(1992) 02 CAL CK 0002

In the Calcutta High Court

Case No : Matter No... of 1992

Surabhi Leathers Pvt. Ltd. APPELLANT

Vs

Collector of Customs RESPONDENT

Date of Decision : 24-02-1992

Acts Referred:

Customs Act, 1962 — Section 49
Imports and Exports (Control) Act, 1947 — Section 3, 4A

Citation : (1992) 59 ELT 253

Hon'ble Judges : Ruma Pal, J

Bench : Single Bench

Advocate : Sudhir Kumar Mehta, for the Appellant;Sibdas Banerjee, for the Respondent

Judgement

Ruma Pal, J.—The issue involved in this application is the interpretation of Public Notice No. 238-ITC (PN)/90-91 dated 31-10-1991 (referred to as the first Public Notice). By the first public notice modifications were effected to the Import & Export Policy 1990-93 (referred to as the Policy). One of the modifications was the dispensing with the "actual user conditions" in respect of import of raw materials, components, consumables and spares appearing in Appendix 6, List 8, Part I of the Policy. The factual background in which this issue has arisen is noted briefly. According to the petitioner this deletion entitled the import of the named items in Appendix 6 of the Policy by all persons. Acting on this assumption the petitioner entered into an agreement with a foreign seller for import of goods covered by Appendix 6, List 8, Part I as already stated. The goods were shipped on 5th December, 1991 and arrived in Calcutta Port on 16th January, 1992. On 13th January, 1992, the petitioner filed three several Bills of Entries in respect of the goods. These have been annexed as Annexure ''C'' to the petition.

2. According to the petitioner the Customs Authorities took no steps to clear the bills of entry although they were obliged to release the bills of entry within 48 hours. The petitioner has drawn the attention of the Court to a public statement

made by the Collector of Customs to that effect. The petitioners sent telex messages to the respondents for release of the bills of entry and also approached the Collector of Customs for release of the goods. Ultimately by letter dated 22nd January, 1992 the Assistant Collector of Customs, Appraising (Group 4) wrote to the petitioner stating that the petitioner was not an Actual User (Industrial) in respect of the goods in question. It was further stated that the Order No. 1/1990-93 of 30th March, 1990 had not removed the Actual User (Industrial) condition from Appendix 6, List 8, Part I items despite the issue of the first Public Notice No. 238-ITC of 31-10-1991 which, according to the Assistant Collector, had essentially only given certain relaxation/relief to Actual Users.

3. The letter dated 22-11-1991 went on to state that in case the petitioner felt that the goods imported by it could be allowed clearance under OGL it could produce suitable clarification in the matter from the Chief Controller of Imports and Exports (CCI & E), alternatively the petitioner could produce a valid licence for the clearance of the goods.

4. It appears that the petitioner offered to produce a REP licence before the Customs Authorities on condition that the same was not debited with the value of the goods until the matter was decided by the CCI & E or a Court of Law. The petitioner thereafter moved this application under Article 226 of the Constitution on 28th January, 1992. Until that date the goods imported by the petitioner were lying on the docks and according to the petitioner it was being made liable to pay demurrage charges for every day that the Customs Authorities delayed in processing the bills of entry and the release of the goods. Upon the writ application being moved, an interim order was passed by S.C. Sen, J. allowing the petitioner to warehouse the goods u/s 49 of the Customs Act, 1962. In the writ petition it has been claimed that the Customs Authorities had wrongfully detained the goods imported by the petitioner by insisting on production of an REP or Additional licence. In support of its contention that the first public notice allowed the import of the goods specified therein to be imported by persons who may not be Actual Users, the petitioner has relied upon the following:

(a) A circular dated 22nd January, 1992 issued by the Deputy Collector of Customs, Bombay which dealt with the import of items of traders under Appendix 6, List 8, Part I of the Policy. In that circular the Deputy Collector has stated:

"Collector has directed that clearance of any items by trader under Appendix 6, List 8, Part I be permitted with the approval of the concerned Additional Collector/ Dy. Collector".

