(1993) 04 MAD CK 0019

In the Madras High Court

Case No : Writ Appeal No''s. 315,316, 353 and 354 of 1993

East West Exporters APPELLANT

Vs

Assistant Collector of Customs RESPONDENT

Date of Decision : 29-04-1993

Acts Referred:

Customs Act, 1962 — Section 111, 3
Penal Code, 1860 (IPC) — Section 463, 464

Citation : (1993) 43 ECC 185 : (1993) 68 ELT 319

Hon'ble Judges : Somasundaram, J;Ratnam, J

Bench : Division Bench

Judgement

Somasundaram, J.—As the points involved in these writ appeals are common, they are disposed of by this common judgment.

2. These writ appeals arise out of the common order of the learned Single Judge made in W. P. Nos. 1012 and 1013 of 1993, directing that the

goods in each of the cases should be allowed to be cleared within 10 days from the date of payment of 50% of the duty in each case plus Bank

Guarantee for 25% of the duty and a personal bond for the balance of 25%. For the sake of convenience, the parties are referred to in this

judgment as per their array in the writ petitions.

3. The petitioners in W. P. Nos. 1012 and 1013 of 1993 are two firms engaged in the business of export of readymade garments and import of

cognate good and the facts in both the writ petitions are identical. The petitioners have purchased a Value Based Advance Licence from one M/s.

Rajendra Enterprises. The purchase was only for part of the value of the licence to an extent of Rs. 11,75,000/-in each case. The petitioners have

paid a sum of Rs. 7,40,000/- as a premium to the said M/s. Rajendra Enterprises for the purchase of the licence. The licence, purchased by the

petitioners enabled them to import and clear goods specified in the licence to the owners for transacting the balance of the licence. The petitioners

have imported Staple Pins from Japan and the goods arrived by the ship around December, 1992. Staple Pins can be imported under the Open

General Licence. With a view to clear the goods without payment of duty, the petitioners submitted the above Value Based Advanced Licence to

the first respondents along with the relevant bills of entry and the advance licence had been detained by the second respondent for certain

investigations. On 11-1-1993 when the petitioners approached the second respondent, they were served with summons u/s 10(B) of the Customs

Act and statements were recorded from the petitioners. Even thereafter, the licence has not been returned and the goods have not been allowed to

be cleared. According to the petitioners, they have acquired the licence in a legal manner paying valuable consideration and investigation cannot

prevent them from clearing the goods. In the above circumstances, the petitioners filed writ petitions 1012 and 1013 of 1993 praying for the issue

of a writ of mandamus directing the respondents to return the respective bills of entry duly assessed and also to permit clearance of the good,

namely the Staple Pins covered by the Value Based Advance Licence without payment of duty.

4. The respondents in the writ petitions filed a counter affidavit contending that a Value Based Advance Licence dated 25- 9-1992 was issued by

the Joint Chief Controller, Imports and Exports in favour of M/s. Indo International Limited, Madras. The total value of the licence was Rs.

64,89,000/-. The Licence holder was permitted to import 21 items of goods mentioned in the annexure to the licence. The licence holder had

complied with the export obligations and was, therefore, enabled to transfer the licence. Actually the licence was transferred in parts to several

persons and ultimately it was transferred to the writ petitioners. A bond or legal undertaking was executed by the licence holder as contemplated in

paragraph 118 of the Hand Book of Procedure for 1992-97 and the same was redeemed by the licensing authority on 23-10-1992. Thereafter,

there was no chance of any amendments in the licence relation to enhancement in the C. I. F. value or by way of addition to the licenced items. The original licence did not include the item of Staple Pins imported by the petitioners. However, the words ""Staple Pins"" have been included in the

annexure by way of an amendment and suspicion arose in respect of the said amendment and investigations were initiated in this regard. The

respondents further contended that, the investigations prima facie disclosed a fraud in making the unauthorised amendment ante dating the same to

avoid the implications of the redemption of the undertaking on 23-10-1992. It was also contended in the counter affidavit that there are chances of

the goods being confiscated u/s 111 of the Customs Act (hereinafter referred to as the Act), and therefore, it would be improper to allow the

goods to be cleared without payment of duty.

