COMPTROLLER OF CUSTOMS AND EXCISE

v.

BURNS PHILP (S.S.) CO. LTD.

[SUPREME COURT, 1971 (Hammett C.J.), 25th September 1970, 29th January 1971.]

Appellate Jurisdiction

Revenue—customs duty—thermofax paper made in America but cut and repacked in smaller sizes in Preference Territory Australia—whether preference rate of duty applied —whether cutting and repacking in Australia constituted the final process of manufacture—Fiji customs legislation a complete code—English authorities based on different definitions not applicable—Customs Tariff Regulations 1968, reg.6(1)—Customs Tariff Ordinance (Cap. 171)—Finance Act 1948 (11 & 12 Geo. 6, c.49) (Imperial) s.23.

Interpretation—Fiji customs legislation a complete statement of Fiji law on subject—to be construed free of any gloss from expositions of English law—Customs Tariff Regulations 1968, reg.6(1)—Customs Tariff Ordinance (Cap. 171)—Finance Act 1948 (11 & 12 Geo. 6, c.49) (Imperial) s.23.

Thermofax paper was made in large size sheets in the United States of America and shipped to Australia in bulk. There the sheets were cut up into the smaller sizes desired by the market and sorted and packed into smaller saleable parcels; the paper was then shipped to Fiji. If the paper had been imported direct into Fiji from America it would have been chargeable with duty at a rate of 50%; such paper if manufactured in the Preference Territory of Australia, was chargeable at 25%. Regulation 6(1) of the Customs Tariff Regulations, 1968, provides that goods shall not be deemed to be manufactured in a Preference Territory unless the final process of manufacture takes place within a Preference Territory and the goods contain at least 25% of Preference Territory labour and materials in factory or works cost. In proceedings between the respondent and the appellant in the Magistrate's Court to determine the correct rate of duty, it was conceded by the appellant for the purpose of the case that the 25% labour and materials content requirement was fulfilled and the question for determination was therefore whether the final process of manufacture of the paper took place in Australia. The Magistrate held that it did, and that the appropriate rate of duty was 25%. On appeal to the Supreme Court:

Held: 1. The structure of the Customs Tariff Ordinance and the Customs Tariff Regulations, 1968, shows clearly that they are intended to contain as far as possible a full and complete statement of the law on this subject in Fiji: they must therefore be construed free from any gloss or interpretations derived from any expositions of the law of England.

Wallace-Johnson v. The King [1941] A.C. 231; [1940] 1 All E.R. 241, applied.

2. The final process of manufacture of the paper had been completed before it reached Australia and what was done to it there was "a treatment of the goods affecting their get-up". A

3. The provisions of the English Finance Act, 1948, whereby such treatment is deemed to be the application of a process in the course of making the goods have no counterpart in the Fiji legislation.

4. In the absence of such provisions the ordinary meaning of the words "process of manufacture" does not include the cutting and packing into small parcels, of paper already manufactured: the appeal would be allowed. B

Other cases referred to:

Low or Jackson v. General Steam Fishing Co. Ltd. [1909] A.C. 523; 101 L.T. 401.

Michel v. Mutch [1886] 55 L.J. Ch. 485; 54 L.T. 45. C

Appeal from a judgment of the Magistrate's Court in an action to recover excess customs duty allegedly paid.

T. U. Tuivaga for the appellant.

M. V. Bhai for the respondent. D

The facts sufficiently appear from the judgment of the learned Chief Justice.

29th January 1971

HAMMETT C.J. : E

The respondent Company imported into Fiji a quantity of "Thermofax Paper" from Australia upon which the Comptroller of Customs demanded and was paid, under protest, customs duty at a rate of 50% amounting to a total of $740. The respondent Company contended that the correct rate of customs duty for these goods was the preferential rate of 25%. It did, therefore, bring an action in the Magistrate's Court in Suva to recover the excess sum of $370. F

The Court below upheld the contention of the respondent Company that customs duty should have been levied at the rate of 25% and gave judgment accordingly against the Comptroller of Customs, who has appealed.

The facts found by the Court below are not in dispute and are, briefly, as follows :— G

The Thermofax Paper in question is made by the Minnesota Mining and Manufacturing Company Ltd. in the United States of America. It is then shipped in bulk, in large master sheets to its wholly owned subsidiary company, bearing the same name, in New South Wales. These master sheets are 51⅝ inches x 41 inches in size and arrive in Australia in pallet pack form, each pack containing from 10,000 to 15,000 sheets. H

These packs are opened up in Australia and undergo a number of separate and distinct sorting and cutting operations by what was described by the learned trial Magistrate as a "fairly sophisticated machine".

The paper is then finally cut to the sizes and repacked into the Company's smaller printed cartons in which it can be marketed commercially. It is in this final form that the paper is imported into Fiji.

It is common ground that if the paper had been manufactured in Australia customs duty would properly be levied at the 25% preferential rate, and, similarly, that if it had been imported direct into Fiji from the U.S.A. it would properly be liable for duty at the 50% rate.

