under coercion and duress, therefore, there could be no waiver based on such letter.

Disposing of the appeals, the Court

HELD : 1.1. Section 28 of the Customs Act only provides for the procedural aspect for recovery of duty, hence, any irregularity committed by a proper officer in following the procedure laid down in Section 28 would not denude that officer of his jurisdiction to initiate action for recovery of escaped duty but it may make such proceedings initiated by that officer voidable. Thus the terms "condition precedent" used in the case of *Tin Plate Co.** is referable to the procedural requirement of Section 28 and not to the jurisdictional aspect of the proper officer to recover the escaped duty and the law laid down in *Tin Plate Co.'s* case is that issuance of a notice under Section 28 is a mandatory requirement of that section, which is concurred with. [941-C, E]

1.2. Even though a provision of law is mandatory in its operation if such provision is one which deals with the individual rights of person concerned and is for his benefit, the said person can always waive such a right. Therefore,

- A if the mandatory requirement of issuance of notice under Section 28 of the Act is considered, it will be seen that requirement is provided by the Statute solely for the benefit of the individual concerned, therefore, he can waive that right. In other words, this section casts a duty on the officer to issue notice to the person concerned of the proposed action to be taken. This is not in the nature of a public notice nor any person other than the person against whom the proceedings are initiated has any right for such a notice. Thus this right of notice being personal to the person concerned, the same can be waived by that person which is the correct position of law. In the instant case, the respondents having specifically waived its right for a notice, cannot now be permitted to turn around and contend that the proceedings initiated against them are void for want of notice under Section 28 of the Act, so as to frustrate the statutory duty of the appellant-Revenue to demand and collect customs duty which respondents had intentionally evaded. [943-B-D]

- **Collector of Customs, Calcutta v. Tin Plate Co. of India Ltd.*, (1996) 87 ELT 589; *Vellayan Chettiar v. Government of Province of Madras*, AIR (1947) PC 197; *Dhirendra Nath Gorai and Subal Chandra Shaw and Ors. v. Sudhir Chandra Ghos and Ors.*, [1964] 6 SCR 1001; *S. Raghbir Singh Gill v. S. Gurcharan Singh Tohra and Ors.*, [1980] Supp SCC 53; *Krishan Lal v. State of J and K*, [1994] 4 SCC 422 and *Martin and Harris Ltd. v. 6th Additional Dist. Judge and Ors.*, [1998] 1 SCC 732, relied on.

- E 2. An oral submission was made before the Collector that the letter in question was obtained by coercion but no affidavit was filed in support of that allegation. Collector rejected the contention holding that at no stage till the final submission of reply respondent made any grievance of coercion of any other undue influence in obtaining the letter. This argument of coercion in obtaining the letter was not even pressed before the tribunal. The tribunal extracted the argument of respondent where there is no reference whatsoever as to the non-voluntary nature of the letter. Thus for all these reasons, respondent's contention that the letter was not voluntarily submitted by them is totally baseless and an afterthought and is thus rejected. [940-B-D]
- F
- G 3. On the facts and circumstances of the case having found that notice was not necessary the appellant-Revenue's appeal succeeds. However, in respect of Revenue's other appeal and assessee's appeals, the finding being a finding of fact is not interfered with. [943-F; 944-A]

- H CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 3711-12 of 2000.

From the Judgment and Order dated 14.9.1999 of the Customs Excise and Gold (Control) Appellate Tribunal, Mumbai in A. Nos. c/1994/92B-2, 151/94-Bom in F.O. No. C-11/2411-12/99 WB. A

WITH

C.A. Nos. 48-49 of 2001.

