
(2001) 02 DEL CK 0101
In the Delhi High Court
Case No : Civil Writ No. 5529 of 1999

M/s Optina Impex Pvt. Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 09-02-2001

Acts Referred:

Citation : (2001) 4 AD 125 : (2001) 91 DLT 566 : (2001) 75 ECC 758 : (2004) 117 ECR 155 : (2003) 151 ELT 493

Hon'ble Judges : V.K. Jain, J

Bench : Single Bench

Advocate : Mr. S.P. Dhupar, for the Appellant; Mr. U. Hazarika, for the Respondent

Judgement

Vijender Jain, J. (Oral)

1. Rule.

2. The petitioner was given an approval by the respondent for setting up of a hundred per cent export oriented unit. Unit of the petitioner was set up in Gujrat. The petitioner's Unit was supposed to export the lenses of high quality and condition in order to successfully compete in the world market.

3. Show cause notice was issued by the respondent under Sections 4-M and Section 4I(1)(a) of Import & Export (Control) Act, 1947 read with Section 20(2) of the Foreign Trade (Development & Regulation) Act, 1992 to the petitioner. Adjudication order was passed on 3.3.1998 and an appeal preferred by the petitioner before the Appellate Committee of the respondent was also dismissed by the Committee.

4. In the writ petition the petitioner has impugned the order passed by the Appellate Committee as well as the order passed by the Adjudicating Authority.

4. Mr. Hazarika learned counsel for the respondent has vehemently contended that the approval for setting up of the industry of the petitioner was granted on

the basis of condition attached to the Letter of Intent. On the basis of the said Letter of Intent Mr. Hazarika has contended that there was shortfall in the export, the capital goods were imported by the petitioner without payment of import duty under said license and the petitioner enjoyed other benefits as well. He has contended that value addition was to the extent of (-)26.56% although same ought to have been 26.56%. Mr. Hazarika has contended that impugned order passed by the Director General of Foreign Trade has dealt in detail on the submissions made by the petitioner.

5. On the other hand, learned counsel for the petitioner has contended that the show cause notice issued to the petitioner was based on the non performance of the petitioner as an export unit. Same was not passed on misuse of goods under the license. He has further contended that the goods under the license. He has further contended that the goods could have been misused if the same would have been used in violation of conditions of license which in this case were imported under OGL. At page 59 of the paper book it has been specifically mentioned in the order No. of 19/88-91, Open General license No.19/88 dated 30th March, 1988 that the goods has to be imported subject to the "Actual User condition as applicable there to in each case."

6. He has further contended that if there was a misuse and the goods were imported then recourse for appropriate action could have been taken by inviting Clause 8 of the Import Control Order. Clause 8 of Import Control Order reads as under:-

Power to debar from importing goods or from receiving licenses or allotment of imported goods:- (1) The Central Government or the Chief Controller of Imports & Exports may debar a licensee or importer of any other person from all or any of the following i.e. importing any goods or receiving licenses or allotment of the imported goods through the State Trading Corporation of India. The Mineral and Metal Trading Corporation of India, or any other similar agency and direct, without prejudice to any other action that may be taken against him in this behalf, that no license or allotment of imported goods shall be granted to him and he shall not be permitted to import any goods for a specified period under this Order:-

(a) if his application for license is at any time found to be not in conformity with any provision of this Order; or

(b) if such application is found to contain any false fraudulent or misleading statement; or

(c) if he is found to have used in support of his application any document which is false or fabricated or which has been tampered with; or

(d) if he has, on any, occasion, tampered with an import license or has imported goods without a license or has bene a party to any corrupt or fraudulent practice in his commercial dealing or in obtaining a license, or is round to have solicited

any license by offering an inducement to the holder of the license or otherwise; or

(e) if his agent or employee has been a party to any corrupt or fraudulent practice in obtaining any license on his (SIC); or

(f) if he fails to comply with or contravenes or attempts to contravene or abets the contravention of any condition embodied in, or accompany, a license or an application for a license; or

(g) if he commits a breach of any law (including any rule, order or regulation) relating to customs or the import and export of goods or foreign exchange;

(h) if he fails to produce any document or information that is called for by the Chief Controller of imports and Exports or any other licensing authority; or

(i) if he fails to submit production returns regularly to the D.G.I.D. or any other sponsoring authority concerned; or

(j) if he fails to comply with the distribution control in respect of imported goods where such control is applicable.

7. What has been contended by learned counsel for the petitioner is that in the show cause notice there was no allegation of misuse of the imported goods. Therefore, the order passed by the Director General of Foreign Trade was without jurisdiction u/s 4I(1)(a) of the Act.

8. I have given my careful considerations to arguments advanced by learned counsel for the parties.

9. From the bare perusal of the show cause notice, it has been mentioned "the unit commenced their production in March 1990 and have made imports of capital goods and raw material for Rs.102.88 lakhs and made exports to the tune of Rs.59.64 lakhs resulting in net foreign exchange loss of Rs.43.24 lakhs. The unit achieved value addition of (-)26.56% against the stipulated value addition of 26.56%".

10. Nowhere in the show cause notice it has been averred that the petitioner had misused the imported goods. If that is the case then the case of the petitioner would not fall u/s 4I(1)(a) as there was no such allegation that the goods have not been used for the purpose for which it was imported under OGL license. The finding given by the Adjudicating Authority and the decision of the Committee which upheld that finding was perverse as that was not the case made out and set out by the respondent in the show cause notice. Industrial Unit which has been granted certain privileges on account of its being 100 per cent export oriented unit, no doubt, has got the advantage of importing goods without payment of custom duty or other duties which are normally applicable in case of a Unit which is not a 100 per cent export unit until and unless the authorities come to the conclusion that the said import made under the license has been misutilised or has been misused contrary to the terms of the license, it can not be said that Section 4I(1)(a) of the Act will come into operation. Section 4I(1)(a)

is as follows:

4I(1) Liability to penalty. Any person who;-

(a) in relation to any goods or materials which have been imported under any license or letter of authority, uses or utilises such goods or materials otherwise than in accordance with the conditions of such license or letter of authority: or
XXXXXXX

shall be liable to penalty not exceeding five times the value of goods or materials, or one thousand rupees, whichever is more, whether or not such goods or materials have been confiscated or are available for confiscation."

11. From the bare reading of the aforesaid Section until and unless allegations were made in the show cause notice that the goods imported under the OGL license has been misutilised penalty cannot be imposed u/s 4I(1)(a) of the Import and Export Control Act 1947. Any violation of condition for license i.e. failure to achieve value addition and for non fulfillment of export obligations action could have been resorted by the Department under Clause 8 of the Import (Control) Order 1955. Nowhere in the said show cause notice it has been mentioned that there was misutilisation of the imported capital goods by the petitioner and the petitioner wanted to have some ill gotten gains by misusing the import facilities. Therefore, the order passed by the Adjudicating Authority u/s 4I(1)(a) of the Act is misconceived and the same is hereby quashed. Petition is allowed.

12. Rule is made absolute.

13. dusty.