

**(1993) 09 MAD CK 0104**

**In the Madras High Court**

**Case No : Writ Petition No. 12753 of 1993**

Sri Nithyakalyani Textiles Ltd.

APPELLANT

Vs

Asstt. Collr. of Cus., Tuticorin

RESPONDENT

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**Date of Decision : 23-09-1993**

**Acts Referred:**

Customs Act, 1962 — Section 25

**Citation : (1994) 70 ELT 547**

**Hon'ble Judges : Kanakaraj, J**

**Bench : Single Bench**

**Advocate : Shri C. Natarajan, for the Appellant; Shri T. Srinivasamoorthy, Additional Central Government Standing Counsel, for the Respondent**

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## **Judgement**

1. This Writ Petition coming on for hearing on Monday the thirteenth day of September 1993 and on this day upon perusing the petition and the affidavit filed in support thereof the order of the High Court, dated 13-7-1993 and made herein and the counter-affidavit filed herein and the records relating to the order relevant to the prayer aforesaid comprised in the return of the respondents to the Writ made by the High Court, and upon hearing the arguments of Mr. C. Natarajan, Advocate for the petitioner, and of Mr. T. Srinivasamoorthy, Additional Central Government Standing Counsel for the Respondents and having stood over for consideration till this day, the Court made the following order :-

By consent of parties the Writ Petition itself is taken up for final disposal. The petitioners own a Textile Mill and are engaged in the manufacture of cotton yarn. The Mill has 28,000 spindles as on date. It is stated that nearly 30% of the yarn manufactured by the petitioners are being exported out of India, earning precious foreign exchange. The Export and Import Policy for the period 1992-97 has introduced in Chapter VI an "Export Promotion Capital Goods Scheme" (hereinafter called the EPCG Scheme). The Scheme provides for the import of Capital goods at concessional rates of duty, subject to an export obligation of four times the c.i.f. value of the import. The petitioners made an

application on 18-12-1991 for the grant of licence for importing certain capital goods and a licence was issued on 17-1-1992. The licence covered the import of 2 Nos. Autoconer Machines and 4 Nos. REITER HIGH SPEED DRAW FRAME MODEL RSB 851 WITH AUTOLEVELLER. The licence entitled the petitioners to import the capital goods at concessional rate of customs duty namely 15% instead of 50%. The licence value was Rs. 1,70,39,165/-. The goods could be imported within 24 months from the date of licence. The petitioners had applied for certain amendments and the licence as amended was communicated to the petitioners on 11-11-1992. The petitioners placed a firm order with a Company at Germany for the shipment of 2 Nos. Draw Frames and opened a letter of credit, on 31-12-1992. The machines arrived during the first week of May, 1993. A Bill of Entry was filed on 24-6-1993, declaring the C.I.F. value as Rs. 37,10,204.07. The duty incidence at concessional rates of 15% works out to Rs. 5,56,530.60. Therefore, the duty saved by the petitioners on these two items works out to Rs. 7,42,040.82. Under the terms of the licence and the policy announced by the respondents, before clearance, the petitioners have to furnish Bank Guarantee for the 50% of the duty saved for a period of three years, and file a bond undertaking the export obligation. The petitioners filed an application on 12-5-1993 seeking approval of the draft bank guarantee and the letter of undertaking. By a letter dated 13-5-1993 the third respondent returned the papers pointing out the defects in the bank guarantee and the letter of undertaking. It is worthwhile to notice the defects. They are as follows :-

"(1) The Bank Guarantee has to be given for the 50% of the duty saved value for the imports allowed under the licence and partial Bonds are not acceptable.

(2) The LUT has to be executed for the amount equal to the value of Export obligation fixed the value of the duty saved the interest @ 24% per annum for a period of 6 years, as specified in Para 102(a)(b) of Handbook of Procedures, 1992-97.

(3) Calculation sheet for Customs Duty saved duly certified by the Customs authorities not produced."

Thereupon the petitioners wrote to the Deputy Collector of Customs, through the first respondent seeking permission to clear the goods provisionally on payment of 15% duty and undertaking to take up the matter with the Chief Controller of Imports and Exports, New Delhi, for splitting up the licence or for issue of fresh licence for the two Draw Frames. The first respondent sent a reply on 6-7-1993 refusing the release the goods provisionally, because the Import licence with the certificate of the Licensing Authority for having executed the bond was a prerequisite condition for the clearance of the goods. The Writ Petition is for the issue of a Writ of Certiorarified Mandamus to quash the order of the third respondent dated 13-5-1993 and to direct the respondents to permit clearance of the goods on the execution of the bank guarantee for 50% of the duty saved on the said two items alone without insisting on a bank guarantee for the Face Value of the Import Licence.

