(1992) 07 CAL CK 0034

In the Calcutta High Court

Case No : Matter No... of 1992

Anita International — APPELLANT

Vs

Collector of Customs — RESPONDENT

Date of Decision : 17-07-1992

Acts Referred:

Customs Act, 1962 — Section 111, 113, 114, 120(2), 77
Imports and Exports (Control) Act, 1947 — Section 3

Citation : (1993) 65 ELT 201

Hon'ble Judges : Suhas Chandra Sen, J

Bench : Single Bench

Advocate : Goutam Chakraborty and Sunil Chatterjee, for the Appellant;P.B. Mukherjee, for the Respondent

Judgement

Suhas Chandra Sen, J.—The petitioner No. 1, M/s. Anita International is a registered Small Scale Industrial Unit and is registered with Council of Leather Export sponsored by Ministry of Commerce, New Delhi. It manufactures leather goods and exports the goods to foreign countries. The petitioner wanted to avail of the benefit of Duty Exemption Scheme and applied for grant of an additional licence on 19th March, 1992 in the Office of the Joint Chief Controller of Import and Exports, for importation of components like Zip Fastener, Button Lining etc. to be used in the export products. An advance licence was issued to the petitioner with an attached list showing the items allowed to be exported. The advance licence along with the duty exemption entitlement certificate was received by the petitioner on or about 5th May, 1992.

2. The petitioner had earlier entered into a contract for supply of leather jackets to M/s. Chrico Diefusion of 9 Rue Duppies, 75003 Paris, France. The importer opened an irrevocable letter of credit bearing No. D.O. 109/024/340 dated 1-4-1992 through the Bank Society De Banque Suisee Swiss Bank of Corporation, Geneva - TLX 42235 to Allahabad Bank International Branch, Calcutta. According to the terms and conditions of the letter of credit the goods

were to be shipped by 21st May, 1992.

3. To fulfil the export obligation, the petitioner manufactured the export items, i.e. and products the leather jackets from indigenous materials, as there was no specific order from the buyer that a particular type of component of any foreign origin were to be used. The petitioner prepared all the necessary shipping documents and despatched the goods to Dock to avail the ready vessel. The necessary shipping documents and shipping bills No. 1336 dated 29-4-1992 and No. 1388 dated 29-4-1992 for shipment of the goods per vessel Navy Card Ret. No. 226/92 and per vessel Tiger River, Ret No. 207/92 respectively were made ready and submitted to the Customs Officers.

4. After processing of the shipping bills by the Customs Authorities, an order was passed to examine the consignment with regard to the stock samples to be produced by the exporter. During the examination of the consignments in Docks on 6-5-1992 the Customs Authorities found the goods to be in order with regard to the stock sample except that the Zipper and Button were used to KKK Brand and Ansun Brand respectively. Whereas the stock sample was of YKK Brand Zipper Antik Button. No dispute was raised by the Customs Authorities in regard to the value of the goods while pointing out the use of nature of Zip fasteners and Buttons.

5. Since the shipment was not allowed by the Customs Authorities, the petitioner made this writ petition. The petitioner''s contention was that the entire export order would be frustrated and valuable foreign exchange lost if the goods were not allowed to be shipped. The petitioner, therefore, asked for permission to ship their leather jackets. An order was passed allowing the petitioner to export leather jackets and the Customs Authorities were directed to allow the petitioner to export the jackets. The petitioner, however, was directed not to withdraw a sum of Rs. 10 lakhs from Allahabad Bank, International Branch, Park Street, Calcutta, where the sale proceeds were to be received. That interim order has been complied with. The goods have been despatched and the security for the export of the goods has been retained. The Court has been informed that a sum of Rs. 10 lakhs, as security, has been retained by the said Bank.

6. Liberty was given to complete the adjudication proceedings and an order has been passed confiscating the goods under clauses (d) and (i) of Section 113 and under Sub-section (2) of Section 120 of the Customs Act and also Section 3 of the Import and Export Act, 1947 read with Export Control Order, 1988.

7. The first question that arises for determination is whether the order of confiscation is right. The adjudication Officer has held as follows :

"From the foregoing facts and circumstances it transpires that the party has contravened the provisions of Section 113(d) and (i) and Section 120(2) of the Customs Act, 1962 and Section 3 of Import and Export Control Act, 1947, as amended read with Export Control Order, 1988 and thereby made the goods liable to confiscation and the exporters M/s. Anita International, being the person concerned for such contravention, are also liable for penal action u/s 114 of the Customs Act, 1962. I am, therefore, taking a serious view against the act of the exporter." Clauses (d) and (i) of Section 113 and Sub-section (2) of Section 120 of the Customs Act, 1962 read as follows :

"Section 113 - Confiscation of goods attempted to be improperly exported, etc.

