

(2014) 10 DEL CK 0019
In the Delhi High Court
Case No : Writ Petition (Civil) 1788/2011

Rashmi Jain

APPELLANT

Vs

Additional Director General of Foreign Trade

RESPONDENT

Date of Decision : 14-10-2014

Acts Referred:

Foreign Trade (Development and Regulation) Act, 1992 — Section 11(2), 2, 7, 8(b), 9(4)

Citation : (2015) 316 ELT 389

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Piyush Kumar and Shikha Sapra, Advocate for the Appellant; Amit Mahajan and Nitya Sharma, Advocate for the Respondent

Judgement

Vibhu Bakhru, J.—The petitioner has filed the present petition impugning orders dated 09.02.2011 and 07.09.2006 passed by respondent nos. 1 and 2 respectively (hereafter referred to as "impugned orders"). The petitioner is aggrieved by the impugned order dated 07.09.2006 whereby a penalty for a sum of Rs. 2,50,000 was imposed upon M/s. Balaji Impex (proprietary concern of petitioner's late husband). The appeal preferred by the petitioner's late husband against the impugned order dated 07.09.2006 was dismissed by the impugned order dated 09.02.2011 passed by respondent no. 1

2. Briefly stated, the relevant facts for considering the controversy raised in the present petition are as under:

2.1 The late husband of the petitioner was in the business of import of metal scrap under the name M/s. Balaji Impex (hereafter referred to as "Balaji"). Sometime in October 2004, Balaji placed an order for supply of Heavy Melting Scrap (HMS) from M/s. Sun Metal Casting LLC, UAE. Pursuant to the said order, 183.650 MTs of HMS was supplied on 25.10.2004, enclosed with an invoice dated 25.11.2004. The said consignment was accompanied by a no-war material certificate issued by M/s. Sun Metal Casting LLC, UAE and a pre-shipment

Inspection Certificate dated 02.11.2004 issued by Moody International, Iran certifying that the said consignment was free from arms, ammunition, mines, shells, cartridges, radio-active contamination or any other explosive materials.

2.2 The said consignment was sold by Balaji to M/s. S.G Steels Pvt. Ltd., Uttaranchal (herein after referred to as "SGS") on high seas. The Bill of entry for clearance of the HMS consignment was filed on 20.12.2004 and after the customs authorities had examined the consignment, some used and rusted empty cartridges/shells were found in some of the containers. The entire goods/consignment was confiscated by the Commissioner of Customs, Inland Container Depot, Tughlakabad, New Delhi and a penalty was imposed on SGS.

2.3 Thereafter, separate show cause notices were issued on 31.03.2006 to Balaji and SGS for imposing penalty on the ground that they had imported prohibited war materials and violated the provision of Foreign Trade (Development & Regulation) Act, 1992 and Foreign Trade (Regulation) Rules, 1993.

2.4 Pursuant to the aforesaid proceedings, respondent no. 2 passed the impugned order imposing a penalty of Rs. 2,50,000/- on Balaji. Similarly, a penalty of Rs. 2,00,000/- was imposed on SGS. Aggrieved by the imposition of the penalties, Balaji as well as SGS preferred appeals before the Appellate Authority. By an order dated 11.01.2007, the appeal filed by SGS was allowed by then Additional Director General of Foreign Trade and the penalty imposed upon SGS was quashed. However, the appeal preferred by Balaji remained pending.

2.5 While the appeal preferred by Balaji was pending, the petitioner's late husband (proprietor of Balaji) met with an accident and, subsequently, expired on 18.01.2008.

2.6 During the pendency of the appeal, respondent no. 2 initiated proceedings for recovery of penalty from Balaji. Aggrieved by the same, the petitioner filed a Writ Petition before the Allahabad High Court and by an order dated 07.04.2010 the Court stayed the recovery proceeding pending disposal of the appeal preferred by Balaji against the impugned order dated 07.09.2006. By the impugned order dated 09.02.2011, the appeal preferred against the impugned order dated 07.09.2006 was rejected.

3. It was contended by the petitioner that the orders passed by the respondents are unreasonable, arbitrary and liable to be dismissed in limine as the respondents failed to address the contentions raised by the petitioner. It was further contended that the respondents have failed to acknowledge that the consignment was accompanied by no war material and that the goods/consignment was cleared by M/s. Moody International, Iran. It was, thus, contended that the respondents have erred in holding that M/s. Moody International was not an authorised agency for issue of an Inspection certificate.