(b) Public Notice No. 273-ITC (PN)/1990-93 dated 13th February, 1992 (referred to as the third Public Notice) issued by the Government of India and published in the Official Gazette on the Import and Export Policy for April 1990 - March 1993 published by the Ministry of Commerce by which Public Notice No. 1-TTC (PK)/1990-93 dated 30th March, 1990 was amended. The further amendments which were made and which are relevant for the purpose of this application relate to Appendix 6 and the import of items under Open General Licence. The amendments effected in this connection relate to Entry No. 1. It is submitted that the raw materials imported by the petitioner are covered by Entry No. 1. By virtue of the amendment, "Actual Users (Industrial) and Others" have been introduced under the category of eligible importers. By this Public Notice it is argued, the conditions governing imports under Open General Licence were further amended. By virtue of the amendments it is submitted the terms and conditions governing imports under Open General Licence and the requirement for import by the Actual Users have been deleted. The petitioner also referred to the change in the heading to Appendix 6, List 8 to show that the import was being permitted by persons other than Actual Users.

5. It is finally submitted by the petitioner that the position was beyond dispute and that the Customs Authority had needlessly made the petitioner liable to pay demurrage amounting to Rs. 70,000/-. It is claimed that the Customs Authority are liable to compensate the petitioner for such payment.

6. On behalf of the respondents it has been contended:-

(1) that the first Public Notice dated 31-10-1991 did not touch the Import Control Order which was contained in Volume II of the Import and Export Policy.

(2) By the Public Notice what was dispensed with was the procedure to be followed by the Actual Users and not the requirements for the import to be made by the Actual User itself. The Court''s attention has been drawn to Public Notice No. 172 dated 4-7-1991, Order No. 1/1990-93 dated 30th March, 1990, Public Notice No. 196-ITC (PN)/1990-93 dated 14-8-1991 and Chapter 15, paras 185 and 220 of the Import and Export Policy 1990-93 in this connection.

(3) The fact that the first Public Notice did not affect the changes claimed by the petitioner is borne out by the wording of the third Public Notice dated 13-2-1992 which introduced changes by way of amendment and not clarification.

(4) It is stated that the Bombay Customs Authorities had limited the benefit of the first Public Notice only to Actual Users.

(5) Finally, it is contended that the respondent''s point of view could not be said to be so irrational or unreasonable so as to warrant interference by this Court by exercise of its extraordinary powers under Article 226 of the Constitution.

7. It is not disputed that the petitioner is not an "Actual User". It is also not disputed that the goods sought to be imported by the petitioner are covered by Entry 1 of Part I of List 8, Appendix 6 of the Policy.

8. Before considering the rival contentions it would assist the interpretation of the Public Notice if it were considered in the context in which it has been made. The Import & Export Policy has been framed and published by the Government of India in exercise of powers conferred on it u/s 3 of the Imports and Exports (Control) Act, 1947 (referred to as the Act). In exercise of the powers conferred

under Sections 3 and 4A of the Act, the Imports & Exports (Control) Order, 1955 (hereinafter referred to as the-Order) was made. The Order contains inter alia the list of articles of which imports are controlled either by way of total prohibition or subject to specific conditions such as a licence or customs clearance permit. Some of such controlled items are permitted to be imported under an Open General Licence (referred to as OGL). Excepting Causes 5, 8, 8A, 8C and 10C, the provisions of the Order do not apply to the import of any goods covered by OGL [vide Clause 11(4) of the Order]. Import under OGL is dealt with specifically under the Policy.

9. Chapter V, Para 58(3) of the Policy insofar as it is relevant provides as follows:

"58(3). Under this Policy, import of a large number of raw materials, components and consumables has been placed under Open General Licence. Actual Users may meet the requirements of their imported inputs under Open General Licence subject to the conditions prescribed in Appendix 6 of this Policy."

10. An actual user has been defined in Chapter I, Para 7(1) of the Policy as follows:

"7(1). "Actual User" means a person, who applies for/secures a licence or avails of the Open General Licence facility for the import of any item or an allotment of an imported item required for his own use, and not for business or trade in it."

11. Para 7(2) of the Policy states that "Actual User Condition shall be construed accordingly."

12. Appendix 6 of the Policy provides for the import of items under OGL. The categories of importers, the items allowed to be imported by them under OGL and the conditions governing their importation are tabulated in Appendix 6. As far as raw materials, components and consumables appearing in Entry 1 of Appendix 6, List 8, Part I and Part II are concerned only Actual Users (Industrial) had been specified as the eligible importers.