The respondent Company relied on the provisions of Regulation 6(1) of the Customs Tariff Regulations which provides as follows :—

> "6.(1) Goods shall not be deemed to be manufactured in a Preference Territory unless the final process of manufacture takes place within a Preference Territory and the goods contain at least 25 per centum of Preference Territory labour and materials in factory or works cost.
> ....."

It was the contention of the respondent Company that the treatment to which this paper was subjected in Australia amounted to "the final process of manufacture". Thus by virtue of Regulation 6(1) it was submitted that they were goods "deemed to be manufactured in a Preference Territory", and thus liable to duty at the 25%, instead of the 50% rate.

This contention of the respondent Company was upheld by the Court below. It is against that decision and, in these circumstances, that the Comptroller of Customs has appealed on the two following grounds :—

> "(i) that the learned trial Magistrate erred in law and in fact in holding that "the Thermofax paper in questiton underwent its final process of manufacture in a Preference Territory namely, Australia" inasmuch as the said Thermofax paper was not manufactured in the said Preference Territory within the meaning of the provisions of regulation 6(1) of the Customs Tariff Regulations, 1968;
>
> (ii) that the verdict of the learned trial Magistrate was against the weight of evidence."

At the hearing of the appeal the respondent Company took one point, which could perhaps have been taken as a preliminary objection. This was to the effect that the Comptroller of Customs had no right of appeal because the judgment in the Court below was a judgment by consent.

This arises in this way. In the Court below the Comptroller contested the respondent Company's claim on two grounds, both of which are to be found in the provisions of Regulation 6(1) of the Customs Tariff Regulations.

These were as follows :—

Firstly : That the final process of manufacture did not take place in Australia which is a Preference Territory; and

Secondly : That if it did the goods do not contain at least 25% of Preference Territory labour and materials in factory or works cost.

At the close of the case for the respondent Company in the Court below its counsel indicated it would need to call further evidence on the second

point. Counsel for the Comptroller was prepared to agree to an adjournment for this purpose but both counsel felt that if the Court could give a ruling on the first point, that might dispose of the matter. It was, therefore, at the wish of both parties that the learned trial Magistrate did on 22nd April, 1970, give an interim decision dealing with the first point only. At the end of the pronouncement of this decision the parties were addressed from the bench as follows :— A

> "It is now open to Counsel to advise me whether a final judgment can be entered or whether an application will be made for an adjournment to call further evidence." B

Counsel for the Comptroller said he wished the trial to continue and asked for a date of hearing to be fixed. Counsel for the respondent Company then asked for a long adjournment and this was granted.

The parties next came before the Court below on 17th June, 1970, when counsel for the Comptroller said he had been instructed to concede the second of the two grounds upon which the claim had been opposed and asked that final judgment be entered for the plaintiff. This was done. C

There is nothing on the record to show that counsel for the Comptroller "consented" to judgment for anything. He knew that the Magistrate was ruling against him on one leg of his defence and he was merely abandoning the other leg of his defence. The record does not say that he said he was taking this course so that he would be able to appeal against the ruling already given against him although in this Court he said this was his intention and he did within the time allowed for an appeal in fact do so. D

It is clear from the record that the learned trial Magistrate did not understand that counsel for the Comptroller was consenting to judgment being entered against the Comptroller. If he had done so, he would merely have entered the record — E

> "By consent judgment for plaintiff"

or some such brief note of a consent judgment. Instead he wrote in his record —

> "For the reasons set out in my ruling of 22.4.70 there will accordingly be judgement for the plaintiff for $370 together with costs and disbursements to be fixed if not otherwise agreed." F

He would not have taken the trouble of writing this out in full if a brief note of "judgment by consent" would have been sufficient.

It is quite clear from what counsel has said to me in this Court that although the record does not indicate it as clearly as may have been desirable, he never at any time intended to consent to judgment being entered against the Comptroller. G

On the facts it appears to me that this case falls within the class of cases envisaged by the note in the Annual Practice referring to *Low or Jackson v. General Steam Fishing Co. Ltd.* [1909] A.C. 523, which reads —

> "Consent to an abbreviation of the procedure does not prevent an appeal from the judgment." H

I am fortified by the view I take of this case by the view taken by Chitty J. in *Michel v. Mutch* [1886] 54 L.T. 45. The learned Judge there intimated that where an order has been agreed to and arranged between

the parties it should appear on the face of the order, that it is an order by consent. In the present case counsel for the respondent Company has not suggested that counsel for the Comptroller did in fact abandon his defence to the claim or agree to judgment being entered against the Comptroller by consent.

I accept the statement by counsel for the Comptroller that all he did in the Court below was to concede one point in order to close the proceedings there so that he could bring this appeal. I am quite satisfied that he did not in fact consent to any judgment. The objection by the respondent to this appeal on this technical ground cannot, in my view, be sustained.

On the merits of the appeal learned counsel for the appellant has contended that the cutting and re-packing of this Thermofax Paper in New South Wales was not, in fact, a "final process of manufacture" at all.

He has called on a number of authorities on this issue. I have examined the appropriate Fiji Ordinances and subsidiary legislation and there appears to be no definition therein of the words "process" or "manufacture", nor of the expression "final process of manufacture", and none have been drawn to my attention by counsel.

