(2003) 07 BOM CK 0108

In the Bombay High Court

Case No : Writ Petition No. 1985, 1986 and 1987 of 1991

Empire Machine Tools — APPELLANT

Vs

K.C. Singh and Others — RESPONDENT

Date of Decision : 08-07-2003

Acts Referred:
Customs Act, 1962 — Section 111

Citation : (2003) 6 BomCR 615 : (2004) 113 ECR 526 : (2004) 165 ELT 146 : (2003) 4 MhLj 786

Hon'ble Judges : V.C. Daga, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : P. Shah, instructed by D.S.K. Legal in Writ Petiton Nos. 1985, 1986, 1987 of 1991, for the Appellant; H.V. Mehta, S.V. Bharucha and K.R. Chaudhari, in Writ Petition Nos. 1985, 1986 and 1987 of 1991, for the Respondent

Final Decision : Allowed

Judgement

J. P. Devadhar, J.—In these three petitions, the challenge is to the order-in-original passed by the Additional Collector of Customs, Bombay, wherein the goods imported by the petitioners have been confiscated u/s 111(d) of the Customs Act, with option to redeem the same on redemption fine and penalty. Since the facts in these three petitions are similar, for the sake of convenience, we have taken the facts in Writ Petition No. 1985 of 1991. The decision in Writ Petition No. 1985 of 1991 will govern all the three writ petitions.

2. Bharat Dynamics Limited is a Government of India Enterprise and is engaged in the manufacture and testing of Guided Weapons having semiconductor devices for the "Defence" of India. For the manufacture of Semiconductor Devices which are ultimately used for manufacture of weapons, the said Government of India Enterprise was required to import from Japan "Metallurgical Microscope having magnification equal to or greater than 400". The said Enterprise had obtained licence inter alia for import of Metallurgical Microscope, but as per the Japanese Law the said goods could not be supplied by the manufacturers in Japan directly

to any Government Agency of any country for Defence purposes of that country. Therefore, Bharat Dynamics Limited issued a letter of authority to the petitioners authorising them to import on their behalf "Metallurgical Microscope". Accordingly, the petitioners imported ''NIKON EPIPHOT-TME Inverted Metallurgical Microscopes'' and sought clearance by filing Bill of Entry under two additional licences. The two licences furnished allowed permit of Items as per Para 215 of Import Policy 1988-91. Para 215(2)(ii) allowed the import of capital goods listed in Appendix 1 - Part B of the said policy. Item No. 12(139) of the said Appendix 1 - Part B reads as follows:-

"Metallurgical Microscope for semi-conductor manufacture (magnification equal to or greater than 400)".

Under Exemption Notification No. 206 dated 2nd August, 1976, the goods imported into India by a Government Undertaking for purposes of Defence of India is wholly exempt from payment of duty.

3. By the order-in-original dated 9th May, 1991, the Additional Collector of Customs sought to confiscate the goods in question on the ground that the microscope imported by the petitioners would require specific licence under Appendix 8 of I.T.C. Policy 1990-1993 and the same were not covered under OGL Entry of 12(141) of Appendix 1B of AM 90-93 policy. The Additional Collector of Customs gave option to the petitioners to pay redemption fine and also levied penalty u/s 112 of the Customs Act, 1962. Challenging the said order present petition has been filed.

4. Mr. Shah, learned Counsel appearing on behalf of the petitioners submitted that the Inverted Metallurgical Microscope were admittedly imported for and on behalf of the Bharat Dynamics Limited, a Government of India Undertaking. The letter of authority was issued in favour of the petitioners, because the Government of India Undertaking could not directly import the goods from Japan on account of the restrictions under the Japanese Law. He submitted that in the light of certificate issued by the Bharat Dynamics Limited to the effect that the said goods were required for the manufacture of weapons having semi-conductor devices and in view of the certificates issued by the Independent Authorities like the Indian Institute of Technology and Chartered Engineer, it was abundantly clear that the Inverted Metallurgical Microscope imported by the petitioners were for the manufacture of semi-conductors and, therefore, the said goods clearly fall under Appendix 1 - Part B of the Policy and is squarely covered by the Additional licence produced by the petitioners. Mr. Shah submitted that pursuant to the order passed by this Court at the time of admission of this petition the goods were in fact supplied by the petitioner to Bharat Dynamics Limited. Under the circumstances, the Adjudicating Authority was in error in holding that the Inverted Metallurgical Microscope is an instrument which is of general use and not exclusively meant for manufacture of semi-conductor and, therefore, the said goods could not be cleared as OGL Item and require a specific licence under Appendix 8 of AM 90-93 policy.

5. Mr. Mehta, learned Counsel appearing on behalf of the respondents, on the other hand, contended that since all type of Laboratory microscope are covered specifically in Appendix 8 Entry 2030 of AM 90-93 policy, the same could not be permitted as OGL capital Goods. The Counsel further submitted that certificate dated 15th May, 1990 issued by Bharat Dynamics Limited in favour of the petitioners was a general certificate and there was nothing to show on record that the said certificate was produced before the Adjudicating Authority and that there was no cogent evidence to show that the goods in question were required by Bharat Dynamics Limited. Accordingly, the Counsel submitted that the order passed by the Additional Collector of Customs is correct and no interference is called for in a writ jurisdiction.

6. Having heard the Counsel on both sides, we are of the opinion that the impugned order passed by the Additional Collector of Customs cannot be sustained for more than one reason. Firstly, the Government Enterprise on whose behalf the goods were imported clearly admitted in its certificate dated 16th January, 1991 (Exhibit - ''I'') to the petition that the Metallurgical Microscope with magnification equal to or grater than 400 is imported by the petitioners at their behest and that the same are required in the manufacture of weapons having semi-conductor devices.

Secondly, the certificates issued to the above effect by the Indian Institute of Technology at Bombay and also by Chartered Engineer have not been controverted or any material is brought on record to establish that the said Metallurgical Microscope are not required for manufacture of weapons having semi-conductor devices.

Thirdly, Entry 12(141) of Appendix 1 Part B of AM 1990-93 policy provides that Metallurgical Microscope for semi-conductor manufacture (magnification equal to or greater than 400) can be imported as OGL item. The said Entry does not state that the Metallurgical Microscope should be exclusively made for semi-conductors. Therefore, there is no warrant to read the Entry in the Import Policy narrowly as contended by the Revenue. In the facts of the present case the material on record clearly establishes that the goods in question could be imported as OGL item at the time of import and the same were imported by the petitioners for and on behalf of Government of India Enterprise for manufacture of weapons having semi-conductor devices. Merely because the said Metallurgical Microscope could be used for purposes other than semi-conductor could not be a ground to hold that the item is not covered under Entry 12(141) of Appendix 1 Part B of AM 1990-93 policy. For all the aforesaid reasons, we hold that the order of confiscation passed by the Additional Collector of Customs cannot be sustained.

7. Accordingly, the petition succeeds. The impugned order dated 9th May, 1991 Exhibit ''I'' to the petition is quashed and set aside. Rule is made absolute in terms of prayer clause (a) of the petition. However, in the facts and circumstances of the case, there will be no order as to costs.