The following export goods shall be liable to confiscation -

*** *** *** (d) and goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;

*** *** *** (1) any dutiable or prohibited goods or goods entered for exportation under claim for drawback which do not correspond in any material particular with the entry made under this Act or in the case of baggage with the declaration made u/s 77 in respect thereof;

*** *** Section 120 - Confiscation of smuggled goods notwithstanding any change in form, etc.

(2) Where smuggled goods are mixed with other goods in such manner that the smuggled goods cannot be separated from such other goods, the whole of the goods shall be liable to confiscation :

Provided that where the owner of such goods proves that he had no knowledge or reason to believe that they included any smuggled goods, only such part of the goods the value of which is equal to the value of smuggled goods shall be liable to confiscation."

8. In the instant case, the charge against the petitioner is that the petitioner has made a false declaration in the shipping bills. It appears from the records produced that the petitioner has made a declaration in the prescribed form to the effect that YKK Zip Fastener and YKK Polyester Zip Fastener had been used for the manufacture of the goods which were to be exported. Apart from the declaration in the statutory form, a statement of materials used for a piece of leather jacket was given in the Column ''description of goods''. The Custom Officer, on inspection, found that the goods that were used were not of YKK Metallic Zip Fastener or YKK Polyester Zip Fastener but Indian Zip Fasteners of Indian Origin. In other words, the allegation of the respondent is that the petitioner deliberately gave a false declaration to get advantage of importing Zip Fastener of foreign make of the said description and quantity.

9. The allegation may be true. But the question remains, can the goods be confiscated on that ground? The goods do not come under Clause (d) of Section 113 because there is no prohibition to export leather jackets to foreign country. If the Jacket is made entirely of indigenous materials, the petitioner will not be entitled to import foreign made materials. On behalf of the Customs Department,

nothing was shown which prohibited export of leather jackets made in India. Therefore, Clause (d) of Section 113 is not attracted.

10. Clause (i) of Section 113 also relates to "any dutiable or prohibited goods" which do not correspond in any material particular with the entry made. The contention of the petitioner, which has not been refuted by the respondent, is that the goods are neither dutiable nor prohibited. So, if there is any mis-description, the goods are not liable to confiscation.

11. Similarly, Sub-section (2) of Section 120 also is not attracted because the goods cannot be described to be the smuggled goods at all. Although the term ''smuggled goods'' has not been defined in the Customs Act, the word ''smuggling'' has been defined to mean any goods which are liable to confiscation u/s 111 of Section 113 by virtue of any act or omission. It has not been shown how these goods are liable to be confiscated u/s 111 or Section 113 because of the mis-description given in the entry. Nothing was produced to show how Section 3 of the Export and Import Control Act was attracted.

12. The following order was passed by the Adjudicating Officer :

"I order confiscation of the goods against the Shipping Bill No. EF-1386 and EF 1388 both dated 29-4-1992. I, however, give an option to the exporter to redeem the goods for export only on payment of a fine of Rs. 7,50,000.00 (Rupees Seven lacs and fifty thousand only). I also impose a personal penalty to the tune of Rs. 5,00,000.00 (Rupees Five lacs only) on the exporter M/s. Anita International for deliberate attempt to defraud and misuse the DEEC benefits. I also order that the licensing Authority be suitably intimated so that the Advance Licence issued to the exporter is cancelled and...an deemed fit. Necessary entries be made in the DEEC Registers/Records of this Custom house so that this party''s consignments are examined thoroughly in future."

13. The first part of the order really imposes various penalties like confiscation of the goods and payment of redemption fine and personal penalty of Rs. 5 lacs. That part of the order will stand quashed. Since the order of confiscation of the goods is not justified in law under clauses (d) and (i) of Section 113 of the Customs Act, the order of confiscation as well as the order imposing redemption fine Rs. 7,50,000/- and personal penalty of Rs. 5 lacs are also quashed.

14. The Adjudicating Officer has also made certain recommendation for taking steps for cancellation of the licence by the Licensing Authority. I do not pass any order in respect of that. I however, direct if any steps are taken by the Licensing Authority, the petitioner should be given a hearing before passing any such order.

15. I also make it clear that this order will not prevent the respondents from proceeding in accordance with law against the petitioner for mis-description in respect of the goods. The petitioner will also be entitled to defend itself in accordance with law.

16. The petitioner will not be entitled to get any advantage of import entitlement

on the strength of the false declaration made on 7th May, 1992.

The writ petition is disposed of on the above terms. The interim orders are vacated.

The respondents shall return the licence and other documents to the petitioner within a period of fortnight from date after making xerox copies thereof.

All parties including the Allahabad Bank, International Branch, Park Street, Calcutta shall act on the signed copy of the operative part of this judgment on the usual undertaking.