2. The first respondent has filed a counter-affidavit stating that the Notification No. 160 of 1992 granting exemption of Customs duty in respect of goods imported under the EPCG Scheme required the following conditions to be fulfilled :-

"(i) that the capital goods are imported under, and in accordance with a licence, under Export Promotion Capital Goods (EPCG) scheme in terms of Export and Import Policy.

(ii) that the Importer at the time of clearance shall produce to the Assistant Collector of Customs a certificate from the licensing authority for having executed a bond order under paragraph 45 of the policy.

(iii) that the Importer at the time of clearance shall make a declaration before the Assistant Collector of Customs binding himself to pay on demand an amount equal to the duty leviable on such goods, but for the exemption contained if he does not comply with the conditions in the table."

According to the first respondent the petitioner had not fulfilled the conditions and therefore, the permission could not be granted to clear the goods. In a separate counter-affidavit filed by respondents 3 and 4 it is pointed out that the bank guarantee and letter of undertaking should have been filed within six months from the date of licence. The period of six months expired on 16-6-1992. Therefore, unless the petitioners were able to get the licence amended no relief could be granted. The second point urged by the respondents is that the licence was for a particular Face Value and there was no indication in the licence giving a separate value for each of the items. There was no provision for splitting the licence and giving a separate value for each of the machines at the stage of shipment. In other words, the licence cannot be split up according to the discretion of the petitioners or the respondents unless the licensing authority himself and sanctioned the splitting up of the licence.

3. Before advertng to the arguments of the rival counsel it would be proper to notice terms of the licence and the statutory obligations imposed by the Act and the policy. Paragraph 38 of Chapter VI of the Export and Import Policy (1-4-1992 to 31-3-1997) relating to the EPCG Scheme is as follows :-

"38. Capital goods (including spares upto 10% of the CIF value of the capital goods) may be imported at a concessional rate of customs duty of 15% subject to an export obligation of four times the CIF value of the imports. The export obligation shall be fulfilled within a period of five years from the date of issue of the import licence."

Paragraph 45 is as follows :-

"The importer shall be required to execute with the licensing authority a Legal Undertaking supported by a bank guarantee wherever necessary for the fulfilment of the export obligation. The details in this regard are specified in the Handbook of Procedures."

The Handbook of Procedure gives the details under Clause 102(i). It is as follows :-

"102. (i) Before clearance of goods through Customs, but not later than six months from the date of issue of the licence, the importer shall execute a Legal Undertaking and Bank Guarantee in the manner indicted below, for fulfilment of the export obligation with the licensing authority in whose jurisdiction the licensee is situated or the Export Obligation Cell II in the Directorate General of Foreign Trade, Udyog Bhavan, New Delhi :-

(a) A Legal Undertaking valid for six years for an amount equal to the value of the export obligation imposed plus the value of duty saved plus the interest at the rate of 24% per annum for a period of six years.

(b) A Bank Guarantee for a amount equal to 50% of the value of duty saved, for a period of three years, where the importer is not an Export House/Trading House/Star Trading House.

(c) Where the export obligation has not been fulfilled at least to the extent of 50% of the total export obligation imposed, within a period of two and a half years from the date of issue of the licence, the bank guarantee shall be enforce and forfeited unless the same is renewed for another three years by the licence holder on his own well before the expiry of the bank guarantee."

4. Mr. C. Natarajan, learned Counsel for the petitioners says that the proper way of interpreting the said Clause 102 and the words "for an amount equal to 50% of the value of the duty saved", are with reference to the amount actually saved and not an amount based on the Face Value of the licence. In other words, it is open to the petitioners to import part of the machineries mentioned in the licence and claim the concessional rate of duty. There is no obligation to import all the machineries at the one and the same time. The duty incidence is only on the goods actually imported. Therefore, in respect of the subject items, import duty is saved only in respect of those two items and for that "value of the duty saved" alone the petitioners are obliged to furnish the Bank guarantee. Learned counsel also says that a proper interpretation of the said Clause 102 should be in accordance with the policy of the Government and cannot be with the object of nullifying the policy. In inviting the Court to adopt an interpretation in favour of the petitioners learned counsel raises the following points :-

(1) Section 25 of the Customs Act, 1962 enables the Government to grant exemption from duty. Notification No. 160 of 1992 issued under the said Section 25 says that the Central Government exempts capital goods "when imported into India". Therefore emphasis is placed on the time of the import. In other words, the notification relates only to the goods actually imported, and not the goods which may or may not be exported in future. The argument is that the Customs Duty is saved only in respect of the goods actually imported and therefore, the demand for the bank guarantee for the entire Face Value of the licence is not called for.

