
(2016) 02 DEL CK 0325
In the Delhi High Court
Case No : W.P. (C) 3532/1998

A.L. Arora

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 02-02-2016

Acts Referred:

Customs Act, 1962 — Section 25 (1), Section 25(1), Section 28

Citation : (2016) 3 ADDelhi 282 : (2016) 336 ELT 630

Hon'ble Judges : Dr. S. Muralidhar and Vibhu Bakhru, JJ.

Bench : Division Bench

Advocate : Rajesh Rawal, Advocate, for the Appellant; Sonia Sharma, Senior Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

Dr. S. Muralidhar, J.—1. The Petitioner is the sole proprietor of M/s. Aval International and has filed the present writ petition seeking the quashing of an order dated 19th May, 1998 passed by the Customs Excise & Gold (Control) Appellate Tribunal, West Block-II, R.K. Puram ("CEGAT") dismissing the Petitioner's Appeal No. C/446/92-B2. By the said order, the CEGAT upheld the order- in-original dated 24th January, 1992 passed by the Additional Collector of Customs holding that the Petitioner had not fulfilled the norms in terms of the Notification No. 117/88-Customs dated 29th March, 1988 in respect of fulfilment of the export obligations under the Import Export Pass Book Scheme.

2. In terms of Chapter XX of the Import and Export Policy of the Government of India for the period April, 1988 to March, 1991, an Import and Export Pass Book Scheme was introduced in order to provide duty free inputs to manufacturer-exporters and export/trading houses for production of goods for export. The scheme provided eligible exporters the facility of duty free raw materials and samples required for the manufacture of an export product. Para 257 (2) of the Import & Export Policy stated that the exemption under the Import Export Passbook issued under the Scheme would be governed by the Department of

Revenue Notifications as reproduced in Appendix 14-B and 13-B. In terms of the Scheme, if an exporter had a firm contract, it could approach the licensing authority for grant for benefit of import of raw materials free of duty which would then be required to be put to use to produce the resultant product for export.

3. Under Para 259 (1) of the Policy imports against the pass book was allowed to the extent of import entitlement as specified in Appendix 14-A to the policy. Para 259 (1) reads as under:

"259(1) Imports against the Pass Book will be allowed to the extent of import entitlement as specified in Appendix 14-A to this Policy. The import eligibility will be based on (i) the annual average export of products which are presently covered by a Sl. No. or Sub-Sl. No. of Appendix 14-A of this Policy during the preceding three licensing periods plus 25 per cent thereof, or (ii) the best years" exports of those products, in any of the preceding three licensing periods plus 10 per cent thereof, whichever is more. These exports will be stepped upto 1-1/2 times to arrive at a figure which may be termed as the "base exports." The maximum import entitlement would be worked out by applying the relevant import entitlement rate of Appendix-14-A, on this "base exports." The exports referred to in this sub-para will include "deemed exports" as covered by sub-paras 190(b), (f), (g) and (i) of this Policy."

4. Para 271 specified the Export obligation. It reads as under:-

"271. (1) The issue of Pass Book licence shall be subject to an export obligation. In the case of Pass Book issued as per Para 259 (1) above, the export obligation would be the "base exports" referred to in that para. In other cases where Pass Books are issued on the basis of specific norms, the export obligation will be fixed in terms of Para 259(3) above. Where the Pass Books are to be issued on the basis of past domestic turnover, the export obligation will be fixed in the inverse ratio by applying the import entitlement rate of the relevant export product given in Appendix 14-A to the c.i.f. value of the licence in question. In cases where an eligible manufacturer-exporter desires to obtain a Pass Book licence for the related product in accordance with the provisions laid down in Para 260 above, the export obligation against such licence would be worked out in the inverse ratio of the import entitlement rate of the relevant export products given in Appendix 14-A of this Policy based on the c.i.f. value of imports allowed against each Pass Book licence."

