(1987) 04 BOM CK 0001

In the Bombay High Court

Case No : Writ Petition No. 85 of 1987

Sampat Raj Dugar APPELLANT

Vs

Collector of Customs and Others RESPONDENT

Date of Decision : 29-04-1987

Acts Referred:

Customs Act, 1962 — Section 111
Imports (Control) Order, 1955 — Section 2(26)

Citation : (1987) 3 BomCR 375 : (1988) 15 ECR 338

Hon'ble Judges : S.M. Daud, J

Bench : Single Bench

Advocate : C.R. Patel, for the Appellant; V.G. Rege, for the Respondent

Judgement

S.M. Daud, J.

1 This petition under Article 226 of the Constitution takes exception to an order for confiscation of goods passed u/s 122 of the Customs Act, 1962

2. Petitioner is an Indian National Resident Abroad (INRA) doing business at Hongkong in the name and style of "UNISILK". Respondent No. 3 who does business at Delhi in the name of "ACQUARIUS" was the holder of an Advance Import Licence Bearing No. P/L/3084211/C/XX/95/D/85 for import of raw silk. This licence was issued on or about 20-5-1985 and its duration was 18 months from the date of issue. Prior to October 1985 in response to orders placed by respondent No. 3, the petitioner had shipped three consignments of raw silk ex-Bombay Port. These consignments were cleared by the third respondent, who produced the clearance documents for that purpose from the petitioner''s bankers. The import of raw silk was under a stipulation that the silk was to be consumed for the manufacture of garments which were to be exported by the importer. This obligation apparently was not fulfilled by the third respondent. Between October and November 1985 the petitioner exported different quantities of raw silk in four lost. The consignments were made deliverable to the order of the petitioner. The requisite documents were sent to the petitioner''s bankers

who had instructions to deliver the same to the purchaser, how were to pay across the counter. The third respondent appeared before the customs authorities and claimed the right to take delivery of the goods. By this time the customs authorities had come to know of the misuse made in respect of the earlier three consignments and also the alleged misrepresentation made by the third respondent in obtaining the Advance Licence. Proceedings were initiated against various persons including the third respondent by the Collector of Customs, Bombay. Petitioner though not formally served with notice in the proceedings, put in an appearance through Counsel and was hear. His stand before the Collector was that the title in the goods had not passed to respondent No. 3, that she had no right to abandon the goods, that whatever her lapses the goods could not be proceeded against to realise a penalty from her and that he had a right to re-export the goods. He made it clear that he was not aware of the basis on which the Advance Licence had been secured by respondent No. 3. In any case, he was not a party to the misuse of the imports made earlier, not to the alleged deceit practiced by respondent No. 3 in obtaining the Advance Licence. This had no effect upon the Collector and he negatived the contentions advanced on behalf of the petitioner in the following terms

"Now I come to the submissions made by Shri C.R. Patel Solicitor, who appeared on behalf of supplier M/s. UNISILK in respect of the four consignments which are yet to be cleared and were seized by D.R.I. New Delhi. It is an admitted fact that the Advance Licence against which these goods were imported has since been cancelled by the Licensing Authority. There is, therefore, no valid import licence for clearance of these goods. For the purpose of allowing re-export of these goods, a valid Import Licence for clearance f the goods should exist even though the goods may not be physically cleared from the Customs. There is no valid licence for the clearance of the goods and as the goods have been abandoned by the importer, M/s. Aquarius, New Delhi, u/s 23(2) of the Customs Act, 1962 who had filed the Bill of Entry for clearance of these goods. I do not propose to allow re-export of these goods because these goods, are liable to confiscation u/s 111(d) of the Customs Act, 1962...................................... I, therefore, confiscate the goods.................. for offence u/s 111(d) of the Customs Act."

To make the factual narration complete, I may here mention that the Advance Licence issued in favour of respondent No. 3 was cancelled under Clause 9 of the Import (Control) Order, 1955 on May 12, 1986. This means that at the date the four consignments entered Bombay Port they were covered by a subsisting and valid Import Licence

3. Petitioner contends that the order passed by the Collector is illegal. This contention is based upon the following submissions :--

(i) That the title to the goods vests in the petitioner, and had not passed to respondent No. 3. For that reason, her lapses cold not be utilised to pass an order of confiscation which affected him and not the 3rd respondent

(ii) That at the date of import, the goods were covered by a valid and a subsisting licence and therefore section 111(d) could not be invoked to justify an order of confiscation

The reply given on behalf of the respondents to these submissions is that once the goods came into Bombay Port, title thereto vested in respondent No. 3. In support of this contention reliance is placed upon section 2(26) of the Customs Act, Clause 5 of the Import Control Order, 1955 and a para of the Import and Export Policy---AM 1985-1986. It is submitted that the goods having vested in respondent No. 3 and that she having misused the facility of import of three earlier consignments and also having obtained an Advance licence by practice of fraud, rendered herself liable to the penalties of the Customs Act. One such penalty was confiscation of the goods u/s 122. Petitioner could proceed against respondent No. 3 for recovery of his dues. He could not claim immunity from confiscation in relation to the goods

4. The petition has to be allowed and I do so for the reasons given below

Section 167 read with sections 18 and 19 of the Sea Customs Act, 1878, to the extent relevant contained a provision worded thus

"If any goods, the importation or exportation of which is for the time being prohibited or restricted by or under Chapter IV of this Act, be imported into or exported from India contrary to such prohibition or restriction .... such goods shall be liable to confiscation; and any person concerned in any such offences shall be liable to a penalty................."

