

(2001) 05 CAL CK 0031
In the Calcutta High Court
Case No : Writ Petition No. 825 of 2000

Kanhaiya Exports

APPELLANT

Vs

Commissioner of Customs

RESPONDENT

Date of Decision : 24-05-2001

Acts Referred:

Constitution of India, 1950 — Article 19(1), 301

Customs Act, 1962 — Section 14(1), 25

Foreign Trade (Development and Regulation) Act, 1992 — Section 2, 3, 3(1), 5, 6

Citation : 106 CWN 460 : (2002) 79 ECC 531 : (2001) 133 ELT 280

Hon'ble Judges : Amitava Lala, J

Bench : Single Bench

Advocate : S.K. Mehta, for the Appellant; N.C. Roychowdhury and Prantosh Mukherjee, for the Respondent

Judgement

Amitava Lala, J.—This writ petition is made by the petitioner company and one of its Directors by saying that the Circular bearing No. 23/99 dated 11th May, 1999 or Paragraph 4 of the said Circular being annexure "DD" to the petition be quashed and/or set aside. It is also prayed thereunder that DEPB (Duty Exemption Pass Book) Licences being No. 0210005970/3/06/00 being annexure "C" to the petition be returned to the petitioner and to allow benefit of the scheme to the petitioner or its transferees. The similar benefit of DEPB Licences also claimed in respect of Nos. 121000490/3/06/00, 0210005508/3/06/00, 0210005514, 1210005642/3/06/00 being annexure "F" collectively to the petition.

2. According to the petitioner company on 30th June, 1999 they have exported certain goods known as "Steel Welding Electrodes". Consignments were provisionally assessed and "let export" orders were passed. The exports of consignments were made under Duty Exemption Pass Book (DEPB) scheme under which the petitioners are entitled to duty credit of 18 per cent of the Free on Board (FOB) value of export specially to the limitation of 50 per cent of the Present Market Value (PMV) of the goods in question. The export of the goods is made under AR 4 form issued by the Excise Authorities under Customs

Notification No. 69/97. The petitioner declared FOB price of US Dollar \$ 953694 and PMV at Rs. 4,40,70,280/-. After making the enquiry, on 4th August, 1999 Shipping Bills were finally accepted by the Customs Authority on the basis of declared PMV. The petitioners obtained copies of Shipping Bills and applied to the Licencing Authority i.e. Director General of Foreign Trade (DGFT) under Ministry of Commerce and on 10th September, 1999, Licencing Authority issued DEPB Licences.

3. On 30th November, 1999 the Customs Authority issued a Circular for verification of DEPB in view of the few instances of forged DEPB which came into circulation. Under the circular DEPB was required to be submitted for verification for the purpose of ascertaining the authenticity/genuineness of the Shipping documents and DEPB only. Under the circular within 48 hours after verification, DEPB licences were required to be returned to the presenter. The petitioner filed the DEPB licences to the Customs Authority for the limited purpose of verification in terms of the Circular No. 14 of 1999 Cus., dated 15th March, 1999. The Customs Authorities accepted the same but did not return the petitioner after verification without showing any ground and finally on 18th March, 2000 the respondent refused to return the DEPB on the ground of Circular No. 23/99-Cus., dated 11th May, 1999 alleging the Commissioner of Customs has decided to cause enquiry and proceeded to deny the benefit of Duty Free Import against the DEPB.

4. Although several prayers were made the petitioners basically challenged the arbitrary refusal of Customs authority in releasing the DEPB licences beyond the period fixed under Circular mentioned hereunder.

