
(1995) 07 BOM CK 0050

In the Bombay High Court

Case No : Writ Petition No. 1126 of 1987

Plethico Pharmaceutical

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 03-07-1995

Acts Referred:

Customs Act, 1962 — Section 112

Citation : (1995) 60 ECR 609 : (1995) 80 ELT 755

Hon'ble Judges : S.H. Kapadia, J;M.L. Pendse, J

Bench : Division Bench

Judgement

Kapadia, J.—Being aggrieved by Order dated 2nd December, 1986 passed by Collector of Customs (respondent No. 2 herein) as also notice dated November 29, 1986 issued by Assistant Collector of Customs, Air Cargo Complex raising a demand on the petitioners for Rs. 6,94,260/- towards customs duty, this Petition has been filed.

2. Facts giving rise to this Petition, briefly, are as follows:

3. In October 1985, petitioner entered into a contract with a German Supplier for purchase of 300 Kgs. of Cephalexin Monohydrate powder (hereinafter referred to, for the sake of brevity, as "the vital drug"). The said drug is a life-saving drug importable under OGL. It was importable, free of duty. Under the said contract dated October 10, 1985 with the German Supplier of repute, payment was to be made by the petitioners vide irrevocable letter of credit opened by the petitioners through their Bankers on October 17, 1985. The goods were imported by Air on 1st November, 1985. On 2nd November, 1985 petitioners filed their Bill of Entry for home consumption. On the basis of the Delivery Order issued by their Bankers, petitioner applied for delivery. Petitioners also applied to the Assistant Drug Controller for testing the material. This was as per the Delivery Order. Thereafter, petitioners were informed that 200 Kgs. out of 300 Kgs. of the said vital drug did not conform to the description. Accordingly, the petitioners informed the German Supplier who, by their letter dated December 20, 1985

confirmed that they were ready and willing to take back the said material. The Customs did not clear the remaining 100 Kgs. of material which was found to be in order. In the meantime, petitioners also informed their Bankers to stop payment. On 31st July, 1986, Assistant Collector of Customs, Air Cargo Complex, informed the petitioners that the goods were required to be re-tested in the Customs House before re-export. Samples were sent accordingly for re-testing to the Deputy Chief Chemist. Petitioners once again requested the Customs to permit them to re-export the goods to the extent of 200 Kgs. By an Order dated 2nd December, 1986, respondent No. 2 came to the conclusion that there was a collusion between the petitioners and the Foreign Suppliers to remit foreign exchange out of India and by the said Order, respondent No. 2 confiscated 200 Kgs. of the said vital drug and imposed penalty of Rs. 2,00,000/- u/s 112(b) of the Customs Act, 1962. No Order was passed in respect of 100 Kgs., although there was no complaint with regard to 100 Kgs. out of 300 Kgs. of the vital drug imported. On 29th November, 1986 simultaneously, the Assistant Collector of Customs, Air Cargo Complex issued a notice alleging that the petitioners have not produced end-use consumption Certificate and demanded Rs. 6,94,260/- on the ground that petitioner have violated conditions of Bond under which petitioners had undertaken to use the imported material for manufacture of life-saving drug. Being aggrieved by Order dated 2nd December, 1986 and notice dated 29th November, 1986, the present Writ Petition has been filed.

4. Mr. Sancheti, the learned counsel for the petitioners contended that in the present case, the Order passed by respondent No. 2, dated 2nd December, 1986 was without any basis. He pointed out that there was no evidence to suggest that petitioners had colluded with the Foreign Supplier to indulge in Foreign Exchange Regulation Act being violated. He pointed out that the petitioners had in fact requested for testing of the goods and when 200 Kgs. did not conform to the description, petitioners took steps to write to the Foreign Suppliers who agreed with the objections raised by the petitioners and requested for re-shipment of the goods. The learned counsel for the petitioners further pointed out that in fact no payment was ever made to the Foreign Supplier under the letter of credit issued by the Bankers of the petitioners and in fact the petitioners by their letter dated 13th January, 1986 stopped payment to the German Supplier. The learned counsel for the petitioners further pointed out that on the one hand, the Collector of Customs has not allowed 200 Kgs. of the vital drug to be cleared and on the other hand, the Assistant Collector of Customs demanded Rs. 6,94,260/- under the above notice dated 29th November, 1986 for not producing end-use consumption Certificate. The learned counsel for the petitioners further pointed out that since the goods did not conform to the description, no payment was made to the German Supplier and the petitioners themselves applied for re-export which they were entitled to under the Customs Act and, therefore, the question of producing end-use consumption Certificate did not arise and the Assistant Collector of Customs was in error in calling upon the petitioner to pay entire duty of Rs. 6,94,260/-. The learned counsel for the

