(1993) 12 MAD CK 0048

In the Madras High Court

Case No : Writ Petition No. 19919 of 1993

Sri Sainath and Co. APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

Date of Decision : 21-12-1993

Acts Referred:
Customs Act, 1962 — Section 17, 25, 47

Citation : (1994) 45 ECC 169

Hon'ble Judges : Kanakaraj, J

Bench : Single Bench

Judgement

Kanakaraj, J.—By consent of parties the writ petition itself is taken up for final disposal.

2. The petitioner is a partnership firm carrying on business at Madras. They had imported 60 Drums/1,500 Kgs. of Sulphur Blue Dyes from Hong Kong. The goods are however, of Chinese origin. The bill of entry was filed on 3.8.1993 for home consumption under duty exemption entitlement certificate (hereinafter called DEEC Scheme). It is admitted that the goods are imported from a trader in Hong Kong for a unit price of U.S. $ 2.40 per Kg. CIF Madras. The total cost of the consignment amounts to U.S. $ 3600. The petitioner had also filed transferable advance licence under paragraph 127 of the Import-Export Policy 1992-97. There was some correspondence regarding the Colour Index and the usage for which the imported goods could be put to. The goods were inspected on 20.8.1993 and an endorsement was made that the goods are as per description. Again the bill of entry was taken by the Special Intelligence Bureau who ordered inspection of 10 Drums and to draw sample. This was done on 9.9.1993. Again an endorsement was made on the bill of entry to the effect that the goods were Sulphur Blue Dyes and they conformed to the description. The petitioner sought for release of at least 80% of the goods as per the Public Notice 58/15/93. The fourth respondent had instructed the third respondent not to release the goods till the outcome of the test report. The following questions had been posed to the

Deputy Chief Chemist:

1. Nature and composition?

2. Whether it is a sulphur dye?

3. Whether the item is used in leather industry?

The Customs Laboratory had submitted the Test Report on 6.10.1993 and the report was as follows:-

The sample is synthetic organic colouring matter (sulphur dye) in the form of blue coloured powder. The above dye can be used in textile as well as leather industry.

The petitioner also produced a procurement invoice from their supplier at Hong Kong indicating the Chinese Company from whom they purchased at unit price of U.S. $ 1.90 per Kg. The complaint of the petitioner is that in spite of the above investigations which were in favour of the petitioner, the respondents are withholding the goods without any reason. The writ petition is therefore, for the issue of a writ of mandamus to direct the respondents to release the subject goods along with a detention certificate for the entire period of detention.

3. In the counter-affidavit filed by the fourth respondent, it is stated that the investigations so far conducted had disclosed that the goods had been imported in gross abuse of the DEEC scheme. The scheme was formulated to encourage genuine exporters and to enable them to import free of duty raw materials and other goods which go into the manufacture of such export goods. Secondly, the respondents have a doubt that the actual value of the goods imported by the petitioner is at least five times more than the value declared by the petitioner. They have also a suspicion that the petitioner has made a misdeclaration in the bill of entry regarding the nature of the goods. They are taking considerable time only because the petitioner has not filed the manufacturer''s invoice from the country of origin. This has necessitated the respondents to make enquiry in the country of origin namely, China, to ascertain the correct value, the contention, therefore, is that it is only after the completion of the investigation that adjudication proceedings will be initiated by the appropriate authority. If there are violations, as suspected, the goods would become liable for confiscation. It is also pointed out that the petitioner is not the original holder of the advance licence and he is only a transferee. The goods covered by the advance licence relates to leather garments. Therefore, it is pointed out that under DEEC scheme the transferee can import free of duty raw materials and other goods which go into the manufacture of such leather garments. So far as the Test Reports are concerned, it is stated that only a visual inspection has been made so far. The respondents proposed to conduct a detailed investigation and chemical analysis of the goods. Again the respect of the public notice relied on by the petitioner, it is submitted that the necessity to correlate the goods still subsisted in respect of a transferee''s advance licence. If the DEEC scheme has been violated, the

respondents have a right to revoke the advance licence to prevent the misuse of such licence. Regarding the issue of a detention certificate it is contended that the same would not arise if it is proved that the goods had been imported illegally and in contravention of the Act and the Regulations.

4. Mr. Jimmy F. Pochkhanawalla, appearing for the petitioner has referred to the above facts and sequence of events from the date of arrival of the ship, the date of filing of bill of entry, and the various dates on which samples were drawn and tests conducted and projects the case of the petitioner in the following manner:-

Even according to the counter-affidavit of the respondents, the original licence holder has fulfilled the export obligations under the Scheme, with particular reference to Paragraph 127 of Hand-Book of Procedures. Therefore, he argues that it is idle to contend that there was a chance of violation of the DEEC scheme. There is considerable controversy as to the question whether there is a liability to prove one to one correspondence between the goods exported and the goods sought to be imported free of duty under the DEEC scheme. Learned Counsel for the petitioner refers to the deletion of a substantial portion of Sub-clause (iv) of paragraph 127 of the Hand Book of Procedures. The portion which is deleted is extracted below:-

Notwithstanding the above facility of transferability, the first licence holder shall be liable to correlate the goods exported with the goods imported in terms of the technical characteristics mentioned in the licence. He shall be responsible for any contravention of the conditions of the licence.