5. It appears that the DEPB licences now issued under the Foreign Trade (Development & Regulation) Act, 1992 by another authority which comes under the Ministry of Commerce. The licences have statutory force as those are issued under the provision of the Act. Section 2(g) of the Act says "licence" means a licence to import or export and includes a customs clearance permit and any other permission issued or granted under the Act. Nature and Character of licence is depending upon the policy of the Central Government. Policy making power of the Central Government is given u/s 3 of the Act. Sub-section (1) of Section 3 speaks the Central Government may, by order published in the Official Gazette, make provision for the development and regulation of foreign trade by facilitating imports and increasing exports. Formulation of export and import policy is also provided for Central Government u/s 5 of the Act. Central Government is empowered to appoint DGFT (Director General Foreign Trade) who will be advisor to the Central Government is formulating such policy u/s 6 of the Act. Any Government has policy making power. The peculiarity of the situation is that the policy of the Central Government is Codified under the Act. In other words the Act has policy making power regarding export and import. It has come into operation in 1992 to provide for the development and regulation of foreign trade by facilitating imports into, and augmenting exports from India and for

matters connected therewith or incidental thereto. It has its own Rule & Order. It has power of search, seizure, penalty, confiscation, suspension, cancellation, adjudication, Appeal, Revision etc. in respect of relevant licences. The impugned Circular being No. 23/99-Cus., dated 11th May, 1999 does not have any statutory force. The benefit of the licences under the Act cannot be taken away by such circular.

6. Customs Authorities and Licensing Authorities operate in distinct and different fields. One cannot sit in appeal over the other. Therefore, it is high time to verify the issue as to how far the Customs Authority can encroach upon the field specially in the given situation. If I go through the two circulars being Circular No. 14/99-Cus., dated 15th March, 1999 and Circular No. 23/99-Cus., dated 11th May, 1999 it will be seen that the first circular is an independent one whereas the second circular is an amended one of the previous Circulars No. 69/97-Cus., dated 8th December, 1997 and Circular No. 79/98-Cus., dated 22nd October, 1998. There is a standing order in respect of revised procedure for verification of DEPB scrips under the first Circular. It appears from Clause 5 of such standing order that on receipt of files duly counter-signed by appraisers and Assistant Commissioners on the DEPB scrips the examiners shall enter the DEPB scrips which have been verified, in the computer system and registration number and date shall also be endorsed on the reverse of DEPB scrips. Verified DEPB scrips shall thereafter be embossed by perforated stamp in the Cash Section under personal supervision of the concerned examiner. This process should be completed latest by 12 O'Clock on the 3rd day. Duly verified and embossed DEPB scrips shall thereafter be handed over to receiving clerk who shall detach DEPB scrip from the files and return the files to the examiner from the safe custody. In the instant case, Customs Authorities enquired and assessed the Shipping Bill finally by declaring PMV as accepted. DGFT being the Licensing Authority issued DEPB licences to the petitioners. According to the petitioners, when any verification of DEPB is further required on account of instances of forgery or so, the authority should follow the procedure of verification in the similar way as laid down in Clause 5 of the standing order under Circular No. 14/99-Cus., dated 15th March, 1999. Otherwise, such clause will have no force of legal necessity.

7. According to me, there is a logic in the submission of the petitioners. On account of element of forgery in few instances of DEPB licences each and every person in the trade world cannot be held up from getting return of DEPB licences in time. One cannot hold up licence/permits etc. required for the business of such person for an indefinite period on the apprehension of fraud. Otherwise, the same will be squarely hit by Articles 19(1)(g) and 301 of the Constitution of India. It further appears that the very purpose of issuance of first circular i.e. Circular No. 14/99-Cus., dated 15th March, 1999 the Government of India, Ministry of Finance (Department of Revenue) is given in the Circular itself. It appears therefrom that two instances have come to the notice of the department where DEPB scrips were obtained by unscrupulous exporters by presenting S/Bs

with forged examination report and "let export" orders along with forged BRCs etc. In some of such cases even the verification of endorsements by Customs Authorities on DEPB scrips has been apparently forged, it has, therefore, become necessary to re-vise the procedure of verification of DEPB scrips. Following such introduction, a standing order for revised procedure for verification of DEPB scrips has been introduced in the circular itself and when the petitioners were called upon to produce the same before the appropriate authority for verification they hold up beyond the fixed period given under Clause 5 of such standing order for the self-same purpose ignoring the circular and standing order and by giving effect of the revised Circular No. 23/99 Cus., dated 11th May, 1999 arising out of Circular Nos. 69/97-Cus. and 79/98-Cus., dated as above.