(2) Clause (iii) of the Notification is as follows :-

"(iii) The importer at the time of clearance of the said capital goods shall make a declaration before the Assistant Collector of Customs, in such form as he may specify, binding himself to pay on demand an amount equal to the duty liable on such capital goods but for the exemption contained herein in respect of which the conditions specified in column (2) of the Table have not been complied with."

According to Mr. C. Natarajan, the declaration of the importer binding himself to pay on demand an amount equal to the duty leviable on "such capital goods" could only relate to the goods actually imported. The word "such" qualifies only the capital goods, under clearance and not the goods to be imported in future.

(3) The object of the Scheme is to permit the importation of the capital goods at concessional rates, so that the importer could guarantee export of four times the C.I.F. value of the imports. Therefore, any interpretation should be to subserve the said object and purpose of the notification.

(4) There is no obligation to import all the items mentioned in the import licence and no penalty is prescribed for the failure to import all the items. The export obligation is only in respect of C.I.F. value of the goods actually imported. When an importer does not import all the items mentioned in the licence, he does not save any duty on the items not exported.

(5) Insistence on the furnishing of bank guarantee for 50% of the licence value would defeat the very object of the Scheme.

In support of his argument Mr. C. Natarajan, has also cited several judgments on the manner of interpretation of an exemption notification. On the other hand, Mr. T. Srinivasamoorthy for the respondents has also cited a number of judgments to suggest that the petitioner has not complied with the prerequisite conditions for the grant of the concessional duty and therefore cannot get the benefit of the notification.

5. I will first refer to the judgment relied on by the counsel for the respondents in *Bakul Cashew Co. v. Customs Officer, Quilon* - 1978 T.L.R. 2102. The following passage is relied upon :-

"In order to earn exemption under the terms of the notification, the appellant has to comply strictly with the conditions and the terms imposed by the notification. That notification requires, inter alia, that the importer executes a bond with such surety or sufficient security and undertaking the three conditions mentioned under Clauses (a) to (c) of the proviso to the notification. No such bond was executed and no security was offered as required by the terms of the notification. Clearly, therefore, the appellant was disentitled to the exemption and the claim for refund was on that ground again, unsustainable."

6. In *Ashok Traders Vs. Union of India and another*, , the following passage is relied upon :-

"It is futile to suggest that advantage under the exemption notification should be made available even though the conditions required for securing advantage are not complied with. The suggestion that only those conditions would be satisfied which are possible of satisfaction is only required to be stated to be rejected. A tax payer, who desires to take advantage of exemption must bring his case within the four corners of the exemption notification."

In *Subhash Photographics v. Union of India* 1993 (66) E.L.T. the following passage is relied upon :-

"It is not for the court to question the wisdom of the Government's - or for that matter, of Board's - policy. Board is a part of the Government. It is in direct charge of the administration of the Act along with the Government. Probably, it is for this reason that the Parliament has, through Chapter Note (2), vested the power to define the expressions occurring in Chapter 98 in the Board".

In *Indian Dyestuff Industries Limited Vs. Union of India*, , an argument was advanced that one of the conditions imposed by a notification was not fulfilled, but the further argument was that the said condition had no application in the case of imported goods. Therefore, it was suggested that it must be deemed that the said condition need not be complied with, even though found in the notification. The Bombay High Court promptly rejected the contention.