5. Before the learned single Judge who heard the writ petitions, it was urged by the learned counsel for the petitioners that under the export and

import policy relating to the period from 11-4-1992 to 31- 3-1997, imports can be made without any restriction except to the extent that such

imports are regulated by the negative list, that so far as the Staple Pins are concerned, there are no restriction for the import of the goods and the

same is admittedly allowed to be imported subject to payment of duty and that inasmuch as the petitioners have purchased a Value Based

Advance Licence which entitle them to clear the Staple Pins without payment of duty, there is no justification for the respondents to delay the

clearance without payment of duty, there is no justification for the respondents to delay the clearance without payment of duty. The learned Single

Judge took the view that the petitioner''s claim for exemption from payment of duty on the ground that they are having a Value Based Advance

Licence and if the said licence is ultimately found to be defective and it did not have the amendment relating to Staple Pins, it would mean that the

clearance of the goods Staple Pins without payment of duty, will be illegal. The learned Single Judge also took the view that the goods cannot be

cleared without payment of duty when the question of fraud and misrepresentation is being investigated and when the respondents have time to

complete the investigation. However, the learned Single Judge held that the petitioners can pay the duty and clear the goods and if the validity of

the licence is ultimately upheld, they can seek a refund of duty. In the view so taken, the learned Single Judge by his order dated 3-3-1993, directed that the goods in each of the cases shall be allowed to be cleared by the petitioners within 10 days from the date of payment of 50% of

the duty in each case plus Bank Guarantee for 25% of the duty and a personal bond for the balance of 25%. Aggrieved by the common order of

the learned Single Judge, dated 3-3-1993 made in writ petitions 1012 and 1013 of 1993, the petitioners have filed Writ Appeals 315 and 316 of

1993 respectively. The respondents not satisfied with the very same common order made in W. P. Nos. 1012 and 1013 of 1993, have filed Writ

Appeals 353 and 354 of 1993 respectively.

6. Before us, Mr. S. Ramasubramaniam, learned counsel for the petitioners while reiterating the contentions urged before the learned Single Judge,

submitted that under the Export and Import Policy relating to the period from 1-4-1992 to 31-3-1997, imports can be made without any

restriction to the extent that such imports are regulated by a negative list; that the goods in question, namely, Staple Pins being under O. G. L. can

be imported lawfully without licence subject to payment of duty and that as the petitioners have purchased a Value Based Advance Licence, which

entitles them to clear Staple Pins without payment of duty, the respondents are bound to allow the clearance of the goods in question without

payment of duty. The learned counsel for the petitioners further contended that in these cases, the Advance Licence has been debited to the extent

of the C. I. F. value of the petitioner''s imports and therefore, there is no further duty liability to be discharged and the order of the learned Single

Judge imposing conditions for release of the goods is totally without warrant and has been made without appreciating the scope of the Value Based

Advance Licence. The learned Counsel also contended that, even in a case where a licence is cancelled on the ground that it is obtained by fraud

or misrepresentation, such a licence continue to be valid till it is voidable and the cancellation has no effect on the imports already made and the

imports cannot be treated as unauthorised. In support of this contention, the learned counsel for the petitioners heavily relied on the following

passage in the judgment of the Supreme Court in East India Commercial Co. Ltd.,Calcutta and Another Vs. The Collector of Customs, Calcutta, .

Nor is there any legal basis for the contention that licence obtained by misrepresentation makes the licence non est, with the result that the goods should be deemed to have been imported without licence in contravention of the order issued u/s 3 of the Act so as to bring the case within Clause

(8) of Section 167 of the Sea Customs Act. Assuming that the principles of law of contract apply to the issue of a licence under the Act, a licence

obtained by fraud is only voidable; it is good till avoided in the manner prescribed by law....

... The specified authority has not cancelled the licence issued in this case on the ground that the condition has been infringed. We need not

consider the question whether the Chief controller of Imports or the Government of India, as the case may be, can cancel a licence after the term

of the licence has expired, for no such cancellation has been made in this case. In the circumstances, we must hold that when the goods were

imported they were imported under a valid licence and therefore, it is not possible to say that the goods imported were these prohibited or

restricted by or under Chapter IV of the Act within the meaning of Clause (8) of Section 167 of the Sea Customs Act"" (Vide para 35) "".