8. Even thereafter, if I verify such circular dated 11th of May, 1999 I shall be able to find out that certain time limit is prescribed in respect of involvement of fraud/collusion/wilful misstatement/or suppression of facts as regards determination of present market value of the goods. But one has to understand the true import of circular. From the paragraph 3 of such circular it is crystal clear that in such cases consignment should be allowed provisional clearance and the Shipping Bills will also be assessed provisionally. Such Shipping Bills will not be entitled to DEPB scrips till the market enquiry is completed and the provisionally assessed Shipping Bills are finalised. In Paragraph 4 therein it is contended that in regard to consignment exported earlier, or even prior to issue of this clarification but if the Commissioner is satisfied that the above-mentioned circumstances exist which necessitated an enquiry into PMV of the goods in any particular case the Commissioner may cause enquiries and proceed to have the credit modified by DGFT or to deny the benefit of duly duty free import against DEPB scrips till it is amended.

9. Therefore, from a conjoint reading of the underlined portion it is crystal clear that the benefit of DEPB scrips can be disallowed in the above-mentioned circumstances since consignment and Shipping Bills are provisionally cleared leaving aside the finalisation. Then and then alone the scope of the second circular can be allowed to operate beyond the period as given. Therefore in the garb of the circular applicable to provisional clearance, a verification of DEPB scrips on account of final assessment cannot be held up beyond the period as given in Clause 5 of the standing order under the first circular. Otherwise there will be no finality of the process. If by applying the test of such circular, the authority concerned wants to get an extension of period in respect of the accepted final assessment of the present market value then it has to be construed that such authority wants to proceed beyond the scope and ambit of their power in clear violation of Article 19(1)(g) and 301 of the Constitution of India.

10. Further, it appears that the licences were issued under the Foreign Trade (Development & Regulation) Act, 1992. The Act is a complete code so far as the method of issuance, suspension and cancellation of licences u/s 9 of the same.

By the impugned circular legislative provision has been sought to be amended which cannot be done in accordance with law. The peculiarity of Clause 4 of the circular is that satisfaction of the power as given to the Commissioner who created facility will be modified by the Director General of Foreign Trade. Therefore, it implies that Authority of the Director General of Foreign Trade has been interfered with. I have a great doubt as to whether such circular has yet been notified or not. u/s 25 of the Customs Act notifications are required to be gazetted. If it is not, then it is simply a guideline which in any event cannot override a legislative enactment.

11. The respondent has taken a very peculiar stand. According to him, FOB value of the consignment was described as "Steel Welding Electrodes". But from examination it was found that the goods are in fact made by "Mild Steel" when the value was declared on account of "Stainless Steel Electrode". Therefore, from the plain reading I fail to understand even from their affidavit itself where is the suppression of material facts. The goods are described as "Steel Welding Electrodes". Neither it has been described as "Mild Steel" or "Stainless Steel Electrode". The value was given accordingly. It has been checked up by the Customs Authorities themselves who allowed the goods to be exported. Initially provisional and subsequently final assessment was made. PMV was accepted. DEPB licences were issued by the appropriate Licencing Authority on the basis of the application or applications. Under such circumstances, I fail to accept the stand of the Customs Authority even observing the situation pedantically. Export can not be an unilateral action. It is bilateral action in which an expertise body of the Government of India involved who in term, granting sanction upon being satisfied with the same on various stages from the entry to the Customs Zone upto final assessment taking into consideration various factors on number of days. It is duty incumbent upon the Customs Authorities to check and verify the goods before releasing the same. If there is any failure on their part the higher authorities will firstly initiate departmental proceedings as against such person involved in such situation to substantiate element of fraud and forgery. But if the authority concerned want to protest them from any of such purported guilt, who allowed other to see light of the day and then try to fish out the evidence from the persons involved in the trade illegally withholding respective licences from carrying out their business on the basis of apprehension of fraud or forgery, then such action directly hit by fundamental principle of natural justice and fair play. In the given situation, when there is no whisper as to involvement of the Customs Authorities to be a party to such alleged illegal affairs how a licence or permit of a citizen to do business will be withheld is unknown to this Court. Moreover cause of action as regards Invoicing normal or over if any, cannot be equated with 4 quasi criminal act like fraud or forgery. It has to be governed by the definition of "value" in relation to any goods. If the authorities come to a definite conclusion not only by releasing the goods provisionally but also finally then it is to be construed that-the assessment of the authority is final based on tariff specification and exemption, if any, in connection thereto. As and when the