Harish N. Salve, Solicitor General, Rajiv Dutta, A.N. Haksar, N.K. Bajpai, Ms. Smita Inna, Ms. Meenakshi Sakhardande, B. Krishna Prasad, Pradeep Kumar Bakshi, Sumeet Lall, U.A. Rana and Prasant Bezboruah for the appearing parties. B

The Judgment of the Court was delivered by :

SANTOSH HEGDE, J. M/s. Associated Cement Company Ltd. (for short 'ACC') had embarked upon a project of substantial expansion and modernisation of its cement factory at Shahabad in Karnataka. The ACC had floated a tender inviting supply of high standard deformed steel bars. In that tender, ACC had claimed that the project was aided by the International Bank for Reconstruction and Development (for short 'the IBRD'), which would give the importer exemption from the import duty. In response to the said tender, M/s. Virgo Steels made an offer to supply 5,187 MT of steel. The offer was accepted by the ACC and the said Virgo Steels obtained an advance licence under the Deemed Export Scheme for duty-free import of the concerned steel under Notification No.210/82. This notification specifically required that if the goods in question was not used for the purpose for which importation was permitted then the importer was liable on demand to pay a sum equivalent to the duty leviable. Sometime in November, 1988, the ACC decided to abandon the work of expansion, hence, the licence obtained under the above said scheme for importation of duty-free steel became invalid. In spite of the same M/s. Virgo Steels imported certain quantities of steel duty-free knowing very well that the expansion project by the ACC had been abandoned. It is on record that M/s. Virgo Steels asked ACC to issue a signed export certificate in regard to actual quantities of steel supplied by it for the purpose of duty exemption, but the ACC pleaded their inability to provide such Deemed Export Certificate in view of the fact that it had abandoned its project. C D E F G

In the above factual background and on the basis of certain information received by the Marine Preventive Wing of Mumbai, Customs investigations were conducted in regard to the import and illegal sale of steel by M/s. Virgo Steels. Based on the said investigation, Commissioner of Customs, Mumbai came to the conclusion that the import made by M/s. Virgo Steels after the H

A abandonment of the project by the ACC was in contravention of the provisions of the Customs Act, 1962 ('the Act'), hence, decided to initiate proceedings against M/s. Virgo Steels and ACC. Having come to know of this decision of the Commissioner of Customs, to pre-empt any penal proceedings, consequences of which could have been very serious, M/s. Virgo Steels wrote a letter dated 30.3.1991 to the Assistant Collector of Customs, Marine Preventive Wing, Mumbai admitting in clear terms that the import of 24,326 MT of Billets and 2300 MT of Lead Ingot by them, and cleared duty-free under the DEC Scheme was illegal. They also admitted that the said material was sold in the market contrary to the terms of said Import Scheme and assured the former that they were ready to pay the duty chargeable under the said import as also any other penalty that may be imposed on them. The relevant part of the said letter is as under:- "In this respect it is our humble submission that we are ready to pay the duty chargeable of 24,326 MT of Billets and 2300 MT of Lead Ingot along with any other penalty imposed on us. *We do not want any show cause notice and personal hearing in the matter.*" (emphasis supplied). Along with the said letter they also enclosed a cheque for a sum of Rs.50 lacs though post dated as a token of their commitment made in the said letter.

E Based on the said letter, the Collector of Customs vide his order dated 16.3.1993 held that duty amounting to Rs. 1,50,11,858 was leviable on the goods cleared by M/s. Virgo Steels and after giving deductions for such amounts already deposited by them, a demand for the balance sum of Rs. 72,02,060 was made on M/s. Virgo Steels along with a penalty of Rs. 5 lacs. In regard to ACC, the Collector imposed a penalty of Rs. 5 lacs for having abetted the illegal import of the said sale.

F M/s. Virgo Steels and ACC preferred their respective appeals before the Customs, Excise & Gold (Control) Appellate Tribunal (for short 'the Tribunal')

G The Tribunal by the impugned order though rejected the contention of M/s. Virgo Steels as to the genuineness of the imports, still allowed their appeal holding that the non issuance of show cause notice as required under Section 28 of the Act had vitiated the proceedings initiated by the Collector of Customs, hence, partially allowed their appeal. The appeal of the ACC was also allowed holding that there was no intentional or otherwise abetment by ACC because they had already informed M/s. Virgo Steels of their decision to abandon their expansion project and had also refused to give M/s. Virgo Steels a certificate justifying the import made by them.

H It is against this order of the Tribunal made in appeal No.C-1994/92-B2,

of M/s. Virgo Steels and Appeal No.C/151/94.Bom. filed by the ACC, the abovenoted four appeals have been preferred before this Court, out of which Revenue has filed two appeals out of which C.A.No.3711 of 2000 is against the order of the Tribunal allowing the appeals filed by M/s. Virgo Steels, in part, and C.A. No.3712 of 2000 is against the order of the Tribunal, allowing the appeal of ACC in its entirety, while M/s. Virgo Steels being aggrieved by that part of the order which has gone against has preferred C.A.Nos.48-49 of 2001.