7. I am of the opinion that none of the above judgments can be applied to the fact of the present case. The contention of the petitioner is that Clause 102 of Chapter VI of the Handbook of Procedures has, in fact, been applied with by the importer and therefore the Notification 106 granting a concessional duty was available to the petitioner. The bone of contention in this case relates to the manner of interpretation of the said Clause 102 and not whether any of the conditions referred to therein are applicable or not. In my opinion therefore the above judgments do not touch the real issue in this case. Before referring to the judgments relied on by the petitioner one other case cited by the respondent may be looked into. That is *Century Enka Limited and others Vs. Union of India and Two others*, . In that case in the affidavit filed in support of the petition the party contended that the entire material imported was to be used in the factory of the party for manufacture of nylon yarn. Thus, it was contended that exemption notification did apply to the said party. The respondents in that case had not cared to contest the said statement. Therefore, the Bombay High Court held that the conditions mentioned in the exemption notification were satisfied and the party was entitled to relief.

8. On the other hand, the argument of Mr. C. Natarajan, for the petitioner is, that when a question arises whether a subject falls within a notification granting exemption, it must be construed strictly and against the subject. However, when once the ambiguity or doubt about the applicability of the notification to the subject is lifted and the subject falls within the notification, then courts should allow the notification to have full effect and the interpretation should be wide and

liberal in favour of the subject. For this proposition, reliance is placed upon Union of India and others Vs. M/s. Wood Papers Ltd. and another, . The ratio is laid down in a forthright manner as follows :-

"Rationale or ratio is same. Do not extend or widen the ambit at stage of applicability. But once that hurdle is crossed construe it liberally. Since the respondent did not fall in the first clause of the notification there was no question of giving the clause a liberal construction and hold that production of goods by respondent mentioned in the notification were entitled to benefit."

In Mangalore Chemicals and Fertilisers Ltd. Vs. Deputy Commissioner of Commercial Taxes and others, , the question was whether at the relevant point of time the party had a prior permission entitling him for refund of certain amounts. The argument in that case was that the requirement of "prior permission" became impossible of compliance because of passage of time. The Apex Court referred to the judgment of Kedarnath Jute Manufacturing Company (1965) 16 STC 607 and distinguished the same by observing as follows :-

"A distinction between the provisions of statute which are of substantive character and were built-in with certain specific objectives of policy on the one hand and those which are merely procedural and technical in their nature on the other must be kept clearly distinguished. What we have here is a pure technicality. Clause 3 of the notification leaves no discretion to the Deputy Commissioner to refuse the permission if the conditions are satisfied. The words are that he will grant. There is no dispute that the appellant had satisfied these conditions. Yet the permission was withheld - not for any valid and substantial reason but owing to certain extraneous things concerning some inter-departmental issues. The appellant had nothing to do with those issues. The appellant is now told : "We are sorry. We should have given you the permission. But now that the period is over, nothing can be done". The answer to this is in the words of Lord Denning : "Now I know that a public authority cannot be estopped from doing its public duty, but I do think it can be estopped from relying on a technicality and this is a technicality [See Wells v. Minister of Housing and Local Government 1967 1 W.L.R. 1000."

The Apex Court also referred to a passage in Francis Bennion in his Statutory Interpretation, 1984 edition, and referred to the following passage at page 683 :-

"Unnecessary technicality : Modern courts seek to cut down technicalities attendant upon a statutory procedure where these cannot be shown to be necessary to the fulfilment of the purposes of the legislation."

They also approved of the passage quoted by me earlier in 83 S.T.C. Page 251.

9. An analysis and scrutiny of the above judgments leaves one with the impression that once the notification in this case namely Notification 160 of 1992 read with clause 102 of the E.P.C.G. Scheme applies to the case of the petitioners, the manner of interpreting the words "value of the duty saved"

should be wider and the importer should be given the benefit of any doubt or lacuna. In doing so, I am reminding myself about the object of the E.P.C.G. scheme. The whole idea is that there should be an incentive for export of more and more goods. I have already referred to Clause 38 of the Export and Import Policy (1992-97) which says the capital goods may be imported at a concessional rate of customs duty of 15% subject to an export obligation of four times the CIF value of the imports. In simple terms, argues, Mr. Natarajan, that if any item is imported under this scheme, the importer is obliged to export four times the CIF value of the imports. Inasmuch as only two machines have been imported under the Bill of Entry in question, the only obligation is to export four times the CIF value of the two machines. Secondly, the bank guarantee specified in Clause 102 should be only to the "value of duty saved" on these two machines. As rightly pointed out by the learned counsel for the petitioner, this scheme, nowhere imposes an obligation on the importer to import all the machineries mentioned in the licence, and the bank guarantee, should be for the face value of the licence and on the consequent duty saved on such face value.