goods are finally assessed as per tariff specifications and exemption, if any, then the Authority definitely followed certain parameters to come to a conclusion. If by virtue of such assessment the petitioners got any benefit that cannot be said evade of revenue but avoid of revenue which cannot be treated as illegal. Goods disclosed as per nomenclature of the table. Authority accepted the same finally. Valuation is made as per P.M.V. which is a policy of the Government. If thereafter the value of such goods in the international market as per dollar appears to be much higher than the local market based on P.M.V. by conversion of foreign exchange in our country to get such limit of import, authority cannot be jealous. The legislature introduced certain policy to give impetus to the export which is a part of modernisation of trade and commerce on the particular basis. If authorities are unhappy then can easily propose to the legislature either for amendment or repeal or re-introduction of fresh policy to overcome the situation. But liberalisation and rigidity both can not run simultaneously. Either one has to be given up. Therefore when such policy of the legislature exists, by virtue of constitutional mandate, administration can not override the same. One of such policy is to verify the DEPB Scrips within 3 days as prescribed under the standing order and the words "should be completed" mandatorily binding upon the authority in doing so. Such period of withholding DEPB Scrips might have been permitted beyond the period only on several conditions as given in the Circular No. 23/99-Cus., dated 11th May, 1999 itself. First of such conditions is Commissioner of Customs is to be satisfied that an enquiry for determining the PMV of the goods, period will be extended by reason of involvement of fraud etc. which shall be recorded by him in writing. Second condition is in such cases consignment should be allowed provisionally and shipping bills also be assessed provisionally. Third condition is that such shipping bills will not be entitled to DEPB Scrip till the market enquiry is completed and the provisionally assessed Shipping bills are finalised. Fourth condition is that a show cause notice is issued upon the exporter as to why the PMV declared should not be rejected/revised. Fifth condition is Commissioner will proceed before the DGFT (Director General of Foreign Trade) to have the credit modified by him and to deny the benefit of duty free import against such DEPB Scrip till it is amended. Condition or conditions are not fulfilled. Therefore, the authority can not be allowed to put the cart before the horse forcibly.

12. Learned Counsel appearing for the authority cited a judgement reported in Indian Bank Vs. M/s. Satyam Fibres (India) Pvt. Ltd.,] to establish before this Court that if any judgement is obtained by fraud, be it constitutional, statutory or Administrative, (and particularly those who have to decide a lis) possess the power to recall their judgement or orders if they are obtained by fraud as fraud and justice never dwell together. I have no quarrel with such proposition. It can not be said in view of the circumstances that there is an established fraud. Mere apprehension of fraud cannot be construed as fraud. The Commissioner of Customs has to be satisfied on enquiry before finalisation of Shipping bills that there are reasons involving fraud, show cause will be issued and if dissatisfied,

proceed to DGFT for the purpose of getting DEPB Credit modified. These are the guidelines of the Circular. The authority can not deviate from the same and extend the jurisdiction without any legal sanction.

13. A stage of provisional assessment is a period of enquiry and investigation subject to finality but once it is finalised the chapter is closed even in any case whatsoever as per the Circular itself. Even thereafter if the authority want to proceed on the general principle of law, as per analysis of the learned Counsel appearing for the respondents, it will be seen that fraud is the essential ingredients of forgery which is a Criminal offence either it has to be proved by direct evidence or inferences drawn from proved facts. Suspicious and surmises and conjecture are not permissible substitutes of fraud. Moreover the burden of proof lies with him who alleges it. He who alleges fraud must do so promptly. That in the reason for which a substantial gap of time is given in between provisional clearance and final clearance. Moreover, final clearance by the Investigating Authority can not be construed as judgment or order obtained by fraud from constitutional, statutory or administrative decision making authority particularly when export was made finally following the policy of the Government of India under a different Act i.e. The Foreign Trade (Development and Regulation) Act, 1992. Therefore, it is very difficult to convert an aggrieved to an accused without foundation.