7. The learned counsel for the petitioners also relied on the ration of the decisions in (1) Lokash Chemical Works Vs. M.S. Mehta, Collector of

Customs (Preventive) Bombay and others, , (2) Fedco (P) Ltd. and Another Vs. S.N. Bilgrami and Others, and (3) Union of India and another

Vs. Sampat Raj Dugar and another, , in support of his contention that a licence obtained by fraud or misrepresentation continues to be valid till it is

avoided and that the cancellation of the licence would have no effect on the actual imports and therefore the imports cannot be treated as

unauthorised. We are unable to accept the above contentions of the learned counsel for the petitioners. In the present case, the material available

on record, prima facie go to show that no valid licence with regard to Staple Pins existed even at the time of import. It is seen from the materials

available on record that the goods in question arrived at the Port of Madras around December, 1992. According to the explanation offered by Shri

M. Gopinath, Assistant Chief Controller of Imports and Exports to his Department, an endorsement was made in the licence including Staple Pins

as one of the items of import on 9-12- 1992 ante dating the same to 23-10-1992. It is also clear from the records that the licence dated 25-9-

1992 as originally issued by the licensing authority does not provide for the import of Staple Pins. However, the item Staple Pins finds a place in the licence submitted by the Importers before the respondents. The records of the licensing authority and the copy of the licence available with

them do not include the item Staple Pins. Therefore, as rightly contended by the learned counsel for the respondents, subsequent unauthorised and

illegal interpolation of Staple Pins into the licence presented to the Customs Authorities by the Importer would not bring into existence a licence for

import of Staple Pins. Further, it is significant to note that the original licencee, namely, M/s. Indo International Limited, Madras, itself has admitted

in its letter dated 29-12-1992 that it did not apply to the licensing authority to include Staple Pins as an item in the licence since it did not utilise

such Staple Pins as materials for the manufacture of the goods exported by them. In such circumstances, the original licence itself was not eligible

for the import of Staple Pins free of duty under the Value Based Advance Licence, since exemption provided for under Notification No. 203,

Customs dated 19-5-1992, extends only to the import of materials as defined in explanation (iii) to the said Notification, wherein materials only

mean those materials used for the purpose of manufacture/packing of the export goods. The relevant portion of the letter dated 29-12-1992, given

by the original licencee reads thus :

With reference to your specific query we state that, we requested the Licensing Authorities to issue licence as per standard norms and never made

representation for inclusion of any other item for the purpose of consideration by Regional Licensing Authority. You would also find from the

licence that the individual value of the items agree with the standard norms of the C. C. I. E. New Delhi. With reference to your specific query, we

wish to state that we never requested the Licensing Authorities to include the item ""Staple Pins"" in the licence as we never use staple pins for the

purpose of export production. The xerox copy of the licence at the time of sale to M/s. A. K. Exports on 4-11- 1992 is produced to your and it

will be seen that there is no amendments for inclusion of any items not covered in the standard norms of the Government"".

Again, the explanation offered by Shri M. Gopinath, Assistant Chief Controller of Imports and Exports on 29-1-1993 to his Department shows

that there is an unauthorised and illegal interpolation by an officer of the licensing authority in December, 1992 by inserting the words ""Staple Pins in the licence, ante dating the same to 23-10-1992. It must be pointed out here that such subsequent interpolation made in the licence would

amount to forgery u/s 463 I. P. C. as it would amount to making a false document u/s 464 I. P. C. As pointed out by Mr. C. A. Sundaram,

Learned Addl. Central Government Standing Counsel, the relevance of ante dating the endorsement to 23- 10-1992 is to get over the provisions

of paragraph 127 (iii) of the Hand Book of Procedure, during with import and export policy, which clearly provides that no amendments shall be

made to any licence after the bond letter of undertaking has been redeemed by the licensing authority and in the instant case, the redemption was

on 23-10-1992. In these circumstances, as rightly contended by the learned counsel for the respondents, the falsification of the licence, and

therefore, the act of forgery, for which there is prima facie evidence, would render the licence in question void ab initio and this would stand on a

different footing from a licence issued pursuant to mis- representation or fraud, which would only be voidable and therefore, valid until invalidated.

