(2010) 12 DEL CK 0100

In the Delhi High Court

Case No : Writ Petition (C) 6887 of 2010 and CM Nos. 13628 and 13629 of 2010

Chemical Centre (India) — APPELLANT

Vs

The Commissioner of Customs and Another — RESPONDENT

Date of Decision : 22-12-2010

Acts Referred:
Drugs and Cosmetics Rules, 1945 — Rule 123, 43

Citation : (2011) 1 AD 595 : (2011) 121 DRJ 558 : (2011) 264 ELT 325

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Maninder Singh, Prathiba Singh and Surbhi Mehta, for the Appellant; Mukesh Anand, Shailesh Tiwari for R-1, Ravinder Agarwal, CGSC and Nitesh Gupta, for R-2, for the Respondent

Final Decision : Allowed

Judgement

S. Muralidhar, J.—The Petitioner seeks release of goods imported by it which, according to the Petitioner, have been illegally detained by the Respondents.

2. The Petitioner is a partnership firm engaged in importing citric acid monohydrate ("CAM") from a Chinese supplier since 2008. The imports have been allowed by the Commissioner of Customs, Respondent No. 1, upon the Petitioner furnishing the requisite documents. The Petitioner sells CAM in the retail market and the invoices of the Petitioner contain the endorsement "not for medicinal use." The Petitioner holds a licence under Form 21-B and 20-B under the Drugs and Cosmetics Act, 1940 ("DCA") for sale or distribution by wholesale. The Petitioner states that CAM is a versatile industrial chemical which has several uses and in particular for cleaning industrial vessels, dissolving rust, water stains from glass etc. It is reiterated that CAM imported by the Petitioner is for non-medicinal uses. Accordingly, it is submitted that the said import does not require a licence as it is covered by Rule 43 and Schedule D of the Drugs and Cosmetics Rules, 1949 ("DCR"). It is submitted that as long as the Petitioner is able to certify that the CAM imported by it is for non-medicinal uses, it is exempt from

obtaining a licence for the import of CAM in terms of Rule 43 DCR. It is further submitted that Rule 123 DCR exempts drugs specified in Schedule K from the provision of Chapter 4 of the DCA as long as they are not sold for medicinal use and each container is labeled conspicuously with the words "not for medicinal use."

3. 96 MT of CAM valued at US$ 62,400 in the form of bulk packs of 25 kgs each was imported by the Petitioner. A bill of entry dated 23rd July 2010, an invoice dated 25th May 2010 and packing list dated 25th May 2010 were all submitted to the Customs officials for clearance. The invoice clearly described the bulk goods as "Citric Acid Monohydrate BP 93." This was also indicated in the packing list.

4. It is stated that in an order dated 30th July 2010 followed by the observation dated 2nd August 2010, the Customs Department noted that the term "BP-93" suffixed after "Citric Acid Monohydrate" indicated that the goods were of pharma grade and could be released only upon a no objection certification ("NOC") from the Assistant Drugs Controller, Respondent No. 2. The Petitioner, by a letter dated 23rd July 2010 addressed to the Customs Department, certified that the CAM imported by it was only for non medicinal purposes. A certificate to this effect issued by its foreign supplier from China dated 25th May 2010 was also furnished. Thereafter, by a letter dated 10th August 2010 addressed to Respondent No. 1, the Petitioner pointed out that the CAM imported by it was for further sale to industrial users who were not manufacturers of pharma products. It was pointed out that the use of "BP-93" in the description of imported goods was merely for analytic reference. Respondent No. 2 was requested to issue an NOC for release of the goods. The Petitioner''s request for a personal hearing by a letter dated 10th August 2010 was not acceded to. By a letter dated 23rd August 2010, Respondent No. 2 rejected the Petitioner''s representation on the ground that CAM also has medicinal uses for treatment of certain illness. By its letter dated 20th September 2010, Respondent No. 2 again rejected the Petitioner''s submissions.

5. Worried about the accumulation of demurrage charges on the imported goods lying at the warehouse, the present petition was filed by the Petitioner seeking quashing of the decisions dated 30th July 2010, 2nd August 2010 of the Customs Department, Respondent No. 1 and those dated 23rd August 2010 and 20th September 2010 by the Respondent No. 2.