4. Thereafter, the petitioner submitted that the conclusion of the respondents and imposition of penalty on the petitioner, who was merely an intermediary high

sea seller, is erroneous and cannot be countenanced as per the definition of "import" under Foreign Trade (Development and Regulation) Act, 1992 and term "importer" under Foreign Trade (Regulation) Rules, 1993 - the petitioner submitted that the importer, in the present case, was M/s. S.G. Steels Pvt. Ltd.

5. The petitioner also submitted that there was no evidence that the petitioner had any knowledge regarding the presence of empty, used and rusted shells in the consignment and hence there was no deliberate disobedience of statutory provisions. Thus, it was submitted that the imposition of penalty was illegal and violative of principles of natural justice.

6. The petitioner also relied upon judgment in Tarak Nath Gayen and Others Vs. Customs, Excise and Gold (Control) Appellate Tribunal and Others, as well as in Hindustan Steel Ltd. Vs. State of Orissa, .

7. It was submitted by the respondents that after the receipt of report from the JDG, ECA (HQ), show cause notices were issued for imposition of penalty on Balaji and SGS for violation of Sections 8(b), 9(4) and 11(2) of the Foreign Trade (Development & Regulation) Act, 1992 for the same cause of action. And, subsequently, fiscal penalty of Rs. 2,50,000 was imposed on the Balaji after considering the submissions made on its behalf.

8. It was also submitted that the appeal preferred by the petitioner against the appellate order could not be decided as the petitioner did not enter appearance before the appellate authority (respondent no. 1) on various dates. It was further contended by the respondents that the petitioner failed to show any evidence or documents that M/s. Moody International, Iran was accredited to inspect the goods and issue certificates. The respondents, thus, contended that petitioner's assumption that M/s. Moody International, Iran was an agency, which was authorised to issue an inspection certificate for the consignment was erroneous. And therefore, the inspection certificate issued by M/s. Moody International was invalid and could not be relied upon.

9. It was further contended that Balaji/petitioner could not seek parity with the orders passed in the case of SGS, as the consignment in question was procured by SGS from Balaji.

10. Balaji had sold the goods in question on high seas basis. Thus, admittedly, the offending goods (HMS) were not imported by Balaji. The term "import" is defined under clause (e) of Section 2 of the Foreign Trade (Development and Regulation) Act, 1992 (hereinafter referred to as "FTDR Act") as under:-

(e) "import" and "export" means,-

(I) in relation to goods, bringing into, or taking out of, India any goods by land, sea or air;

(II) in relation to services or technology,-

(i) supplying, services or technology-

- (A) from the territory of another country into the territory of India;
- (B) in the territory of another country to an Indian service consumer;
- (C) by a service supplier of another country, through commercial presence in India;
- (D) by a service supplier of another country, through presence of their natural persons in India;
- (ii) supplying, services or technology-
 - (A) from India into the territory of any other country;
 - (B) in India to the service consumer of any other country;
 - (C) by a service supplier of India, through commercial presence in the territory of any other country;
 - (D) by a service supplier of India, through presence of Indian natural persons in the territory of any other country:

Provided that "import" and "export" in relation to the goods, services and technology regarding Special Economic Zone or between two Special Economic Zones shall be governed in accordance with the provisions contained in the Special Economic Zones Act, 2005 (28 of 2005)"

11. The term "importer" is defined under Rule 2(c) of the Foreign Trade (Regulation) Rules, 1993 which reads as under:-

"(c) "importer" or "exporter" means a person who imports or exports goods and holds a valid Importer-exporter Code Number granted under section 7"

12. By the impugned order dated 07.09.2006, a penalty of Rs. 2,50,000/- was imposed on Balaji on the basis that it had imported the offending goods. This is apparent from the contents of the said order, the relevant extracts of which are quoted below:-

"7. Thus M/s. Balaji Impex, D-108/4, Saket, Meerut-250004 the high Sea Seller (the noticee firm) has mis-declared the description of the goods in the import documents for HMS but have imported objectionable items of war materials and sold to the final Indian importer in a clandestine manner with an intention to smuggle the same into India which is falling within the scope of the term "Ammunition" as defined under Arms Act, 1959 and whereas the empty or discharged cartridges of all Bores and Sizes fall under the Restricted Category as per ITC (HS) Classification No. 72042110 and 72042910 & thus the importer have suppressed the actual information and have brought restricted category items into India alongwith the HM Scrap without any import licence. The above consignment has been procured by the noticee firm from foreign supplier supported by the pre-shipment Inspection Certificate issued by an unauthorised agency M/s. Moody International Iran, and sold to the final Indian importer, in

contraventions of the provisions of FTDR Act.