10. The whole issue can be looked into from another angle. In what way is the revenue prejudiced by upholding the interpretation sought to be placed by the petitioner ? Is there any possibility of the importer causing any loss to the revenue by clearing the subject goods and executing a bank guarantee for 50% of the value of the duty saved on the two machineries, alone ? In other words, so far as the two machineries which are imported and in respect of which the importer saves customs duty, the importer is willing to satisfy all the conditions. Even assuming that the petitioner does not import the rest of the machines covered by the licence, I am unable to visualize any prejudice to the respondent. Nor is the learned counsel for the respondents able to suggest any damage or prejudice to the respondents if the goods are allowed to be cleared on the execution of a bank guarantee for the duty saved on the two goods alone. The only difficulty experienced by the respondents is that they have no power to split the licence and permit clearance of the goods by applying the exemption notification in respect of the two items imported. But, there seems to be no difficulty in allowing clearance of the two items of the total of seven items mentioned in the licence and applying the exemption notification. In other words, an importer can import the items mentioned in a licence, in instalments. If that is so, I do not see any difficulty in the exemption notification being applied in respect of the goods which are imported in instalments separately to each of the instalments.

11. One other difficulty which is expressed is that the licence does not mention the value of each machinery to enable the customs authority to give effect to the exemption notification. In my opinion, this is an argument based on desperation because the Customs Act and the Rules give enough power to value the goods imported ignoring the value cleared by the importer. Therefore, if the respondents 1 and 2 doubt the C.I.F. value of the two items imported, it is certainly open to them to assess the correct value and demand the execution of



the bank guarantee for the duty saved on the basis of the value arrived at by the respondents. Therefore, this cannot be an insurmountable hurdle in allowing the clearance of the goods.

12. There is, however, one argument of the respondents which relates to the applicability of the exemption notification itself. This is found in clause 102 of the Handbook of Procedures, already quoted by me. It says that before clearance of goods through customs, "but not later than six months from the date of issue of the licence" the importer shall execute the bank guarantee and Legal Undertaking. The licence was issued on 17-1-1992 and the period of six months expired on 16-6-1992. As against this, the contention of the petitioner is that the licence was amended and the amended copy was received by the petitioner on 11-11-1992 and the petitioner filed the application on 12-5-1993 for vetting the bank guarantee and Legal undertaking. Even then the period of six months is over by 10-5-1993. But the question really is whether this condition is mandatory to the extent that a few days delay cannot be excused. The entire scheme is based on a time schedule with an obligation on the importer to complete the export process within a total period of five years from the date of issue of the import licence. This is clear from clause 38 of the Export, Import Policy. Clause 102 of the Handbook of Procedures after prescribing the period of six months for the execution of the bank guarantee and Legal Undertaking also contains a clause for the completion of 50% of the total export within a period of 2 1/2 years from the date of issue of the licence. Even so, the condition regarding the execution of the bank guarantee and Legal Undertaking within six months from the date of licence does not seem to be an absolute condition which cannot be relaxed. Certainly this court cannot legislate and say that the period of six months can be extended by a few days. It is in this context that we must refer to the counter-affidavit of the respondents 3 and 4. After referring to the period of six months, the counter-affidavit proceeds to say "the remedy available to the writ petitioner is the approach the Licensing Authority namely, C.C.I. and E., now D.G.F.T., for getting it suitably altered or amended by the Licensing Authority as per their requirements". Inasmuch as there has been only a few days delay after the licence was amended, I am permitting the clearance of the goods subject to the condition that the petitioner applies for modification of the conditions prescribed in the licence.

13. In fine, I accept the argument of the learned counsel for the petitioner that there is sufficient compliance of the Notification and the provisions of the E.P.C.G. Scheme so long as the petitioner is willing to furnish bank guarantee of 50% of the duty saved on the two items covered by the subject bill of entry. I, however, record the statement of the petitioner that he is willing to execute a Legal Undertaking valid for six years, for an amount equal to the value of the export obligation imposed plus the value of the duty saved plus the interest at the rate of 24 per cent per annum for a period of six years. The writ petition is, therefore, allowed as prayed for subject to the execution of the Legal Undertaking for the entire Face Value of the licence and a father undertaking to

seek for amendment of the licence regarding the condition to furnish bank guarantee within six months or a relaxation of the said period of six months, from the appropriate authority. There will be no order as to costs.