Learned Solicitor General appearing for the Revenue, contended before us that the tribunal has erred in coming to the conclusion that the principle of waiver did not apply to the requirement of notice under Section 28 of the Act. He submitted that by the letter of 30.3.1991, the Managing Partner of M/s. Virgo Steels had in specific terms admitted the violation of conditions of the licence granted to it under the Deemed Export Scheme as also the firm's liability to pay duty and penalty. He further submitted that the firm having expressly waived its right to receive a show-cause notice as also personal hearing, it cannot be permitted to turn around and say that non-issuance of notice under Section 28 of the Act is fatal to the Revenue. Mr. Rajiv Dutta, learned senior counsel appearing for M/s. Virgo Steels, while defending the order of the tribunal, submitted that a notice under Section 28 of the Act being a condition precedent to invoke the jurisdiction of the Officer concerned, in the absence of such notice proceedings initiated for the recovery of duty became void. He also submitted that the principle of waiver does not apply to a mandatory requirement of law. He further contended that the letter of 30.3.1991 was obtained by the Customs Authorities under coercion and duress, therefore, there could be no waiver based on such letter. He further assailed the finding of the Tribunal that the import made by M/s. Virgo Steels was not for the purpose of a project aided by the IBRD.

We will first consider the argument of learned counsel for M/s. Virgo Steels that their letter of 30.3.1991 was written by the firm because of coercion and duress, hence, cannot be relied upon. This argument was raised for the first time before the Collector during the course of arguments of learned counsel appearing for M/s. Virgo Steels in the adjudicatory proceedings. It is to be seen that the said letter is dated 30.3.1991 and the argument of learned counsel was addressed on 3.12.1992 - i.e. more than one and a half years after the said letter was sent to the Collector concerned. During that period of over one and a half years, the Partner of the Company who had signed the letter or anybody else on behalf of the firm, made no attempt to resile from the

- A contents of the said letter. They have neither made any complaint nor taken any steps to get over the contents of the letter written on behalf of the firm on 30.3.1991. It is relevant to note at this stage that along with the letter, a post-dated cheque was sent and no steps were taken to stop payment against that cheque either. Before the Collector though an oral submission was made by learned counsel that the letter in question was obtained by coercion not even an affidavit was filed in support of that allegation. The Collector by his order, had rejected the said contention holding that at no stage till the final submission of reply on 3.12.1992, M/s. Virgo Steels had made any grievance of coercion or any other undue influence in obtaining the letter of 30.3.1991. It is also necessary to note herein that this argument of coercion in obtaining the letter of 3.12.1992 seems not to have been pressed before the Tribunal. The Tribunal in its impugned order in paras 8 and 9 has extracted the argument of learned counsel for M/s. Virgo Steels where we find no reference whatsoever as to the non-voluntary nature of the letter of 30.3.1991. For all these reasons, we have no hesitation in rejecting this contention of M/s. Virgo Steels that the letter of 30.3.1991 was not voluntarily submitted by them. This argument before us, in our opinion, is totally baseless and an afterthought.

- We will next consider the requirement of Section 28 of the Act and the applicability of the principle of waiver to the said requirement of that Section. While so doing, it is to be noted that our discussion of Section 28 of the Act is with reference to the Section as it stood at the relevant time and not with reference to the existing Section 28 of the Act. The Tribunal by the impugned order has held that in the absence of a notice under Section 28 of the Act, the recovery of duty which has escaped collection, is impermissible in law. While accepting this argument, the Tribunal has placed reliance on a judgment of this Court in *Collector of Customs, Calcutta v. Tin Plate Co. of India Ltd.* (1996) 87 ELT 589. It is true that in the course of the above-cited judgment, this Court had held that a notice under Section 28 is a condition precedent, but having perused the said judgment carefully, we are of the opinion that this Court used the expression "condition precedent" with reference to issuance of notice under Section 28 and not with reference to the jurisdiction of the proper Officer under that Section. While the absence of notice may invalidate the procedure adopted by the proper Officer under the Act, it will not take away the jurisdiction of the Officer to initiate action for the purpose of recovery of duty escaped. This is because of the fact that the proper Officer does not derive his power to initiate proceedings for recovery of escaped duty from Section 28 of the Act. Such power is conferred on him by other provisions of the Act which mandate the proper Officer to collect the duty leviable. By a

