
(2001) 03 MAD CK 0073

In the Madras High Court

Case No : W.A. No's. 2086 and 2087 of 1999

Commissioner of Customs

APPELLANT

Vs

Salem Stainless Steel

RESPONDENT

Date of Decision : 13-03-2001

Acts Referred:

Citation : (2001) 78 ECC 43 : (2001) 131 ELT 30

Hon'ble Judges : V.S. Sirpurkar, J;V. Kanagaraj, J

Bench : Division Bench

Advocate : V.T. Gopalan, ASG for K. Gunasekar, ACGSC, for the Appellant; R. Thiagarajan, for M. Muthappan and D. Gurusurthy, for the Respondent

Final Decision : Dismissed

Judgement

V.S. Sirpurkar, J.—This judgment will dispose of W.A. Nos. 2086 and 2087 of 1999. A common judgment by the learned single Judge of this Court is in challenge. By the instant judgment, the learned single Judge allowed the writ petitions filed by the present respondent. Following facts will help to understand the controversy involved.

2. Petitioner had purchased two quantity based Advance Licences, bearing Nos. 0325984, dated 16-8-1994 and PK0545079, dated 24-1-1995, issued by the Joint Director General of Foreign Trade, Bombay and office of the Joint Director General of Foreign Trade, New Delhi respectively. These licences related to the Policy Year 1994-95. The first licence was issued in the name of Amar Enterprises, Bombay for import of non magnetic stainless steel sheets/coils of AISI 304 specification while the other licence dated 24-1-1995 was issued in favour of M/s. Rajan Overseas Private Limited, Delhi for import, of non magnetic stainless steel sheets/coils made of AISI-304 specification. These licences were issued under the Duty Exemption Entitlement Scheme and as such carried with them certain export obligations. It is an admitted position that as per the Import Export Policy 1992-97, such licences become transferable on the licensee fulfilling the export obligation and getting necessary endorsement to that effect

regarding the transferability from the licensing authority. It is an admitted position that the two exporters had completed their export obligations and had got the necessary endorsement of transferability from the licensing authority on both the licences. Since the said licences were purchased by the petitioner, he became the holder of valid licences, enabling him to import the items described therein. The petitioner had also completed all the formalities to import the goods covered under these licences through the port of Madras and after that imported four cases of stainless steel coils from Singapore, weighing about 28.068 kgs. The Petitioner did not have the requirement of the whole stock for immediate use and, therefore, bonded the goods, which were imported on 7-9-1995. Subsequently, when the petitioner wanted to get the goods released for immediate use, the petitioner filed the Bill of Entry (B.E. No. 004232, dated 2-3-1996) for clearance of 12,235 kgs. of coil contained in two cases. Petitioner pleaded before the learned single Judge that the necessary documents, including the original licences transferred in favour of the petitioner, were also filed. It seems that the description in the Bill of entry, probably on the basis of the import document, mentioned the thickness of the goods to 2.00 and 3.13 mm. A query was, therefore, raised to the following effect:

"As per the import document, the thickness of the goods under reference one 2.00 mm and 3.15 mm, whereas the thickness of the goods not mentioned either in the Advance Licence under reference one in Part II DEEC Book. Please clarify the same."

It is the case of the petitioner that he on 18-3-1996 sent a reply to the Assistant Commissioner of Customs, Grade VII and pointed out that the licences in question did not specify the thickness or gauge of the items to be imported but mentioned only the chemical composition and the goods which were imported admittedly satisfied and answered the chemical composition mentioned in the document. It was also pointed out that since these licences were issued during April, 1994 and March, 1995, the criterion of conformity was restricted only to the chemical composition and not to the thickness. The petitioner pleads that after this was placed before the Deputy Commissioner of Customs, Grade VII, he made an endorsement that the nexus had to be established. Following this endorsement of the Deputy Commissioner, the Assessing Officer remarked in the Bill of Entry that since the importer was unable to prove the nexus, the importer had either to produce the valid advance licence or pay duty on import. This endorsement was made on 4-4-1996. The petitioner pleaded that he sent a letter, dated 8-4-1996 and pointed out that the nexus had to be established only with reference to the chemical composition and not with regard to the thickness as demanded by the authorities and also required a personal hearing for that purpose but to no effect and the petitioner, therefore, straight away filed a writ petition before this Court, challenging both the endorsements.