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A fiscal penalty of Rs. 2,50,000/- (Two Lakhs Fifty Thousand) only is imposed on the notice firm M/s. Balaji Impex for importing Heavy Melting Scrap consignment mixed with objectionable war materials and sold to the final Indian importer M/s. S.G. Steels on High sea sale basis without any valid Pre-Shipment Inspection Certificate, in contravention to the provisions of FTDR Act, 1992"

13. The impugned order dated 09.02.2011 also proceeded on the basis that Balaji was the importer of the said goods. This is also clear from paragraph 8 of the impugned order dated 09.02.2011 which reads as under:-

"I have gone through the facts of the case available on record and the submissions made by the appellants. In this case M/s. Balaji Impex imported restricted items (war material) in contravention of the Foreign Trade Policy. M/s. Moody International, Iran is not an authorized agency to issue an Inspection Certificate for a consignment meant for India. Hence, I found no reason to interfere with the Adjudication Order passed by the Jt. DGFT, DGFT (HQ)."

14. The learned counsel appearing for the respondent supported the impugned orders by contending that the penalty had been imposed on Balaji on the basis that it had abetted import of goods in contravention of the provisions of the FTDR Act.

15. In my view, this contention is liable to be rejected. This allegation (of abetting) does not find mention in any of the impugned orders. The impugned order dated 07.09.2006 specifically alleges that Balaji had "misdeclared the description of goods in the import documents for HMS but have imported objectionable items of war materials and sold to the final importer in a clandestine manner with an intention to smuggle the same into India". Undisputedly, this allegation cannot be sustained. In the first instance, Balaji had not imported any objectionable items into India. Further, the intention to smuggle the said items cannot be ascribed to Balaji as Balaji was not the beneficiary of the import of the goods in question in India.

16. Even, if one assumes that Balaji was charged with abetting import of goods in contravention with the FTDR Act, it is obvious that Balaji alone could not be penalized for the same. It is implicit in an allegation of abetting an offence that another person is guilty of that offence which is alleged to have been abetted. In this case, SGS would have been the offender as well as a beneficiary of the import of goods into India. However, SGS had succeeded in its appeal and the penalty of Rs. 2,00,000/- imposed on SGS had been set aside by an order dated 11.01.2007. The Appellate Authority had accepted the contention that there was no willful concealment and/or importation of the offending war material by SGS. In this view, where it has already been held that the person who imported the

goods in question is not guilty of any willful concealment/importation of offending goods, the question of imposing a penalty on a high seas seller for abetment of import in violation of the FTDR Act does not arise.

17. Balaji had purchased these goods on the strength of a certificate issued by Moody International, Iran. Concededly, Moody International (India) Pvt. Ltd. is an authorized agency listed in appendix 5 to the handbook of procedures. The petitioners, thus, proceeded on the basis that Moody International (Iran) which is an affiliate of Moody International (India) Pvt. Ltd. would also be accredited for certification purposes. It is also not in dispute that custom officers had not raised any objection with respect to the pre-shipment inspection certificate. Thus, although the respondents may be correct that the pre-shipment certificate was not from an accredited agency, Balaji's assumption that M/s. Moody International, Iran was an accredited agency appears to be bonafide. In the given facts and circumstances, no ulterior motive or mal-intent can be ascribed to Balaji in accepting the certificate of M/s. Moody International.

18. It is also relevant to note that the value of HMS was only Rs. 33,600/- which was not significant in comparison to the total value of the goods imported. This fact has been completely ignored by the respondents while imposing penalty on Balaji.

19. In view of the above, the respondents had misdirected themselves in imposing penalty on Balaji. Accordingly, the impugned orders dated 09.02.2011 and 07.09.2006 are set aside. The writ petition is allowed and the parties are left to bear their own costs.