13. On 30th March, 1990, Import Trade Control Order No. 1/90-93 was issued by which the Central Government which gave general permission with effect from 1st April, 1990 to 31st March, 1993 to import into India from any country except Union of South Africa and Fiji, raw materials, components and consumables by Actual User (Industrial) subject inter alia to the various conditions of which Condition No. 3 is relevant for the purpose of this case. That condition reads as under:

"(3). The raw materials, components and consumables are required by the Actual User (Industrial) concerned for his own use i.e. subject to the "Actual User" condition."

14. In this background the first Public Notice which is the subject matter of interpretation in this application was issued. The relevant extract of the Public Notice reads:

"2. Notwithstanding what has been provided in the Import and Export Policy, 1990-93 (Volume I) as amended and Hand Book of Procedures, 1990-93 (Volume I) as amended, the ''Actual User condition'' in respect of import of raw materials, components, consumables and spares appearing in Appendix 6, List 8, Part I and Machinery, Equipment, Instruments, Tools appearing in Appendix I, Part 13 of the Import and Export Policy stands dispensed with. Consequent to the deletion of ''Actual User condition'', the condition of production of a declaration to the Customs Authorities at the time of Customs clearance giving the particulars of their industrial licence or registration as an Actual User and that the imports are in accordance with terms and conditions of industrial licence and approved Phased Manufacturing Programme of indigenisation for import of raw materials, components, consumables, spares and capital goods allowed for import under Open General Licence stands dispensed with."

15. On the same date i.e. 31st October, 1991 ITC Order No. 78/90-93 was issued in exercise of the powers conferred by Section 3 of the Act by the Central Government. The public notice (referred to as the second Public Notice) provides for further amendment in the Import Trade Control Order No. 1/90-93 dated 30-3-1990 to the following effect:

"(i) in condition No. (3), the following shall be added at the end, namely:-

"except in the case of items covered by Part I of List 8 of Appendix 6 of the Import and Export Policy, 1990-93".

(ii) condition Nos. (7), (8) and (9) shall be omitted.

(iii) in condition No. (25A), in the second sentence, for the word "including", the word "except" shall be substituted."

16. In my view the outcome of the two public notices was a throwing open of the import of inter alia raw materials appearing in Appendix 6, List 8, Part I to persons irrespective as to whether they are actual users or not.

17. The language of the first Public Notice is explicit. It deleted ''Actual User Conditions'' in respect of named items. The question is therefore - What are "actual user conditions"? It is nothing more than the condition of actually usyig the item imported for the importer''s own use and not for business or trade in it. This follows from the definition of actual user in the policy as quoted earlier. An importer who does not actually use the item imported is not an actual user. There cannot be an actual user who does not use. The concept does not survive without the condition. To contend that the concept of actual user survives without the condition of actually user is to create a distinction where none exists and the respondents'' contention that the policy still requires import of the raw materials etc. appearing in Appendix 6, List 8, Part I by actual users is an exercise in semantics which is unsound in logic and impossible in practice. Consequently, the effect of the deletion of the "actual user''s condition" by the first public notice would mean that the import of raw materials, components etc.

appearing in Appendix 6, List 8, Part I could be made by all classes of importers.

18. The reference to Public Notice dated 4-7-1991 or Order dated 30-3-1990 or Public Notice dated 14-8-1991 or the provisions of the Import-Export Policy do not support the respondent''s contention that in spite of the Public Notice dated 31-10-1991 the concept of Actual Users in respect of the named items survived. All the notices and orders were antecedent to the first Public Notice. As far as the provisions of the Policy are concerned they have been expressly overridden by the first Public Notice.

19. The view taken by this Court is fortified by the second Public Notice by virtue of which raw materials, components etc. required to be imported by Actual Users (Industrial) under the Trade Control Order No. 1/90-93 was amended so that the condition for import of raw materials etc. by actual user is now limited to such raw materials etc. not falling within the items covered by Part I, List 8 of Appendix 6 of the Policy.

20. The language of the public notice is overriding by reasons of the non-obstante clause. All other provisions in Volume I of the Policy relating to the import of the named items are therefore to be read subject to the terms of the first public notice. It was not necessary to refer to Volume II of the Policy which only deals with the policy and procedure for export licensing. There is also no specific provision in the Order which deals with the import of goods by actual users under Open General Licence (OGL). There was therefore no necessity to refer to the Order in the public notice. The matters sought to be effected by the Public Notice are solely within the purview of Volume I of the Policy.

21. It is immaterial whether the Bombay or the Madras or any other Customs Authority have already accepted this interpretation of the first Public Notice although this fact may have a bearing on the bona fides of the Calcutta Customs in holding otherwise.