The words of section 111 of the Customs Act are--

"The following goods brought from a place outside India shall be liable to confiscation

(d) any goods which are imported or attempted to be imported or are brought within the India Customs Wasters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force.

The sections are almost identical. Application therefore came up for consideration before the Supreme Court in East India Commercial Co. Ltd., Calcutta v. Collector of Customs, Calcutta 1983 ELT 1342 (S.C.). Subba Rao, J., speaking for the majority had this to say

"Nor is there any legal basis for the contention that licence obtained by misrepresentation makes the licence non-est, with the result that the goods should be deemed to have been imported without licence in contravention of the order issued u/s 3 of the Act so as to bring the case within Clause (8) of section 167 of the Sea Customs Act. Assuming that the principles of law of contract apply to the issue of a licence under the Act, a licence obtained by fraud is only voidable ; it is good till avoided in the manner prescribed by law."

Mr. Patel is right in relying upon the above passage to contend that having regard to the subsistence and validity of the Advance Licence during the period the goods were imported, it could not be said that the importation was contrary to any prohibition imposed by or under the Act or any other law for the time being in force. The reply given on behalf of the respondents is, that for the purpose of section 2(26) it is not only the owner of the goods who is the importer, but the importer can include "any persons holding himself out to be the importer". But the definition of the expression "importer" places the owner before the person holding himself out to be the importer. As between the owner and the person holding himself out to be the importer, it is the former who takes precedence. In the instant case it was only for the limited purpose of obtaining delivery of the goods, that respondent No. 3 had presented herself as the importer. Title to the goods has not passed to her, for she had not retired the relevant documents from the petitioner''s bankers. She had no right to abandon the goods, because in the very first place they did not vest in her. Such vesting would have followed her retiring the documents As that event had not taken place, no right accrue to the Customs Authorities to proceed against the goods for a lapse committed by respondent No. 3. The respondents rely upon Clause 5(3)(ii) of the Import Control Order, 1955. To the extent relevant this clause reads:

"It shall be deemed to be a condition of every such licence that .... that the goods for import of which a licence is granted shall be the property of the licensee at the time of import and thereafter upto the time of clearance through Customs".

From this it is sought to be argued that respondent No. 3 had become owner of the goods and therefore these goods could be proceeded against for lapses committed by the deemed owner. A deeming provision has to be confined within strict limits. As Clause 5(3)(ii) itself indicates the deeming is for the limited purpose of clearance through customs. Where the clearance through customs is not even attempted but abandoned, the licensee cannot be described as person in whom the property vests. Once there is abandonment and a disinclination to go forth with the clearance formalities, it is clear that the licensee does not want to have anything to do with the goods. The title does not vest in the intending importer. Whatever the said importer is permitted to do prior thereto i.e. prior to the retiring of the documents, is only in a provisional capacity. Therefore, the deeming provisions does not justify the action of respondents Nos. 1 and 2 in confiscating the goods. Reliance placed upon the paragraphs of the Import Export Policy-AM 1985-1986 is also of no consequence. It is said that the consignments did not bear the endorsement of their being covered by the Advance Licence in favour of respondent No. 3. I do not see how this has any bearing on the subject. It is not that the Customs Act or the Import Control Order 1955, require specification in the documents, that they were covered by any particular Advance Licence. All that was required was that they were so covered, and this had to be established to the satisfaction of the Customs Authorities, at the time of their clearance

5. It was argued that if the petition is allowed, the method followed by respondent No. 3 may become a modus-operandi for illegal imports into this country. Arguments based upon desperation do not really furnish any clue as to the interpretation of an enactment. If what prevails in this case becomes the modus operandi for unscrupulous elements, Government has the power to bring in suitable amendments to take care of these misusing beneficial provisions. The Collectors''s order assumes that the property had vested in respondent No. 3, an assumption not well founded. Next, he assumed that the goods were liable to be confiscated because the Advance Licence had been cancelled on a date after the arrival of the goods in Bombay Port and before the passing of the confiscation order. This was an error, for the penalty of confiscation could be imposed only if the importation itself was invalid. That the Advance Licence had been obtained by practice of fraud or that the earlier imports made under it had not been utilised for manufacture of garments for export, could not be a reason for confiscating the goods which belonged to the petitioner, when the offender was respondent No. 3. The submission that petitioner can proceed against respondent No. 3 is devoid of merit. If petitioner can proceed against respondent No. 3, so can respondents Nos. 1 and 2, and in fact they have, because the Collector has imposed a personal penalty of Rs. 5 lakhs on that lady. The order of the Collector cannot be sustained

ORDER

Order of the Collector, in so far as it relates to the confiscation of the goods, is hereby quashed. Respondent No. 1 and 2 do hand over the four consignments to the petitioner or his clearing agent for re-shipment upto himself at Hongkong in terms solicited in the petition. For the period the goods were detained rendering petitioner liable to pay demurrage to the Bombay Port Trust, respondents Nos. 1 and 2 shall issue a detention certificate to the petitioner. Rule in above terms made absolute with the costs