(2003) 11 BOM CK 0041

In the Bombay High Court

Case No : Writ Petition No. 120 of 1991

Jeegar Gems APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 19-11-2003

Acts Referred:

Imports and Exports (Control) Act, 1947 — Section 4I

Citation : (2004) 3 BomCR 784 : (2004) 112 ECR 508 : (2004) 163 ELT 414

Hon'ble Judges : R.M.S. Khandeparkar, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : N.S. Thakkar and N.M. Shah, for the Appellant; A.J. Rana and S.V. Bharucha, instructed by T.C. Kaushik, for the Respondent

Final Decision : Dismissed

Judgement

J.P. Devadhar, J.—In this petition, the Petitioners challenge penalty and debarment order passed under the Imports & Exports (Control) Act 1947 and Imports (Control) Order, 1955 respectively.

2. The facts in brief, are that:

An REP licence bearing No. P/K/K/044825/REP was issued to the Petitioners on 7th April, 1981 for import of diamonds unset and uncut up to the value of Rs. 12,14,186/-. The licence was valid up to 31st March, 1982. On 20th March, 1982 an endorsement was made on the licence for import of OGL items in terms of Para 185 of AM 1981-1982 policy subject to the condition laid down therein and the licence was made non-transferable. In view of the above endorsement, the Petitioners could import OGL items for actual use only.

3. On 27th March, 1982 the Petitioners issued a letter of authority to M/s. Didwania Imports & Exports Pvt. Limited (''L.A. holder'' for short) authorising them inter alia to import on behalf of the Petitioners the permissible OGL items under the relevant import policy AM 1982. The said L.A. holder on the basis of the letter of authority and the licence sought to clear 159.73 MTs of PVC Resin

suspension grade valued at Rs. 5,84,111/- which were already imported, but were not cleared. Since the order for import of the said goods was placed prior to the letter of authority and the goods were imported prior to the issuance of the letter of authority, the Customs Authorities issued a show cause notice dated 7th March, 1983, calling upon the L.A. holder to show cause as to how the order for import was placed with the foreign supplier on 8th March, 1982 when the letter of authority was issued on 27th March, 1982. Ultimately, the Collector of Customs by an order dated 9th April, 1984 took a lenient view by holding that placing an order of import of goods prior to the obtaining of letter of authority is a technical offence and by taking a lenient view the Collector allowed release of the goods cautioning the L.A. holder not to commit such mistakes in the future.

4. As stated hereinabove, the importation of OGL items under Para 185 of AM 1982 policy was subject to the actual user condition. In the present case, though the goods were cleared on the Petitioners REP licence, no particulars were furnished to the licensing Authorities regarding the disposal of the goods. Therefore, letters were addressed by the licensing Authorities calling upon the Petitioners to furnish details of the disposal of the aforesaid goods. As the Petitioners failed to furnish the particulars of disposal of the said goods, show cause notice was issued by the licensing Authority on 3rd September, 1985 to the Petitioners as well as the L.A. holder calling upon them to show cause as to why action should not be taken against them under the Imports & Exports (Control) Act, 1947 and Imports Control Order, 1955.

5. The adjudicating authority found that the imported goods have been misutilised in violation of the provisions under Imports & Exports (Control) Act, 1947 as well as Imports Control Order, 1955, and accordingly passed the impugned order dated 8th May, 1987 levying penalty of Rs. 1,00,000/- on the Petitioners under Sections 4I(l)(a), (c)(i) and (d) of the Imports & Exports (Control) Act, 1947 and also debarred the Petitioners and their prop./Partners/ directors etc. and their branches, if any, from obtaining any licences for the period from 31st March, 1987 to 31st March, 1988. The Petitioners filed an appeal against the said order but the same was dismissed on 30th November, 1990. Challenging the aforesaid order, the present petition has been filed.

6. Mr. Thakkar, learned Counsel appearing on behalf of the Petitioners submitted that in the present case the goods in question have not been imported by the Petitioners. The letter of authority, issued by the Petitioners to the L.A. holder was to import the goods in accordance with law. If the L.A. holder had already imported the goods in violation of the Import Policy, then the Petitioners cannot be penalised for that importation merely because a letter of authority has been issued by the Petitioners. He submitted that in the present case the Customs Authorities had found that the clearance of the goods sought by the L.A. holder was unauthorised and was liable for confiscation. He submitted that once the goods are held liable for confiscation and thereafter permitted to be redeemed, then the redeemed goods will be that of the L.A. holder and not of the

Petitioners. In such circumstances, the L.A. holder who cleared the goods can be held responsible and not the Petitioners. He submitted that where the goods imported prior to the issuance of the letter of authority is confiscated and allowed to be redeemed, it cannot be said that the import of the said goods was on account of the letter of authority and consequently no penalty could be levied upon the Petitioners. Mr. Thakkar submitted that the letter of authority issued by the Petitioners on 27th March, 1982 was prospective in nature and would not apply to the goods which were already imported prior to the issuance of the letter of authority. Therefore, for the offences committed by M/s. Didwania in importing the goods in violation of the Import Policy, the Petitioners cannot be held responsible. He submitted that till the licensing authorities initiated proceedings, the Petitioners were not aware of the illegal import effected by the L.A. holder. Thereafter, the Petitioners repeatedly called upon the L.A. holder to furnish particulars of import and handover the goods so that remedial action could be taken in the matter. However, there was no co-operation from the L.A. holder. In these circumstances, since the Petitioners being innocent, it was submitted that the penalty levied against the Petitioners be quashed.