6. While directing notice to issue in this writ petition on 8th October 2010, this Court directed that it would be open to the Petitioner to provide to the Respondents the list of the purchasers who will use the imported goods. Thereafter on 21st October 2010, this Court permitted the Petitioner to clear the imported goods subject to the condition that the imported goods were kept in a secure place under the direct supervision of Department of Customs. The Petitioner informed the Court on 23rd November 2010 that on the insistence of the Customs Department, the Petitioner was required to furnish a bank guarantee and a bond, which it did under protest. This Court then passed an

order leaving it open to the Petitioner to seek appropriate remedies in accordance with law for the loss, if any, suffered by the Petitioner on account of the alleged non-compliance by Respondent No. 1 with the Court''s order dated 21st October 2010.

7. At the hearing on 6th December 2010, the Petitioner pointed out that after the impugned decisions dated 23rd August 2010 and 20th September 2010, the Petitioner''s further consignments have been permitted to be cleared upon the Petitioner furnishing an affidavit stating that imported CAM would not be used for medicinal purposes.

8. In response to the order dated 6th December 2010 passed by this Court, Mr. Ravinder Agarwal, learned Counsel for Respondent No. 2 produced a copy of the undated communication received from the Drug Controller General (India) ("DCGI") (Import & Registration Division) stating that imported goods were of pharma grade and, therefore, fell within the category of "Drugs" as defined under the DCA. It was insisted that the import of the goods had to be in accordance with DCA and DCR and then alone could it be released. A distinction is sought to be drawn between the other consignments imported by the Petitioner subsequently which have been cleared by stating that they were not "pharma grade" goods.

9. Mr. Maninder Singh, learned Senior counsel appearing for the Petitioner refers to a chart at (Annexure P-17 pages 133 and 134 of the paper book) showing the imports permitted by the Respondents of CAM by several other parties, despite the fact that description of the goods in the bills of entry and invoices contained the suffix "BP". It is submitted that "BP", used as a suffix to the description of the goods, only indicated the quality/grade of the imported substance.

10. Mr. Maninder Singh also relied upon the judgment of the Madras High Court in S. Kesarimal Vs. Commissioner of Customs (Imports), where it was held that use of imported goods for the manufacture of diet supplements was not use for medicinal purposes, and was therefore exempt from the need to obtain a licence in terms of Rule 43 read with Schedule D of the DCR. It is submitted that as long as the Petitioner was able to certify that the CAM imported by it was not for medicinal purposes, the requirement of Rule 43 DCR read with Schedule D thereof was fulfilled. No licence was required for such import as it was exempt from the provisions of Chapter IV DCA.

11. Mr. Ravinder Agarwal, learned Counsel appearing for Respondent No. 2 first points out that in terms of a Circular dated 13th December 2005, imported drugs having a dual purpose for use as a raw material in the manufacture of other drugs, required an application to be made to CDSCO, Headquarter, where a case-to-case examination would be undertaken. After due scrutiny, permission to import dual purpose drugs would be granted. It is submitted that in this case, the Petitioner submitted an application after the import was made and, therefore, this was contrary to the procedure outlined in the Circular dated 13th December

2005.

12. Secondly, Mr. Agarwal submitted that a self certificate by the importer in terms of Rule 43 of the DCR may not be sufficient. The invoices produced by the Petitioner showed that sales of CAM imported were made to retailers. It is submitted that although such retailer may not himself be a manufacturer of drugs, he may in turn sell the CAM to a manufacturer of drugs. It is submitted that the Petitioner would therefore not be in a position to issue a certificate about non-use of the imported goods for medicinal purposes.

13. The above submissions have been considered.

14. It is significant that in the communication dated 23rd August 2010 addressed to the Assistant Drugs Controller, the DCGI informed that "the purpose of import of subject drugs is for further sale to the industrial users other than pharma but not for the captive consumption, hence the import may not be permitted by this office." The above letter, therefore, is an acknowledgement by Respondent No. 2 that the CAM imported by the Petitioner was for sale to industrial users "other than pharma". The letter wrongly proceeds on the assumption that the Petitioner was required to captively consume the CAM imported by it. Mr. Ravinder Agarwal, candidly states that there was no such requirement either under the DCA, DRC or even the circular dated 13th December 2005. Consequently, the reason for DCGI not permitting the import of the CAM by the Petitioner is not a valid one.