5. The products listed in Appendix 14-A which are relevant for the purposes of this petition, are as follows:

6. The Petitioner states that he had already obtained a confirmed order for export of pure silk and embroidery garments and that an application had been made for issuance of an Import and Export Passport under the aforementioned scheme. The Petitioner was issued an Import Export Passbook under the aforementioned scheme along with a Export Licence dated 13th December, 1988. The licence was in two parts"one relating to import entitlements and other

relating to export obligations. A copy of the said licence has been placed on record. The licence dated 13th December, 1988 mentions at the outset that the FOB value of the export had to be Rs. 20 lakhs. The description of the goods permitted to be imported reads "1500 kgs. of Mulberry raw silk of any Grade other than Dupion Yarn" and the approximate value C.I.F. of the import is indicated as Rs. 10 lakhs. The licence was valid for 18 months from date of issue. The limiting factor for the purposes of clearance for customs was indicated as "quantity and value both".

7. In Part C of the licence an endorsement dated 1st February, 1990 was made by the Assistant Chief Controller of Imports & Exports stating that "the export obligation has been met to the extent of Rs. 20 lakhs before import taken place. In terms of para 381 of the Hand-book 1988-1991 "NO BOND/LUT" is required to that extent."

8. Part E of the licence contained columns indicating the details of the bills of entry, the dates of import of mulberry raw silk, the quality and weight, CIF value, total customs duty and the endorsement of the customs officials thereon. The quantity of the raw mulberry silk imported was indicated as 1424.82 kgs and the CIF value of the goods imported was shown as Rs. 998997+ landing charges Rs. 9990 = Rs. 10,08,987.

9. Part F of the licence spelt out the export obligations. There were four columns. The first one showed the serial number; the second one was titled "Description" under which was stated: "natural silk pure silk embroidered readymade garment containing 100% natural silk by weight." The third column titled "Technical specifications" was left blank. The last column indicated the FOB value of the export in rupees as Rs. 20,00,000/-. Therefore, as far as the export obligation was concerned, the licence required the petitioner to have exported natural silk readymade garments of the value of Rs. 20 lakhs. There was no indication that the entire quantity of the raw mulberry raw silk that has been imported i.e., 1500 kgs should have been exported in the form of natural readymade garments utilising such imported goods. That, in fact, is the crux of the dispute in the present case.

10. The Respondents took the stand that the Petitioner had failed to satisfy the obligation in terms of Notification No. 117/88-Cus. dated 29th March, 1988 since the weight of the consignment of embroidery silk garment exported by the Petitioner was 557.147 kgs only. It was, therefore, concluded that the balance quantity (1424.82 kgs-557.147 kgs." 867.673kgs) of imported raw mulberry silk was not utilized and, therefore, to that extent, the Petitioner would have to pay the corresponding customs duty. A show cause notice was issued to the Petitioner on 24th August, 1991.

11. The stand of the Petitioner was, however, that the only obligation under the scheme was to export natural silk garments of the value of Rs. 20 lakhs which it had fulfilled even prior to the making of the import.

12. By the order dated 24th January, 1992, the Assistant Collector of Customs rejected the Petitioner's explanation and concluded that the Petitioner would have to pay the customs duty proportionate to the unutilised mulberry raw silk which was calculated at Rs. 2,08,899. The Petitioner was called upon to pay the aforesaid amount with 18% interest from the date of importation till the date of payment of duty.

13. Aggrieved by the above order, the Petitioner filed an appeal before the CEGAT in which a specific plea was raised that the show cause notice was barred by limitation since it was issued more than six months after the date of clearance of the goods. It was further contended that by a letter dated 23rd January, 1991 the Petitioner had already brought to the notice of the Department the full facts regarding utilization of the raw material. Since the show cause notice dated 26th August, 1991 was in any event issued more than six months after that date, it was time barred. Another plea raised was that in rejecting the Petitioner's defence to the show cause notice, the Assistant Collector had in the original order referred to the instructions contained in a letter dated 11th September, 1990 from the Member (Customs) and a DEEC Circular No. 6 dated 19th June, 1990. Neither of those documents had been referred to in the show cause notice and therefore the Petitioner did not get an opportunity to make any submission in that regard.

14. At the stage of grant of stay of the Order of the Assistant Collector, the CEGAT by its order dated 13th April, 1994 adverted to the point raised regarding limitation and observed that there was no reason why the demand could not have been made in time as stipulated under Section 28 of the Customs Act. Stay of the Order of the Assistant Collector was granted unconditionally.