petitioners further pointed out that the Collector of Customs has made no reference to the remaining 100 Kgs. and no reasons have been given for not granting clearance of the said goods to the extent of 100 Kgs. In fact, subsequent to the filing of the Petition, there is no trace of a portion of the goods. Mr. Bulchandani, the learned Advocate appearing for the respondents contended that the Collector of Customs has given good reasons for coming to the conclusion that there was collusion between Foreign Supplier and the petitioners and, therefore, he was right in passing the impugned Order dated 2nd December, 1986. Mr. Bulchandani further contended that the petitioners did not obtain end-use consumption Certificate and, therefore, Assistant Collector of Customs, Air Cargo Complex called upon petitioners to pay the entire duty amounting to Rs. 6,94,260/-.

5. We find considerable merit in the contention advanced on behalf of the petitioners. The facts of the case indicate that the petitioners imported the vital drug from a reputed German Supplier; that on the basis of Delivery Order issued by Bank of Tokyo, petitioners applied for delivery of the goods and simultaneously applied to the Assistant Drug Controller for testing of the material on 4th November, 1985 when petitioners detected that 200 Kgs. of the said vital drug did not conform to the description of the imported material and immediately the petitioners informed the German Supplier about non-conformity. The German Supplier was not paid because the petitioners instructed their Bankers to stop payment, under the letter of credit. The petitioners also simultaneously applied for re-export of 200 Kgs. of the material. These facts clearly shows that the finding of the collector that there was collusion between Foreign Supplier and the petitioners was unfounded. There is nothing to indicate that there was a collusion to remit foreign exchange in violation of FERA, particularly when the petitioners had stopped payment and also in view of the fact that petitioners had taken steps immediately on import of the goods to have the material chemically tested and when 200 Kgs. did not conform to the description, petitioners immediately wrote letters to the German Supplier who agreed to the re-shipment of the goods. In the above set of circumstances, the impugned Order passed by the Collector is liable to be set aside on the ground that there is no basis for recording the findings of collusion against the petitioners. Normally, we would have directed the petitioners to go in Appeal, but the Petition is pending in this Court from 1987 and in the circumstances, we have gone into the facts of the case.

6. We also find merit in the contention of the petitioners that under the above circumstances, the Assistant Collector of Customs could not have called upon the petitioners to pay entire Customs duty amounting to Rs. 6,94,260/- for not producing end-use consumption Certificate. Under the Notifications, imported material was exempted subject to the petitioners producing end-use consumption Certificate. The raw material imported was required to be used for manufacture of vital drugs. In the above set of circumstances, it was not possible for the petitioners to produce end-use consumption Certificate because the

petitioners applied for re-export when they found that the goods did not conform to the description of the imported material. In the present case, the Customs authorities did not give permission to the petitioners to re-export. In the present case, the Customs had an alternative of destroying the goods. Since the payments have not been made to the German Suppliers, the petitioners also believed that the Customs would either grant permission to re-export or destroy the goods, but it is not open to the respondents not to clear the goods for re-export on one hand on the other hand claim the entire duty amount of Rs. 6,94,260/- vide notice dated 29th November, 1986 issued by the Assistant Collector on the ground that end-use consumption Certificate is not produced by the petitioners. The said notice dated 20th November, 1986 is contradiction in terms. For the foregoing reasons, we find merit in the Writ Petition.

7. Rule is accordingly made absolute in terms of prayer (a). The impugned order passed by respondent No. 2 dated 2nd December, 1986 and the notice dated 29th November, 1986 are quashed. However, in the facts and circumstances of the case, there will be no order as to costs.