perusal of Chapter V of the Act in which Section 28 is found, it is seen that the charging Section which authorises the levy of customs duty is found in Section 12 of the Act. Section 17 contemplates the procedure for making an assessment in regard to duty payable while sub-section (4) of Section 17 makes a provision to empower the proper Officer to reassess the imported goods for duty if it is found that the assessment made at the time of importation was based on incorrect or false information. Section 142 of the Act found in Chapter XVIII provides for actual recovery of sums due to the Government. A cumulative reading of these provisions found in the Act clearly shows that the jurisdiction of a proper Officer to initiate proceedings for recovery of duty which has escaped collection, is not traceable to Section 28. The power to recover duty which has escaped collection is a concomitant power arising out of the levy of customs duty under Section 12 of the Act, and the same does not emanate from Section 28 of the Act. In our opinion, Section 28 only provides for the procedural aspect for recovery of duty, hence, any irregularity committed by a proper Officer in following the procedure laid down in Section 28 would not denude that Officer of his jurisdiction to initiate action for recovery of escaped duty but it may make such proceedings initiated by that Officer voidable. In that view of the matter, in our opinion, the term "condition precedent" used in the case of Tin Plate Co. (supra) is referable to the procedural requirement of Section 28 and not to the jurisdictional aspect of the proper Officer to recover the escaped duty. In the said view of the matter, we are of the opinion that the law laid down by this Court in Tin Plate Co.'s case (supra) is that issuance of a notice under Section 28 is a mandatory requirement of that Section, with which we are in agreement. We also notice the very important fact that in that case the question of waiver did not arise and what was considered by this Court was the contention of the Revenue that a subsequent letter written by the Revenue after the expiry of the period of limitation would cure the defect of non-issuance of a notice.

The next question for our consideration is: can a mandatory requirement of a statute be waived by the party concerned? In answering this question, we are aided by a catena of judgments of this Court as well as of the Privy Council. We will first refer to the judgment of the Privy Council which has been consistently followed by the Supreme Court in a number of subsequent cases involving similar points. In *Vellayan Chettiar v. Government of Province of Madras* (AIR 1947 PC 197), the Privy Council held that even though Section 80 C.P.C. is mandatory, still non-issuance of such notice would not render the suit bad in the eye of law because such non-issuance of notice can be waived by the party concerned. In the said judgment, the Privy Council

A held that the protection provided under Section 80 is a protection given to the person concerned and if in a particular case that person does not require the protection he can lawfully waive his right.

B In the case of *Dhirendra Nath Gorai and Subal Chandra Shaw and Ors. v. Sudhir Chandra Ghosh and Ors.*, [1964] 6 SCR 1001, this Court followed the judgment of the Privy Council in *Vellayan Chettiar* (supra) and held that even though the requirement of Section 35 of the Bengal Money Lenders' Act is mandatory in nature, such mandatory requirement could be waived by the party concerned. On a true construction of Section 35 of that Act, this Court held that the said Section is intended only for the benefit of the judgment-debtor and, therefore, he can waive the right conferred on him under the said Section.

C In the case of *S. Raghbir Singh Gill v. S. Gurcharan Singh Tohra and Ors.*, [1980] Supp SCC 53, this Court negated an argument that the requirement of Section 94 of the Representation of the People Act, 1951 cannot be waived. This argument was based on the principle that public policy cannot be waived. Rejecting the said argument, this Court held that the privilege conferred or a right created by a Statute, if it is solely for the benefit of an individual, he can waive it. It also held that where a prohibition enacted is founded on public policy, courts should be slow to apply the doctrine of waiver but if such privilege granted under the Act is for the sole benefit of an individual as is the case under Section 94 of the Representation of the People Act, the person in whose benefit the privilege was enacted has a right to waive it because the very concept of privilege inheres a right to waiver.