15. The subsequent letter dated NIL by Respondent No. 2 to its learned Counsel pursuant to the Court''s order dated 20th December 2010, states that since the description of the imported CAM contained the suffix "BP" it was of "pharma grade" having pharmaceutical activity and therefore could not be permitted to be imported. The chart produced by the Petitioner at Annexure P-17, which is not disputed by the Respondents, shows that identical imports of CAM by other importers, with the description of the goods as "CAM BP-98" and "CAM BP-2003", have been permitted. There is merit in the contention of learned Senior counsel for the Petitioner that suffix "BP" is merely an indication of the quality or grade of the imported goods. It is possible that even without the suffix "BP" the imported CAM could be used for medicinal purposes. What is relevant for Rule 43 DCR is the certificate of the importer that the imported goods will not be used for medicinal purposes. Once such certificate is issued, it is not open to the Respondents to ignore such certificate and insist on the importer obtaining a licence. As explained by the Madras High Court in S. Kesarimal the declaration by the importer of the use of the imported goods for non-medicinal purposes is determinative of whether Rule 43 would be attracted in a given case. In the present case, the Petitioner has repeatedly stated that it is prepared to furnish an affidavit stating that it will not use the CAM imported by it for medicinal purposes and further that it will not sell the CAM imported by it to any person who is likely to use it for medicinal purposes. It is not possible for the Respondent to insist on any other certification by the Petitioner beyond what is required by Rule 43 or Rule 123 DCR. The Petitioner cannot be expected to

ensure that the retailer to whom the Petitioner sells the imported CAM does not in turn sell it to a person who might use it for medicinal purposes. It is for the Respondents to ensure enforcement of the law to prevent any violation.

16. This Court takes on record the statement made by the learned Senior counsel for the Petitioner, on instructions, that the Petitioner will furnish within one week an affidavit to the Respondents undertaking that the Petitioner will supply to the Respondents a complete list of the purchasers of the CAM imported by it under the consignments in question. It would be open to the Respondents to undertake a surprise check of the premises of the purchasers as disclosed by the Petitioner. If the Respondents find that such purchasers have sold the consignment to a manufacturer of drugs or a person who is likely to use such goods for medicinal purposes, the Respondents will proceed to take action in accordance with law.

17. For the aforementioned reasons, this Court sets aside the order dated 30th July 2010 and the consequent observation dated 2nd August 2010 of the Customs Department requiring the production by the Petitioner of an NOC from the DCGI. The decision communicated in the letter dated 23rd August 2010 from the DCGI to the Customs Department, and the orders dated 29th August 2010 and 20th September 2010 communicated by Respondent No. 2 to the Petitioner are also set aside. It is directed that the Petitioner will be permitted by the Respondents to remove the goods in question, which have already been cleared, upon the Petitioner furnishing to the Respondents within one week an affidavit stating that:

(a) The Petitioner will not use the imported goods for any medicinal purposes and also will not sell it to any party, who is likely to use the goods for medicinal purposes; and

(b) The Petitioner will furnish to the Respondents the complete list of all the purchasers of the CAM imported by it under the consignments in question.

18. It is clarified that it would be open to the Respondents to undertake surprise checks at the premises of the purchasers as disclosed by the Petitioner and further proceed in accordance with law, if it is found that the imported CAM purchased from the Petitioner by such retailers is in turn sold to others who use it for medicinal purposes. This Court has already clarified in its order dated 23rd November 2010 that it would be to the Petitioner to seek appropriate remedies in accordance with law for the alleged loss, if any, suffered by it on account of the alleged non-compliance by Respondent No. 1 with the order dated 21st October 2010 passed by this Court. The bond and bank guarantee furnished by the Petitioner, as recorded in this Court''s order dated 23rd November 2010, are hereby discharged.

19. With the above directions, the writ petition is allowed, but in the circumstances, with no order as to costs. The pending applications are also disposed of.