3. It was opposed before the learned single Judge by the appellant state on the ground that the petitioner could have filed the statutory appeal and a writ

petition was not maintainable. It was also reiterated that the imported materials must conform to the materials which had been exported by the original licensee and, therefore, if the petitioner had imported the stainless steel sheets/coils of a particular thickness, he must prove that the original licensee had exported the stainless steel material of the same thickness.

4. The learned single Judge accepted the contention raised by the petitioner and hold that the petitioner was only a purchaser of the import licences from the original licensees and the original importers had imported the materials as per the original licences and had fulfilled their obligations of the export. The learned single Judge also found that in the original licences, there was no specification of the thickness of the stainless steel sheets/coils. The learned single Judge also found that since the original licensees had already discharged their export obligations and obtained transfer endorsements and then sold the licences to the petitioner, there will be no question of establishing the nexus because the transferee like the petitioner did not have any export obligation. That export obligation was already discharged by the original licensees. The learned single Judge then relied upon the decision in *Bussa Overseas and Properties (Private) Limited and another Vs. Union of India and another*, and held that when once the export obligation had been discharged, it was not for the customs authorities to insist for the nexus and the customs authorities had no say in the matter. The learned single Judge also held that since the licences were not cancelled and the goods were imported under the valid licences and when there was no obligation of export, which was already discharged, there was no question of the authorities to insist for the nexus between the goods imported by the petitioner and the goods exported by the original licensees. It is this judgment, which is in challenge in both the appeals.

5. The learned Additional Solicitor General, Mr. V.T. Gopalan, firstly contends that the petition itself was premature as, on the basis of the aforementioned endorsements, no assessment had yet been made by the concerned officer and the assessment orders could have been challenged by way of appeals or any other statutory remedy available. Per contra, learned Senior Counsel, Mr. R. Thiagarajan, appearing on behalf of the respondent contended that though it is true that the assessments have not yet been made, however, if the concerned authority chose to do something which it had no jurisdiction to do, there would be no point in asking the petitioner to wait till the assessment and suffer on account of an adverse order. According to the learned Senior Counsel, the endorsements were clear enough to suggest that a view was already taken by the concerned authorities and the Commissioner had written an order, which amounted to a final finding. It will have, therefore, to be seen whether the said endorsements made in two cases were within the powers of the concerned authority.

6. The learned Additional Solicitor General, Mr.V.T. Gopalan pointed out that merely because the import licences were transferred after the original licensee

had fulfilled his export obligation that by itself did not entitle the transferee like the petitioner to import anything distinct and different from the goods covered in the original import licence in favour of the original licensee. The learned Counsel argues that there would still be a power in the Customs authorities to check as to whether the goods imported on the basis of the transferred licence by the transferee correspond to the goods which are covered by the original licence. There can be no dispute that the Customs authorities would have the powers to check about the goods and their similarity. In this behalf, the learned Additional Solicitor General contended that before the authorities the original licences were not produced at all and in their absence, there was no way to know as to whether the goods, which were being imported, were the same goods which were covered under the original licences. It must be firstly seen as to whether the original licences, i.e. the advance import licences were at all before the concerned authority. Considering the language of the first endorsement, it is clear that the advance import licences were certainly before the concerned authority. Otherwise, a query could not have been raised that the thickness of the goods was not mentioned in the advance licences or in the Part II DEEC book. During the course of the arguments, Mr. R. Thiagarajan, learned Senior Counsel for the respondent pointed out that it was a claim made in the writ petition itself that the advance licences were specifically produced before the authority. Our attention was drawn to paragraph 3 of the affidavit wherein a specific assertion is made to the following effect:

"Along with the Bill of Entry, necessary documents, including the original licences transferred in favour of the petitioner were also filed."