Counsel for the appellant Comptroller has pointed out that the Court below referred to and largely relied upon the definition of the term "process of manufacture" given in *Halsbury's Laws of England* 3rd Ed. Vol. 33 at para. 403 in the following terms :—

> "403. Meaning of process of manufacture. A process of manufacture is a process applied so as to make goods or in the course of the making of goods. Any treatment of goods, which affects their get-up and which results in the goods becoming chargeable goods or becoming chargeable at a higher rate of tax, is deemed to be the application of a process in the course of the making of goods. This is also the case as regards any treatment which affects the goods themselves."

The authority for the several statements of law made in this paragraph is given in *Halsbury* as the English Finance Act 1948. In that Act the term "get-up" is also defined as including "marking, labelling, packing or any other treatment adopted for identifying goods or presenting goods to the user or consumer."

On the basis of these definitions I see no reason to differ from the view of the Court below. What was done to this Thermofax Paper in Australia appears to me clearly to be a treatment of the goods which affected their "get-up". The express terms of the Finance Act, 1948, provided that such treatment "is deemed to be the application of a process in the course of making the goods."

Without such express statutory provisions such treatment could not be so deemed. Indeed, if the ordinary and natural meaning of the words "process of manufacture" included "treatment of the goods affecting their get-up", there would have been no need for the English statute expressly to provide that such treatment should be deemed to be a part of the "process of manufacture."

The reason why the learned trial Magistrate considered that the term "process of manufacture" used in the Regulation 6 of the Customs Tariff Regulations in Fiji ought to be construed in the same way as by statutory definition it must be construed in England under the Finance Act, 1948, is to be found in the sentence in his judgment where he said —

"The Finance Act of 1948 is of course an analogous enactment to the Customs Tariff Ordinance in Fiji in that it is concerned inter alia with the assessment of duty and tax on manufactured goods."

I am by no means persuaded that these two enactments are or ought to be treated as analogous. But in any event, a study of the material provisions of each enactment relevant to the point of determination in this case indicates the following distinctive differences of approach. The English Finance Act of 1948, by its own definition, deliberately widens its scope so as to include, rather than exclude, goods that are to be liable to purchase tax. The Customs Tariff Regulation, in Regulation 6, deliberately restricts and attempts to exclude, rather than include, goods which fall within the classification of those manufactured in a Preference Territory.

But quite apart from that, granted the essential object of both statutes concerns the collection of revenue, it by no means follows, as a result, that a specific definition of terms in the English Statute ought to be applied to the same or similar terms where they appear in the Fiji Ordinance.

Reference may certainly be made to judicial decisions on the ordinary meaning that should be attached to the term "the final process of manufacture" in Regulation 6, based on the normal course of construction of statutes. It is only after careful consideration and with circumspection that regard may be paid to a specific definition of this term in an English statute in considering how the term ought to be construed in an enactment in Fiji which does not contain any such definition. Further, judicial interpretation in the English Courts of such specific definitions in an English statute are of only limited value, if any, when considering the Fiji enactment, and the meaning of terms used therein in a different context.

This point of construction was considered by the Privy Council in *Wallace-Johnson v. The King* [1940] 1 All E.R. 241. The Editorial Note to the report of this case is in point and reads :—

"The enactments of the colonies are often drafted in words following the decisions of the English courts. Although this may give some clue to the intention of the legislature, the construction of such enactments is still primarily a matter of the construction of the precise words of the enactment, and, if the enactment is intended to be a complete code of the law, it must be construed free from any glosses derived from English decisions."

This was the effect of the judgment of Viscount Caldecote, which was the basis of the decision of the Privy Council.

The elaborate structure of the Customs Tariff Ordinance (Cap. 171) and the Customs Tariff Regulations 1968 show clearly that they are intended to contain as far as possible a full and complete statement of the law on this subject in Fiji. They must, therefore, as was stated by Viscount Caldecote in Wallace-Johnson's case be construed in their application to the facts of this case free from any glosses or interpretations derived from any expositions, however authoritative of the law of England.

The facts in this case are clear. This Thermofax Paper was made in large size sheets in America and then shipped to Australia in bulk. In Australia these sheets were cut up into the smaller sizes desired by the market, sorted and packed into smaller saleable parcels. The paper was then shipped to Fiji for sale. The character and nature of the paper itself was not in any way altered by what took place in Australia. The final process of manufacture of the paper had been completed before it reached Australia. The sorting, cutting and re-packing of the paper in Australia was not a process of manufacture but "a treatment of the goods affecting their get-up."

In the absence of some statutory provision in Fiji by which such treatment must be "deemed to be a process in the course of making the goods", it would, in my view, be stretching the ordinary meaning of the words "process of manufacture" too far to read them as including the cutting of paper already manufactured and packing it into small readily saleable parcels.

For these reasons I allow this appeal. The judgment of the Court below is set aside. It is ordered that judgment be entered for the defendant/appellant with costs and disbursements in this Court and the Court below to be taxed if not otherwise agreed.

Appeal allowed.