(2011) 07 MAD CK 0173

In the Madras High Court

Case No : Writ Petition No. 9420 of 2011 and M.P. No. 1 of 2011

Big Bag International Pvt. Ltd. APPELLANT

Vs

Central Board of Excise and Customs RESPONDENT

Date of Decision : 15-07-2011

Acts Referred:
Constitution of India, 1950 — Article 14, 19, 19(1), 21
Foreign Trade (Development and Regulation) Act, 1992 — Section 5

Citation : (2011) 274 ELT 49

Hon'ble Judges : M. Jaichandren, J

Bench : Single Bench

Advocate : C. Saravanan, for the Appellant; T.R. Senthilkumar, for the Respondent

Final Decision : Dismissed

Judgement

M. Jaichandren, J.—This writ petition has been filed praying for a Writ of Declaration to declare the impugned Circular MF(DR) No.

58/2004-Cus, dated 21.10.2004, of the first Respondent, as null and void, as it is contrary to the provisions of the Foreign Trade Policy, Foreign

Trade (Development and Regulation) Act, 1992, Customs Act, 1962 and Articles 14, 19(1)(g) and 21 of the Constitution of India.

2. It has been stated that the Petitioner is engaged in the manufacture of Woven bags meant for export to foreign countries. The Petitioner is one of

the biggest exporters of such goods and it is recognised as a star export house, by the Director General of Foreign Trade, Bangalore. It has been

further stated that Paragraph 3.10.4 of the Foreign Trade Policy confers certain privileges to the status holders like the Petitioner, who are eligible

for the following privileges:

3.10.4 states that a status Holder shall be eligible for privileges as under:

i) Authorization and Customs Clearances for both imports and exports on self-declaration basis;

ii) Fixation of Input-Output norms on priority within 60 days;

iii) Exemption from compulsory negotiation of documents through banks. Remittance/Receipts, however, would be received through banking

channels;

iv) 100% retention of foreign exchange in EEFC account;

v) Exemption from furnishing of BG in Schemes under FTP;

vi) SEHs and above shall be permitted to establish Export Warehouses, as per DoR guidelines.

vii) For status holders, a decision on conferring of ACP status shall be communicated by Customs within 30 days from receipt of application with

Customs.

Viii) As an option, for Premier Trading House (PTH), the average level of exports under EPCG Scheme shall be the arithmetic mean of export

performance in last 5 years, instead of 3 years

ix) Status Holders of specified sectors shall be eligible for Status Holder Incentive Scrip under Para 3.16 of FTP.

3. It has been further stated that, by the impugned circular of the first Respondent, dated 21.10.2004, as amended from time to time, the benefits

and privileges conferred under the Foreign Trade Policy have been curtailed or withdrawn. The exporters, who are status holders, have been

issued with show cause notices, by the various officers, under the Customs Act, 1962, forcing them to furnish bank guarantees for the entire duty

to be paid by them. Such notices are being issued arbitrarily, jeopardising the operation of the exporters, contrary to the benefits conferred under

the Foreign Trade Policy.

4 It has been further stated that the third Respondent had issued a show cause notice, dated 13.12.2010, demanding from the Petitioner an amount

of Rs. 1,05,107/-. The Petitioner had submitted a suitable reply. A personal hearing had also been conducted on 6.1.2011. However, no orders

had been passed by the third Respondent, till date. While so ,M/s. Big Bags India Private Limited had merged with the Petitioner. A demand notice had been issued demanding an amount of customs duty to the tune of Rs. 2.42 lakhs. The Petitioner has contested the demand, as it is time

barred.

5. It has been further stated that the officers from the office of the second and the third Respondents have been employing coercive methods to

make the Petitioner pay the customs duty, as demanded by them, by withholding and delaying the clearance of imports and exports. Therefore, the

Petitioner has been paying the duty demanded by the second and the third Respondents, under protest.