The Bombay High Court in Jindal Dye Intermediate Ltd. v. Union of India and Ors. (W.P. No. 1865 of 1993) by judgment dated 25.10.1993 has observed as follows:-

Prima facie, for reasons which we have set out in our order dated 14th of September, 1993 in Writ Petition No. 1581 of 1993, the exact correlation between the item imported and the ingredients of the item exported is not required once the export obligation in relation to which the advance licence has been issued, has been fulfilled. In fact, once the export obligation is fulfilled those licences are fully transferable and any of the items which are enumerated in the advance licences can be imported without the importer having to show that the item so imported is an ingredient of the item which was originally exported.

5. On the other hand, on this question Mr. Sundaram for the respondents refers to the General Exemption No. 147 issued u/s 25(1) of the Customs Act which requires the importer to show that the goods imported are actually used in the manufacture of resultant products exported. According to him, this basic requirement has not been dispensed with. He also refers to paragraph Nos. 119, 120 and 127 of the Hand Book of Procedures to suggest that the judgment of the Bombay High Court should not be followed by this Court. So far as the clause deleted in Paragraph 127(iv), he argues that the liability fastened on the "first

licence holder" alone is removed. Inasmuch as the petitioner is only a transferee, obligation cast on the petitioner to comply with the general exemption notification 147 has not been done away with. Though I do not want to decide this question and express my opinion one way or the other at this stage, I do find considerable force in the argument of the counsel for the respondents. I am not expressing any opinion because the parties have come to Court at a premature stage when no adjudication has taken place. If an adjudication takes place that will be subject to further appeals. Therefore, I do not want to express any opinion on this aspect of the case. It is sufficient for me to notice that the apprehension of the respondents is not without substance.

6. The second aspect of the case referred to by the counsel for the petitioner is that the question of valuation was never raised during the period from the date of bill of entry upto the stage of filing of the counter affidavit. Relying on Sections 17 and 47 of the Customs Act, it is argued that the respondents cannot from time to time raise now points and delay the release of the goods. It is also pointed out that the respondents never demanded manufacturer''s invoice for all these days. As against this it is argued by the respondents that the Customs Act contemplates investigations being completed and adjudication proceedings being initiated within six months with power to have time extended in appropriate cases.

7. The third important point which is argued by the learned Counsel for the petitioner is the note made by the Additional Collector on 8.10.1993. In fact it is argued that after the said direction by the Additional Collector nothing remained except to release the goods. It is interesting to note that the Assistant Collector has made the following endorsement-

The above bill of entry has been filed by M/s. Sri Sainath & Co., who happen to be traders and not actual users. Further the supply is not directly from any reputed manufacturer, therefore testing of sample of the consignment is warranted. In view of the guidelines given under APDO 59/93. The bill of entry is enclosed herewith for necessary action at your end. SIB may be associated with the drawal of samples from the subject consignment please.

On the above note of the Assistant Collector, Additional Collector made the following endorsement.

It is noticed that the Groups are referring the bills of entry unnecessarily to SIB without any valid reasons. It is hereby directed that no live consignment can be referred to SIB unless prior approval of Addl. Collector (SIB) is taken. In this case what is required to be done is to draw the sample, take a test bond and release the consignment pending test result. A.C. (Gr.7) may take necessary action.

On behalf of the respondents it is pointed out that this is only a note order and cannot be equated to an order made after initiating adjudication proceedings. This note order was never communicated to the petitioner, and it is rightly pointed out that if the direction was against the interest of the petitioner, he would never have accepted the order as a valid order in the eyes of law. Here again I am impressed by the arguments of the respondents because in the process of deciding the issue, various officers may give various opinions, differing one to the other. The assessee cannot certainly take advantage of the one opinion which is in his favour and argue that the same should be given effect to by a Court.

8. Learned Counsel for the petitioner argues that the counter-affidavit has not made out any ground for the grant of further time to investigate the matter. He has referred to the procurement invoice which refers to the Contract Number and tallies with the invoice filed by the suppliers. He therefore, argues it is too much on the part of the respondents to dispute the valuation relied on by the petitioner. Learned Counsel relies on an order of the Tribunal reported in 1992 (38) ECR 587 which according to the petitioner is binding on the authorities.

We are also of the opinion that the suppliers are various government organizations of the countries from where the goods are imported. It will be improper to assume that the price confirmed by the official suppliers did not disclose the true price.