The learned Senior Counsel for the respondent, therefore, urged that there was no question of the advance licences not being before the authorities and it was only after the advance licences were examined that the concerned authorities wrote a finding that since those advance licences did not mention the thickness of the goods, "valid" advance licences, probably meaning, the licences where the thickness of the goods was mentioned, would have to be produced. The learned Counsel is undoubtedly correct because in the endorsement dated 4-4-1996, it is specifically mentioned as follows :

"In this case, the importer is unable to prove the nexus. They have to either produce valid advance licence or pay duty on merit."

In the endorsement dated 8-3-1996, there is a clear-cut reference made that the advance licences did not mention any thickness of the goods. The learned Counsel, therefore, urged that the authorities were almost putting the cart before the horse by asking for an advance licence which would be in consonance with the goods imported. The learned Senior Counsel pointed out that the only description in the advance licences was in respect of the chemical composition of the stainless steel and it was an admitted position that the goods which were imported by the petitioner were of the same description. The learned Senior Counsel invited our attention to the contention of the writ petitioner in paragraph

6 of the affidavit, where it is contended as under:

"I state that the direction of the respondents in the Bill of Entry that the petitioner has to establish the nexus between the goods exported and those imported is clearly illegal and without jurisdiction. The test report, dated 16-10-1995 issued by the National Metallurgical Laboratory, Madras Centre after testing the goods imported, clearly indicates that the sample conformed to AISI 304 Stainless Steel. This test report is in accord with the requirement as to the chemical composition of the goods exported."

Apart from this requirement of conformity to the chemical composition, there is no other norm or requirement to be satisfied by the importer. From this the learned Counsel points out that the goods covered under the original Advance Import Licences and the goods which were imported by the petitioner were identical.

7. The learned Additional Solicitor General appearing on behalf of the appellant very fairly admits that in so far as the chemical composition of the goods is concerned, both the goods are identical. The learned Counsel also admits that in the Advance Import Licences, the thickness or gauge of the goods is not mentioned at all and what is mentioned is only the chemical composition of the stainless steel, which was non-magnetic nature. The learned single Judge, therefore, proceeded to hold that once this was an accepted position that the goods, which were being sought to be imported by the petitioner, were of the same chemical composition as mentioned in the original Advance Import Licences and once there was no other description to be found of those goods, the concerned authorities could not insist upon the nexus of the basis of the thickness or gauge of the goods. In our opinion, the learned Judge was absolutely right in so holding.

8. During the debate, Mr. R. Thiagarajan, learned Senior Counsel produced before us a copy of the original Advance Import Licence, which was also seen by us as also the learned Additional Solicitor General and it is clear that the said Advance Import Licence had no other description excepting the description regarding the chemical composition of the stainless steel of non-magnetic nature. Therefore, it is clear that in insisting upon the so-called "valid" Advance Import Licences, the concerned authorities were clearly overstepping their Jurisdiction.

9. In our opinion, the learned single Judge was also right in holding that the nexus need not be established because the question of nexus would arise only when the obligation of the exporter exists and the petitioner, as purchaser of the licences, after the discharge of the obligation of export, is not required to establish the nexus. The Division Bench judgment of the Bombay High Court in *Bussa Overseas* case, cited *supra*, applies on all fours to the present case. We are in respectful agreement with the Division Bench judgment of the Bombay High Court. In that view, the appeals are dismissed and the judgment of the

learned single Judge is confirmed. The authorities shall now proceed to make the assessment orders ignoring the questioned endorsements and in the light of the observations made in both the judgments of the High Court. No costs.