6. It has been stated that the third Respondent had issued a letter bearing Reference No. F. No. S. Misc.70/2011-DFIA, dated 23.2.2011,

requiring the Petitioner to issue bank guarantee for securing the entire duty, said to be payable for the goods cleared under the Export Promotion

Scheme, as per the Foreign Trade Policy, based on the impugned circular of the first Respondent, dated 21.10.2004.

7. The learned Counsel for the Petitioner had submitted that the impugned circular of the first Respondent is contrary to the Foreign Trade Policy,

issued u/s 5 of the Foreign Trade (Development and Regulation) Act, 1992, as well as the provisions of the Customs Act, 1962. Even though the

impugned circular of the first Respondent, dated 21.10.2004, is contrary to law and contrary to Articles 19 and 21 of the Constitution of India, the

officers of the second and the third Respondents have an obligation to follow the said circular, as it has been issued by the Ministry of finance.

Even though the Petitioner is a status holder and has been enjoying certain privileges, as per the Foreign Trade Policy, the impugned circular of the

first Respondent had amended, modified and abridged some of the privileges, causing grave prejudice to the Petitioner and other similarly placed

status holders. The impugned circular, which is contrary to paragraphs 3.10.4 of the Foreign Trade Policy, cannot be sustained in the eye of law.

8. The learned Counsel appearing for the Petitioner had relied on the decision of the Supreme Court, reported in Sandur Micro circuits Limited v.

Commissioner of Central Excise, Belgaum (2008) 14 SCC 336, wherein the supreme Court had held that a circular cannot take away the effect of

a notification, having the force of law. When the privileges had been granted to the Petitioner by way of a statutory notification, such privileges cannot be diluted or withdrawn by way of circulars.

9. In the counter affidavit filed on behalf of the Respondents, the averments and allegations made on behalf of the Petitioner had been denied. A

primary objection had been raised stating that the writ petition is not maintainable on the ground of laches, as the Petitioner is seeking a relief to

quash the impugned Circular, dated 21.10.2004, issued by the first Respondent, belatedly.

10. It has been further stated that the impugned circular, dated 21.10.2004, has prescribed the norms for execution of bonds and bank guarantees,

in pursuance of the Foreign Trade Policy 2004-2009. As per paragraph 2.27.1 of the said Policy, star export houses are exempted from furnishing

bank guarantees, on imports, under various schemes. Hence, a similar exemption had been provided to the exporters under the provisions of the

Circular.

11. It had also been stated that paragraph 2.20 of the Hand book of Procedures (Vol.I) which had been notified through a Public Notice No. 1

(RE-2008)/2004-09, dated 11.4.2008, issued by the Director General of Foreign Trade, Ministry of Commerce and Industries, prescribes that in

case of direct imports, before clearance of goods through customs, the Licence Holder shall execute a legal undertaking/bank guarantee, before

the customs authorities, in the manner prescribed by them. Accordingly, the impugned Circular had been issued prescribing the manner of

executing such undertaking/bank guarantee.

12. It has been further stated that, while prescribing the norms, the bank guarantee exemption had been approved, subject to certain conditions, as

mentioned in 3.2 of the Circular. One of the conditions stipulated is that the licence holder should not have been penalised, under the provisions of

the Customs Act, 1962, The Central Excise Act, 1944, The Foreign Exchange Management Act, 1999, or The Foreign Trade (Development and

Regulation) Act, 1992, during the previous three financial years. The conditions prescribed are in tune with the provisions of the Hand Book of

Procedures formulated under the provisions of the Foreign Trade Policy. As such, the conditions prescribed in the circular are in consonance with

the provisions of the Foreign Trade Policy and therefore, the impugned circular is valid in the eye of law.

13. It has been further stated that the exemption granted in favour of a star export house from furnishing of bank guarantees is subject to certain

conditions. If an exporter is found to have committed acts of duty evasion involving mis-declaration, mis-statement, collusion, or willful suppression

in the previous financial year, the exemption from furnishing of bank guarantee would be revoked. It has been further stated that the Petitioner has

claimed duty exemption against Duty Free Import Authorization (DFIA), as per the provisions of the Notification No. 40/2006 -Customs, dated

1.5.2006, as amended by Notification No. 17/2009 -Customs, dated 19.2.2009.