8. On the basis of the materials referred above, the Joint Chief Controller of Imports and Exports, Madras-14 has also issued a show cause notice

dated 5-2-1993 to the petitioners proposing to cancel the endorsement ""Staple Pins"" on the Advance Licence on the ground that such

endorsement was made subsequent to the issue of the licence unauthorisedly and contrary to rules. The factual materials referred above, prima

facie go to show that this is not a case of import under a valid licence subsequently invalidated but a case where there was no licence for the goods

in question, namely, Staple Pins even at the time of import. The decisions referred above and relied on by the learned counsel for the petitioners

are not helpful to the petitioners because, they are clearly distinguishable on facts. The decisions relied on by the learned counsel for the petitioners,

are only authorities to the proposition that a licence, until invalidated, would continue to be valid and therefore, an import made until such

invalidation would not be unauthorised. Again, it must be pointed out, the cases relied on by the learned counsel for the petitioners arose out of a

situation where post-import conditions of licence were not fulfilled by the importers, subsequent to the import and clearance of the goods and

therefore, the licences were sought to be cancelled. In such circumstance, courts have held that subsequent cancellation of the licence would not make the imports, which had already taken place, unauthorised. That is not the position in the present case.

9. As the materials on record referred above, prima facie go to show that there is no Value Based Advance Licence with regard to the item Staple

Pins even at the time of import, the petitioners cannot contend that they are entitled to clear the goods in question without payment of duty.

Therefore, it has to be held that the petitioners are not entitled to the relief as claimed in the writ petitions. It must be pointed out that the only

purpose of producing the Value Based Advance Licence is to make the import duty-free. However, even if there is no valid Value Based Advance

Licence, in respect of Staple Pins, they being under O. G. L., can be imported lawfully without licence on payment of duty. Therefore, we have no

hesitation in holding that the petitioners can clear the goods in question only on payment of duty.

10. The next contention of the learned counsel for the petitioner is that the show cause notice dated 5-2-1993 issued by the Joint Chief Controller

of Imports and Exports to the petitioners itself clearly shows that the very authority who issued the licence and countersigned the same has made

the entry in the original licence relating to Staple Pins in December 1992 but ante dated the same as 23-10-1992; that the said entry was not done

at the instance of the petitioner and that by the time, the petitioners acquired the licence in question by paying valuable consideration, the entry

relating to Staple Pins was there and there was nothing whatsoever, in the licence which could have excited any suspicion of the petitioners and

therefore, since the petitioners are bona fide holders of the licence for value, the licence has to be honoured by the respondents in accordance with

the apparent tenor of the licence. There is no substance in this contention of the learned counsel for the petitioners. As already pointed out, there is

sufficient materials in this case to show prima facie that the Value Based Advance Licence produced by the petitioners is a forged document as far

as the goods in question is concerned. Staple Pins was not included as an item in the original licence but it was unauthorisedly tampered with and

falsified in December 1992, to include Staple Pins as an item ante dating the same to 23-101992. Such falsification evidently aroses since the item

Staple Pins could not have been otherwise legally included in the licence, as, they have not been utilised for the manufacture of export goods, which alone would attract the applicability of Notification 203/92. It must be remembered that a forged Value Based Advance Licence, as far as Staple

Pins are concerned, cannot convey any right to the petitioners even assuming that they are bona fide purchasers of the licence for value. Therefore,

we have no hesitation in rejecting the last contention of the learned counsel for the petitioners. In these circumstances, we see no merit in the Writ

Appeals 315 and 316 of 1993 filed by the petitioners.