9. Lastly, it is contended that the preponderance of evidence as borne out by the order of the Additional Collector and the Test Reports already furnished by the authorities clearly suggest that the balance of convenience is in favour of the petitioner and there cannot be any further delay in the release of the goods. On the contrary, it is argued by the respondents that the release of the imported goods depends upon one of two things namely, assessment or adjudication. If an assessment is completed, certainly it is open to the importer to have the goods released. In the alternative, if the authorities have reason to believe that there are violations on any one aspect of the case, they are entitled to investigate the matter and initiate adjudication proceedings. In this case, it is pointed out that there is a doubt as to valuation, doubt as to the actual nature of the goods and the question of violation of DEEC scheme. Above all, it is insisted that the petitioner never co-operated with the department in filing the manufacturer''s invoice. Had such an invoice been filed much of the delay could have been avoided. Learned Counsel for the petitioner has also relied on 1992 (62) ELT 616 a decision of the Tribunal relating to the fact that all the manufacturing units in China are regulated by export licensing system and that there is no private ownership of manufacturing unit in China. Therefore, learned Counsel for the petitioner commends for acceptance the procurement invoice filed by the petitioners. It is also pointed out that the respondents have no right to withhold the advance licence deposited by the petitioner at the time of filing of bill of entry. Some of the licences are likely to expire in January, 1994.

10. Having heard both sides of the arguments it must first be pointed out that the parties are calling upon the Court to decide issues at a very preliminary stage. At this stage, the only question is whether the respondents should be

directed to release the goods or whether they should be given time to investigate and initiate adjudication proceedings. This is a vexed question which is coming up for decision, time and again because, on the one hand the importers are anxious to get the goods released and on the other hand the Customs Authorities are anxious to see that the Revenue does not suffer any loss on account of malpractice on the part of the importer.

11. Strictly speaking the only question is whether the respondents should have any specified time within which they should exercise their power to initiate adjudication proceedings, or in other words, are the respondents bound to assess the goods and release the same for Home Consumption within any specified time? There is absolutely no indication in the Act and the Rules regarding any fixation of time. Each case will depend upon the peculiar facts of the case, the number of questions to be investigated and the approximate time which is required to investigate into the matter. For instance, in this case, it is argued that the respondents have to make enquiries in the country of origin to find out the correct price of the goods. In fact, this is the only aspect of the case which requires considerable time according to the respondents. The petitioner is justified, in relying on the Trade Notice which emphasises the need for eliminating the hurdles in the clearance of the imported goods which require an analytical test of samples drawn from the consignment. On the other hand it cannot be forgotten that this Trade Notice is only in respect of a particular type of goods like chemicals. No doubt, the Trade Notice suggests 10 to 25% of the cargo imported could be detained and assessment completed. Here again, there is a clause which says, "unless a prima facie doubt exists about the genuineness of the import".

12. In this case there is an added difficulty regarding the valuation of the goods and the question of correlation of the goods. Learned Counsel for the respondents has referred to certain documents to suggest that prima facie the actual value of the goods will be at least five times more than the value as declared by the petitioner. Five months have elapsed since the date of bill of entry. In this period of five months the period spent after the filing of the writ petition has to be excluded. If that is so, the respondents have had only three months for the purpose of investigation. The Government of India is formulating policies and announcing schemes only with the hope of encouraging more and more exports with a view to earn foreign exchange. If the lower Officers do not reflect the anxiety of the policy makers and process such imports quickly and to the satisfaction of the importers there is every chance that persons will not be inclined to take advantage of such policies. The Officers who are implementing the scheme should remember this aspect of the case. For instance, in this case the import is in respect of a chemical and the total consignment value is only U.S. $ 3600. If the respondents are not in a position to get a quick clarification as to the correctness of the import they should exercise their discretion and make an assessment and release the goods on the basis of available materials. Delay in such matters does not benefit either the citizen or the Revenue. Taking

an overall assessment of the entire situation, I am inclined to give three more weeks for the Revenue to decide the matter one way or the other. In other words, whatever investigations that the respondents wish to make, they should complete the same within three weeks from today. If the investigations are not completed on or before 12.1.1994 and a show cause notice issued by the date the respondents are directed to assess the goods and release the same for Home Consumption. They could either release the entire goods or at least 80 per cent of the goods as per the Trade Notice 58/15/93 dated 16.7.1993 relied on by the petitioner. If however, a show cause notice is issued for adjudication of the case on or before 12.1.1994, the petitioner will be given the time for submitting his explanation. In such an event adjudication proceedings should be completed on or before 15.2.1994. The question of issue of a detention certificate will depend upon the result of the investigations. If the investigation discloses that the goods were detained at the instance of the Customs Authority, and there was no fault on the part of the importer, then the respondents may issue a detention certificate. The views expressed by me in Photon India Ltd., Calcutta v. 1. Asst. Collector of Customs, Group 5-A, Madras, 2. Additional Collector of Customs (Appraising), Madras-1, 3. The Collector (Appeals), Customs House, Madras-1, W.P.No. 15064 of 1993 dated 16.9.1993 will govern the question of issue of a detention certificate.

13. Regarding the advance licences are concerned, the respondents are directed to return the same to the petitioner within four weeks prior to the date of expiry of the respective licences. If any licence is to expire in January 1994, the same should be returned immediately. This will be without prejudice to the right of the respondents to take action, if any. It is open to the respondents to take xerox copies of the respective licences. The writ petition is ordered in the above terms. There will however, be no order as to costs.