7. Mr. Thakkar further submitted that none of the provisions of the Imports & Exports (Control) Act, 1947 and the Imports Control Order have been violated by the Petitioners. He submitted that when the Petitioners have not imported the goods, the question of using or misutilising the imported goods u/s 4(I)(1)(a) of Import & Export (Control Act) does not arise at all. Similarly, the Counsel submitted that Section 4(I)(1)(c)(i) of the Act as well as Section 4(I)(1)(d) of the Act have not been contravened by the Petitioners. Accordingly, he submitted that the penalty levied against the Petitioners is liable to be quashed and set aside.

8. Mr. Rana, learned Senior Counsel appearing on behalf of the Respondents submitted that in the present case the licence issued to the Petitioners was non-transferable and the goods imported under the licence were subject to actual user condition. The Counsel submitted that if there is violation committed by the letter of authority holder then the principal i.e. Petitioners to whom the licence belonged is liable for the acts committed by the L.A. holder. In the present case there is no material on record to show that the imported goods have been used as per the conditions set out in the licence. In this view of the matter, he submitted that the levy of penalty against the Petitioners is in accordance with law and no interference is called for.

9. We have heard Counsel on both sides. The endorsement made on the REP licence issued to the Petitioners clearly shows that the OGL items permissible under AM 1981-1982 Policy could be imported subject to actual user conditions and the licence was non-transferable. It is not in dispute that in the present case the L.A. holder had sought to clear the goods on the basis of the licence issued to the Petitioners. Since the importation was prior to the letter of authority, the Customs authorities had initiated proceedings for confiscation of the said goods but however, it being a technical offence, the goods were not confiscated but

were allowed clearance by cautioning the L.A. holder to be careful in the future. Merely because, the order states that the goods have been imported in contravention of Clause 3(2) of the Imports (Control) Order, 1955 it cannot be said that the said goods were confiscated by the Customs authorities. A perusal of the order passed by the Customs Authorities clearly shows that the issue considered therein was with reference to the importation prior to the issuance of the letter of authority and the same being a technical breach, the goods were not confiscated but were allowed clearance with a warning to the L.A. holder. Therefore, the contention of the Petitioners that the goods in question were confiscated and were allowed clearance on redemption is totally incorrect. It is not the case of the Petitioners that the goods in question were not cleared under the licence granted to the Petitioners. In fact, in Para 10 of the petition it is stated that the goods in question were imported under the licence issued to the Petitioners. Therefore, the goods cleared by the L.A. holder cannot be said to be confiscated goods. Since the goods in question were cleared under the licence issued to the Petitioners, non-observance of the licence condition attracts penalty and the Petitioners as licence holder cannot escape penalty u/s 4I of the Imports & Exports. (Control) Act, 1947.

10. In the present case, apparently the goods cleared under the REP licence issued to the Petitioners have been sold in the open market in gross violation of the licence condition. Neither the Petitioners nor the L.A. holder have placed any material on record to show that the imported goods have been used as per the licence conditions. Before the adjudicating authority, the L.A. holder stated that the goods in question were delivered to the Petitioner but without any supporting documents. Petitioners, on the other hand contended that they were kept in dark by the L.A. holder about the importation. However, the facts on record clearly show that the goods in question were cleared under the licence issued to the Petitioners and even if the misutilisation of the imported goods is by the L.A. holder, the Petitioners being the licence holder cannot escape penal liability. The fact that Petitioners have not taken any steps when the licence was to expire on 31st March, 1982 the Petitioners on 27th March, 1982 issued a letter of authority and thereafter in the matter regarding the importation of the OGL goods and the fact that the Petitioners had neither cancelled the letter of authority nor informed the licensing authorities about the issuance of the letter of authority clearly shows that the Petitioners are not so innocent as they claim to be. The imported goods being not used by the actual user there was clear violation of the licence conditions and penal provisions contained in Section 41 were squarely attracted. The Petitioners being the licence holder were liable for penal action. In this view of the matter, we see no reason to interfere with penalty of Rs. 1,00,0007- levied against the Petitioners and against the penalty of Rs. 3,00,000/- on the L.A. holder.

11. As regards the debarment is concerned, Counsel for the Petitioners fairly states that in view of the changed policy provisions, he is not pressing the ground.

12. At the time of admission of the petition, the Petitioners were directed to deposit the penalty amount with the Prothonotary & Sr. Master and accordingly the Petitioners have deposited the amount. The Prothonotary & Sr. Master, High Court, Bombay is directed to forward the said amount of Rs. 1,00,000/- with accrued interest, if any, to the Respondents, forthwith.

13. The petition is, accordingly dismissed. However, there will be no order as to costs.