11. Now let us examine whether there is any merit in W. A. Nos. 353 and 354 of 1993 filed by the Department. Mr. C. A. Sundaram, learned

Additional Central Government Standing Counsel appearing for the appellants in the said writ appeals contended that the learned Single Judge is

not correct in permitting the clearance of the goods on the conditions stipulated in the order and that the learned Single Judge on the facts and

circumstances of the present case ought not to have ordered the release of the goods pending investigation. The learned Counsel further contended

that since the goods namely, Staple Pins were sought to be cleared without payment of duty relying on the exemption Notification 203/92, and the

conditions to be satisfied for claiming exemption from payment of duty under Notification 203/92, have not been observed, the goods in question

become liable for confiscation confiscation u/s 111(o) of the Act and therefore, such goods cannot be released to the petitioner pending

adjudication proceedings. The learned counsel also contended that even assuming that the importer had not participated in the illegal acts with

regard to the falsification of the licence, the confiscation being an action in rem, would render the goods liable for confiscation in whosesoever

hands and therefore, the release of such goods to the importer cannot be permitted. In support of the said contention, the learned counsel relied

upon the decision in Collector of Customs, Madras and Others Vs. D. Bhoormall, . There is no substance in the above contentions of the learned

counsel for the Department. Clause (o) Section 111 of the Act contemplates confiscation of goods which are exempted from duty subject to a

condition, which condition is not observed by the importer. Occasion for taking action under this clause arises only when the condition is not

observed within the period prescribed, if any, or where the period is not so prescribed, with in a reasonable period. The question of petitioners not satisfying the conditions prescribed in Notification 203/92 for claiming exemption, from payment of duty in respect of Staple Pins imported into

India against the Value Based Licence does not arise in this case, in view of our finding that in the present case, no valid Value Based Advance

Licence with regard to Staple Pins was in existence at the time of import and therefore, the petitioners cannot claim exemption from payment of

duty. Further it cannot be said that in the present case, the goods in question are exempted from payment of duty subject to certain conditions and

those conditions were not subsequently satisfied. This is a case where, the petitioners imported Staple Pins without a valid licence. Therefore, we

have no hesitation in holding that the provision of Section 111(o) of the Act does not stand attracted to the facts of the present case, and that the

goods in question are not liable to confiscation u/s 111 of the Act. Again, it must be pointed out that, under Export and Import Policy relating to

the period from 1-4-1992 to 31-3-1997 imports can be done without any restrictions except to the extent such imports have been regulated by

the negative list of imports and any other provision of the policy and any other law for the time being in force. Paragraph 10 of the Export and

Import Policy says that negative list may consist of goods, the import or export of which is prohibited restricted through licensing otherwise, or

canalised. Paragraph 12 of the said policy provides that any goods, the export or imported only in accordance with a licence issued in this behalf.

Admittedly, the goods in question does not figure either in the negative list or in the sensitive list of imports. For the goods in question there are no

restrictions for import and they can be imported lawfully without licence but subject to payment of duty. In these circumstances, it has to be held

that the goods in question are not liable to confiscation u/s 111 of the Act and to such a case, principles laid down in Collector of Customs,

Madras and Others Vs. D. Bhoormall, , will have no application. Therefore, we see no merit in Writ Appeals 353 and 354 of 1993 filed by the

Department also.

12. From the above discussion of ours, it follows that the goods in question is not liable for confiscation u/s 111 of the Act. It is also clear that the

said goods cannot be cleared by the petitioners without payment of duty as there is no void Value Based Advance Licence in respect of the said goods. As the goods are not liable for confiscation, the respondents also cannot have any valid objection for the petitioners clearing the goods on

payment of duty. As pointed out by the learned Single Judge, if the validity of the licence, in respect of Staple Pins, is ultimately upheld in the

adjudication proceedings initiated by the Joint Chief Controller of Imports and Exports, Madras pursuant to the show cause notice dated 5- 2-

1993, the petitioners can always week refund of the duty paid by them for clearing the goods in questions subject to the statutory limitations.

13. For all the reasons stated above, we are inclined to hold that the learned Single Judge is quite right in directing that the goods in each of the

cases shall be allowed to be cleared within 10 days from the date of payment of 50% of the duty in each case plus furnishing Bank Guarantee for

25% of the duty and executing a personal bond for the balance 25%. We cannot take exception to the conclusion of the learned Single Judge and

therefore, all the writ appeals are liable to be dismissed. Accordingly, these wit appeals are dismissed. No costs.