15. Thereafter, while disposing of the appeal on 19th May, 1998 the CEGAT rejected the plea of the Petitioner that it was required to fulfil the export obligations in terms of value only.

16. The Court has heard the submissions of Mr. Rajesh Rawal, learned counsel for the Petitioner, and Ms. Sonia Sharma, learned counsel for the Respondent.

17. As far as the obligations to be fulfilled in terms of the Import Export Pass Book Scheme, the Central Government has issued notification No. 117/88-Cus., dated 29th March, 1988 under Section 25(1) of the Customs Act, 1962. The said notification states, inter alia, that the Central Government exempts goods from the whole of the duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 when such goods are imported for the purposes of manufacture of products (referred to as resultant products) or replenishment of goods used in the manufacture of the resultant products or both and for export out of India as mandatory spares along with the resultant products, for the execution of export orders in accordance with the Import Export Pass Book Scheme. Among the conditions stipulated to be fulfilled for availing of the exemption in terms of the said notification are that the imported goods

should be specified in and covered by the import licence, incorporated in the Import Export Passbook in respect of their value, quantity if any, description and technical characteristics. Another specific condition is that "the resultant products and manufactory spares, as specified in the said Import Export Pass book in respect of value, quantity (if any), description and technical characteristics are exported out of India within the period specified in the said Import Export Pass Book or within such extended period as the Export Commissioner in the Office of the Chief Controller of Imports and Exports allow".

18. Significantly, the notification does not spell out the consequences, if any, of not exporting the resultant goods both in terms of value and quantity corresponding to the imported goods. Even in the licence issued to the Petitioner, the export obligations set out in Part F only spell out the obligation in terms of value and not in terms of quantity. There is no requirement in the licence that the Petitioner is required to fulfil the export obligation both in terms of value and quantity.

19. Interestingly, within a few months of the notification No. 117/88-Cus, a Circular No. 1/88 was issued by the Chief Controller of Import and Exports on 14th July, 1988 clarifying that "where the Pass Book Licences are issued for natural silk in terms of import entitlement percentages given in Appendix 14-A, the export obligation has to be fulfilled only in terms of value and the co-relation between quantum of imported inputs with the quantum of exported goods is not necessary." No doubt, para 3 of the said circular makes an exception to the applicability of the above clarification "in cases where Pass Book is obtained based on the specific input/output norms, in terms of para 259(3) of the Import & Export Policy."

20. The Petitioner's case is not covered under Para 259 (3) of the policy which reads as under:

"259 (3) Wherever, the eligible exporter finds the value norms as specified in Column (4) of Appendix 14-A of the Policy not appropriate for his export product, he will have the following options:-

(i) To get the Pass Book issued in terms of the norms prescribed in Appendix 13-C in case all the items required by him are covered by these norms; or

(ii) To get the Pass Book issued as per norms already fixed in his case for the same export product by the Headquarters Advance Licensing Committee in the office of the CCI&E, New Delhi; or

(iii) To get the norms fixed for his export product from the Headquarters Advance Licensing Committee in the office of the CCI&E, New Delhi.

In such cases, the Pass Book will be issued with quantity and value as limiting factors both for the purpose of imports and exports. Issue of Pass Book licences on the basis of these norms will be further subject to the condition that a minimum value addition of 33 per cent and the minimum higher value addition

prescribed for certain products as specified in Appendix 13-D is achieved from the c.i.f. value of imports to f.o.b. value of exports. In cases where a Pass Book is issued on the basis of specific norms as per option outlined at (iii) above, subsequent requests for the issue of Pass Book(s) for the same product received from the same applicant can be considered by the licensing authorities on the basis of these norms without reference to the Advance Licensing Committee at the Headquarters."

21. It is plain, therefore, that Para 259 (3) would apply only where an exporter who find that the value norms specified in Appendix 14-A are not appropriate for his export product, opts to have a passbook issued in terms of the norms under Appendix 13-C or norms already fixed for the same export product by the "Headquarters Advance Licence Committee" or to get the norms fixed from the said Committee. This is perhaps due to the fluctuation in the international market which might make it impractical for the exporter to meet the value norms as endorsed on the licence. In the present case, the Petitioner having not opted for any change in the value norms as endorsed in the license, the question of the applicability of Para 259 (3) of the Policy does not arise.