14. By citing another judgment reported in Collector of Customs Vs. Pankaj V. Sheth, learned Counsel appearing for the respondents contended before this Court that the factual basis of such case has to be taken into account before passing the final order herein. The first two paragraphs of such judgement have given the factual background on which the Division Bench of this court was pleased to proceed with the matters. Such paragraphs are quoted hereunder :

"The basic issue involved in this appeal is whether the customs authorities have the right to refuse to endorse the exports made by an Exporter in the DEEC book of export Part II after the export is effected by the Exporter.

The writ petitioner had exported plastic Flat Jet Nozzles made from HDPF Granules on 7th January, 1994 to a purchaser at Singapore. The FOB value of the Nozzles was declared as Rs. 48,46,8507-. The goods were examined by the Appraising Department of the Customs. Samples were drawn by them to verify the value of the Nozzles. The goods were suspected of being over invoiced. Pending enquiry the export was allowed provisionally against a bond. Assessment was made provisionally and an endorsement was made on the Shipping Bills to this effect by the Customs Authorities. The Customs Authorities, however, refused to endorse the fact of export in Part II of the DEEC Book of the writ petitioner. Unless the Customs Authorities make such endorsement the writ Petitioner cannot apply for transfer of the import licence for import of duty free goods to which the writ petitioner became entitled by reason of such export. It is the Petitioner's case that the customs authorities were duty bound to make the endorsement of the export and they had no jurisdiction to question the valuation

of the goods."

Therefore, it is clear from the fact situation of the aforesaid case that the endorsement of the Part n of the DEEC Book of the petitioner was refused at the provisional stage of assessment which is totally different from the instant case wherein final assessment has been made.

15. Secondly, at that point of time there was no existence of the circulars giving process of valuation as per local Present Market Value (PMV). Therefore, when the basis has been introduced by the Customs Authorities they cannot take a different stand other than the Present Market Value to bring the exporter in the garb of fraud or forgery etc. because the exporter has proceeded on the basis of the own Circulars of the Customs Authorities. In the premises whether such valuation is correct or incorrect, it has to be gone into by adopting a method as given by the Division Bench itself i.e. by applying Section 14(1) of the Customs Act, 1962 in a given situation i.e. at the provisional stage of Assessment. In other words the Division Bench is categorical about jurisdiction of the Customs authorities whether the same is restricted to the assessment of duty u/s 14(1) of the Act at that stage but not after final assessment which the respondents failed to understand and misapplied the same. It is to be remembered that jurisdiction can be applied when it is available but it can not be applied when it is not available otherwise it will be treated as exceeding the jurisdiction what exactly happened in the present case. If both the factual matrix are compared it will be seen that the case of the Division Bench was preceded at the provisional stage and that too after issuance of show cause notice unlike the present case after final assessment by way of withholding DEPB Scrips beyond the prescribed mandatory period of verification. Thus, both the cases are significantly different from each other. In such circumstances, withholding a licence of a trader for an indefinite period cannot be construed as an act of fair play on the part of the Statutory Authority.

16. Therefore, it is a clear case of violation of Article 19(1)(g) read with Article 301 of the Constitution of India. As a result whereof I allow the writ petition. Due to long withholding of DEPB licences by the customs authority, at an interim stage the petitioners made a prayer to release DEPB Scrips on any condition to avoid the lapse of the same which was allowed by this Court on a condition of furnishing bank guarantee on the basis of a consensus derived in between the parties. Such order of release of the DEPB licences stands confirmed. Condition of putting bank guarantee by the petitioners stands withdrawn in view of the circumstances. The respondent authority or authorities are directed to release the bank guarantee immediately upon communication of the order.

17. Accordingly, the writ petition stands disposed of. However, no order is passed as to costs.

18. Xerox certified copies of this judgment will be supplied to the parties within seven days from the date of putting requisites for drawing up and completion of

the order and certified copy of this judgment.

19. All parties are to act on a signed copy minute of the operative part of this judgment on the usual undertaking and subject to satisfaction of the officer of the Court in respect as above.