D In *Krishan Lal v. State of J & K*, [1994] 4 SCC 422, this Court while considering the requirement of furnishing copy of inquiry proceedings under Section 17(5) of the J & K-(Government Servants) Prevention of Corruption Act, 1962 held following the judgment in *V. Chettiar's* case (supra) and *D.N. Gorai* (supra) that though the requirement mentioned in Section 17(5) of the Act was mandatory, the same can be waived because the requirement of giving a copy of the proceedings of the inquiry mandated by Section 17(5) of the Act is one which is for the benefit of the individual concerned.

E In *Martin & Harris Ltd. v. 6th Additional Distt. Judge and Ors.* [1998] 1 SCC 732, this Court while considering the provision of Section 21(1) (a) first proviso of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 negated a contention advanced on behalf of the appellant therein that the said provision was for public benefit and could not be waived.

F It held that it is true that such benefit enacted under the said proviso covered

a class of tenants, still the said protection would be available to a tenant only as an individual, hence, it gave the tenant concerned a locus poenitentiae to avail the benefit or not. It also held that the benefit given under the said section was purely personal to the tenant concerned, hence, such a statutory benefit though mandatory, can be waived by the person concerned. A

From the ratio laid down by the Privy Council and followed by this Court in the above-cited judgments, it is clear that even though a provision of law is mandatory in its operation if such provision is one which deals with the individual rights of person concerned and is for his benefit, the said person can always waive such a right. B

Bearing in mind the above decided principle in law, if we consider the mandatory requirement of issuance of notice under Section 28 of the Act, it will be seen that that requirement is provided by the Statute solely for the benefit of the individual concerned, therefore, he can waive that right. In other words, this Section casts a duty on the Officer to issue notice to the person concerned of the proposed action to be taken. This is not in the nature of a public notice nor any person other than the person against whom the proceedings are initiated has any right for such a notice. Thus, this right of notice being personal to the person concerned, the same can be waived by that person. C

If the above position in law is correct, which we think it is, M/s. Virgo Steels, having specifically waived its right for a notice, cannot now be permitted to turn around and contend that the proceedings initiated against them are void for want of notice under Section 28 of the Act, so as to frustrate the statutory duty of the Revenue to demand and collect customs duty which M/s. Virgo Steels had intentionally evaded. D

Since the sole ground on which the appeal of M/s. Virgo Steels was allowed by the Tribunal is based on non-issuance of a notice under Section 28 and we having found such a notice was not necessary in the facts and circumstances of the case, the appeal of the Revenue as against M/s. Virgo Steels has to be allowed. E

In C.A. Nos.48-49 of 2001, M/s. Virgo Steels have, *inter alia*, questioned the correctness of the findings of the tribunal as to the illegality of the import of steel made by them, the Tribunal after considering the material on record by the impugned order, has agreed with the finding of the Collector that M/s. Virgo Steels had imported the steel in question, duty-free representing that the same was being imported for utilisation in a project financed by the IBRD F

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- A** but was in fact sold in the open market. This finding being one of facts and having been arrived at by the Collector and the Tribunal on the basis of the material on record, we are not inclined to disturb this finding, nor, indeed, do we find any good ground to do so. Hence, we find no merit in these appeals and these appeals fail.
- B** C.A. No.3712 of 2000 is filed by the Revenue against the order of the Tribunal which has allowed the appeal filed by ACC holding that there was no material to come to the conclusion that ACC had abetted the illegal import of steel by M/s. Virgo Steels. This finding also being a finding on a question of fact, we are not inclined to interfere with this finding. At this stage we must
- C** place on record the fact that learned Solicitor General has very fairly conceded that he is not in a position to persuade us to take a contra view in this appeal, therefore, this appeal also fails.

For the reasons stated above, C.A. No.3711 of 2000 is allowed, the impugned order of the Tribunal is set aside and that of the Collector restored.

- D** The appellants shall be entitled to costs payable by M/s. Virgo Steels, Mumbai.

C.A. No.3712 of 2000 is dismissed. No costs.

C.A. Nos.48-49 of 2001 are dismissed with costs.

- E** Ordered accordingly.

N.J.

Appeals dismissed.