22. It is seen that what has been endorsed in Part F of the Licence is consistent with Appendix 14-A to the Policy in which the export obligation has been defined as 50% of the value of the imported goods. In the present case, it is not the case of the Respondent that the Petitioner has not fulfilled the export obligation in terms of value. The case made out in the show cause notice is that the Respondent has not fulfilled the obligation in terms of quantity. The impugned order dated 24th January, 1992 refers to paras 257 (1), 261 and 262 (2) and 281 of the Policy and concludes that "even though quantity of natural silk readymade garments to be exported has not been mentioned under Export obligation in Part F of Part 2 of the said Pass Book, the importers were supposed to utilise the entire imported quantity in the manufacture of export product."

23. What paras 257 (1), 261, 262(2) and 281 envisage is the utilization of the imported product in the manufacture of the resultant product. It is not the Department's case that the Petitioner has not utilized the imported raw material in the manufacture of the resultant product that has been exported. What is significantly overlooked, both by the Assistant Commissioner in the order dated 24th January, 1992 and the CEGAT in the impugned order dated 19th May, 1998, is Para 271 (2) of the Policy which clearly states "in cases where the Pass Book has been issued as per import entitlement given in Appendix 14-A, the export obligation will have to be fulfilled in terms of value only." It is only in other cases, i.e., cases other than those to which Appendix 14-A applies, that the export obligation shall have to be fulfilled both in terms of quality and value.

24. The order in original dated 24th January, 1992 refers to a DEEC Circular No. 6 dated 19th June, 1990 and a letter dated 11th September, 1990 from the Member, Customs stating that the export obligation has to be discharged in terms of value as well as quantity. Mr. Rawal, the learned counsel for the

Petitioner, is right in contending that such circulars and instructions cannot possibly restrict the ambit of a notification issued under Section 25 (1) of the Customs Act. Interestingly, in a similar case of *Shyam Antenna Electronics Pvt. Ltd. v. Collector of Customs, Delhi* (order dated 31st July, 1997 of the CEGAT in Appeal No. C/2193/1991), the CEGAT accepted a similar plea of the exporter in that case that in terms of Notification No. 117/88-Cus, the export obligation was to be met only in terms of value and there was no quantity restriction. Therefore, neither the DEEC Circular No. 6 dated 19th June, 1990 nor the letter of the Member Customs dated 11th September, 1990 can be relied upon by the Department to restrict the exemption available to the Petitioner in terms of Notification No. 117/88-Cus., dated 29th March, 1988.

25. Ms. Sonia Sharma, learned counsel for the Respondent, referred to the decision of the Karnataka High Court in *Pooja Exporters v. Assistant Director, D.R.I.*, 1989 (41) ELT 21 Kar. A perusal of the said decision reveals that it was a case arising under the Advance Licence Scheme and not under the Import and Export Pass Book Scheme. The facts in that case concerned diversion of the imported goods to a place other than where it was supposed to be utilized in the manufacture of the resultant products for exports. In the present case, it is not the stand of the Respondent that the Petitioner has diverted the unutilized quantity of imported goods to some other destination or for any other purpose.

26. Mr. Rawal is also right in his contention that the Petitioner's argument that the show cause notice issued by the Respondent was barred by limitation in terms of Section 28 of the Customs Act has not been dealt with either in the order in original dated 24th January, 1992 or even in the impugned order of the CEGAT despite a specific ground having been raised by the Petitioner in that regard. This would be an additional reason to hold that these orders are unsustainable in law.

27. For the aforementioned reasons, the Court is of the view that the show cause notice dated 24th August, 1991 alleging violation of non-fulfilment of the export obligation by the Petitioner as per Notification No. 117/88-Cus., dated 29th March, 1988 was misconceived as there was no obligation on the Petitioner to comply with any "quantity" norms for export. The only requirement was in terms of value, which the Petitioner fulfilled.

28. Consequently, the Court set aside the order in original dated 24th January, 1992 passed by the Assistant Collector of Customs and the impugned order dated 19th May 1998 passed by the CEGAT.

29. The writ petition is allowed but with no order as to costs.