14. The notification stipulates that on import of goods under the duty exemption scheme, the importer shall, at the time of clearance of goods,

execute a bond with such surety or security and such form, as prescribed by the authorities concerned, for a sum as may be specified by the

Deputy Commissioner of Customs or Assistant Commissioner of Customs, binding himself to pay on demand an amount equal to the duty leviable

with interest, in cases where the conditions of the notification are not complied with. Therefore, the averment of the Petitioner that the impugned

circular has been issued contrary to the statutory notifications issued and the Foreign Trade Policy is incorrect. The impugned circular would not be

infringing any of the provisions of law. Further, the impugned circular has not been issued contrary to the provisions of law, as alleged by the

Petitioner. As such the decision of the Supreme Court cited by the Petitioner is not applicable to the present case.

15. It has been further stated that the show cause notice was issued to the Petitioner on the ground of misdeclaration and suppression of facts for

claiming additional duty exemption in the clearance of imported goods under the Duty Free Import Authorization (DFIA) Scheme. The Petitioner

has been issued with show cause notices and the matter had been adjudicated on 23.2.2011, vide Order-in-Original No. 14780 of 2011,

imposing a penalty of Rs. 1.5 crores and 2.5 crores on Big Bags International Pvt. Ltd. And Big Bags India Pvt. Limited, respectively. Therefore,

some of the privileges conferred on the Petitioner, as a status holder, had been withdrawn. In such circumstances, it cannot be said that the

impugned circular of the first Respondent, dated 21.10.2004, is arbitrary and illegal.

16. In view of the averments made in the affidavit filed in support of the writ petition and in the counter affidavits filed on behalf of the Respondents

and in view of the submissions made by the learned Counsels appearing on behalf of the parties concerned and on a perusal of the records

available, this Court is of the considered view that the Petitioner is not entitled to the reliefs prayed for by the Petitioner, in the present writ petition.

17. The Petitioner has chosen to challenge the impugned circular of the first Respondent, dated 21.10.2004, belatedly, without challenging the

subsequent circulars. Further, the Petitioner has not been in a position to show that the impugned circular of the first Respondent, dated

21.10.2004, is contrary to the Foreign Trade Policy and the relevant provisions of law, including Articles 14, 19 and 21 of the Constitution of

India, as it could be seen from the records available, that the Circular has been issued in consonance with Hand Book of Procedures and the

Foreign Trade Policy of the Ministry of Commerce and Industry, Government of India.

18. Even though the Petitioner had been enjoying certain privileges, as a status holder, as per the notification issued under the Foreign Trade

Policy, such privileges had been granted subject to certain conditions prescribed in the Hand Book of Procedures. Further, it has been contended

on behalf of the second and the third Respondents that the Petitioner had committed certain irregularities by misdeclaration and suppression of

facts, while claiming additional duty exemption in the clearance of imported goods, under the Duty Free Import Authorization (DFIA) Scheme.

19. Even though the Petitioner claims to have challenged the show cause notice, as well as the Order-in-Original No. 14780, dated 23.2.2011,

and even if the Petitioner had already paid the amounts claimed as customs duty, in respect of the goods in question, it would not support the cause

of the Petitioner in the present writ petition. As such the contentions raised on behalf of the Petitioner cannot be countenanced. As the writ petition

is devoid of merits, it is liable to be dismissed. Hence, it is dismissed.

20. However it goes without saying that it would be open to the Petitioner to pursue the alternate remedies available to it, in challenging the orders

passed against it, before the appropriate authorities concerned, in the manner known to law and on the Petitioner succeeding before such authorities, it would be open to the Petitioner to claim the privileges conferred in its favour, as a status holder, as per the procedures established by

law. No costs. Consequently, connected miscellaneous petition is closed.