22. PN No. 273-1TC (PN)/1990-93 dated 13-2-1992 does no more than effect in particular the changes wrought by the first public notice. The amendments specifically incorporate the general principle laid down by the first public notice in the various relevant provisions of the Policy. The third public notice only makes explicit the changes brought about by the first Public Notice and leaves no manner or doubt as to the intention behind the first Public Notice and the object sought to be achieved thereby.

23. Some of the particular amendments effected by the third Public Notice which are specifically noted would show that the requirement that the goods named in the first Public Notice shall be made only by actual users has ceased to exist. Prior to the amendment, Appendix 6, Entry No. 1 read as follows:

-- Items Categories of eligible importers -- 1(i) Raw

materials, components and Actual Users (Industrial) consumables appearing in Appendix 6, List 8, Part I and Part II
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24. Now, by virtue of the third public notice the category of eligible importers has been amended to read as "Actual Users (Industrial) and Others".

25. In the conditions governing imports under OGL in Appendix 6 of the Policy the requirement for actual users to furnish declarations or certificates etc. have been completely deleted. Condition No. 4 (page 181 of the Policy) prior to its amendment read as follows:

"(4). Shipment of raw materials, components and consumables under Open General Licence can be made on through consignment basis to India during the currency of the Import and Export Policy for 1990-93 (Volume I) unless the item has been shifted from the Open General Licence. However, in respect of firm Orders backed by irrevocable Letters of Credit opened and established before the 28th February, 1993 by Actual Users (Industrial) for use in his factory, shipment can be made upto the 30th June, 1993."

26. By the third public notice the phrase "by Actual Users (Industrial) for use in his factory" has been deleted.

27. In condition (5)(i) the words "Actual Users" have been replaced by the word "importer".

28. In condition 6, the first sentence prior to its amendment read as follows:

"Actual Users importing capital goods, raw materials, components, consumables and spares, jigs, fixtures, dies, patterns and moulds, as are covered under Open General Licence, shall be subject to "Actual User" condition."

29. This has been replaced by deleting the reference to capital goods, raw materials, components, consumables and spares. In other words the excluded materials are no longer subject to actual user conditions.

30. It is not necessary to specifically note each of the particular amendments brought about by the third Public Notice in this judgment. It is sufficient to state that the amendments effected in the conditions by the third Public Notice similarly specifically delete all references to actual user as far as the imports of items named in the first Public Notice are concerned.

31. The last amendment sought to be effected by the third Public Notice relates to the heading of List 8 of Appendix 6 (page 216 of the Policy). That heading originally read as follows:

"RAW MATERIALS, COMPONENTS, CONSUMABLE, AND TOOLS ALLOWED FOR IMPORT UNDER OPEN GENERAL LICENCE".

This has been amended to read as under:

"RAW MATERIALS, COMPONENTS, CONSUMABLES, SPARES AND TOOLS ALLOWED FOR IMPORT UNDER OPEN GENERAL LICENCE BY ACTUAL USERS AND OTHERS FOR ACTUAL USE/STOCK AND SALE AND AGAINST EXIM SCRIP/ ADDITIONAL EXIM SCRIP".

32. The use of the word "and" is disjunctive. The phrase "Actual Use/Stock and Sale" similarly envisage, permissible alternatives.

33. When the Government was therefore seeking to effect by the first Public Notice was a liberalisation of the import in respect of certain items which has been sought to be defeated by the respondent authorities by ignoring the amendments. The view taken by the Customs Authorities is not even a possible view. It is difficult to see what other amendments the Central Government could have issued to clarify the position further.

34. It appears from the documents produced before this Court by the respondents, that the Collector of Customs had sent a fax message to the Chief Controller, Imports and Exports, New Delhi for a clarification of the matter. The fax message requested for a clarification by return of telex. The date of the telex is not given. It has also not been disclosed to this Court whether the clarification was given by the CCI & E and if so, what the nature of the clarification was.

35. Before detaining the goods at all, the Collector of Customs should have obtained the clarification himself, if he were in any doubt as to the effect of the Public Notice. It was not open to the Customs Authorities to detain the goods and cast the burden of obtaining a clarification in this matter on the shoulders of the importer, especially when the Public Notice explicitly and in terms supported the importer''s contention. In a case where the Customs Authorities had wrongly detained the imported goods thereby causing loss and damage to an exporter, the Supreme Court held:

"This is undoubtedly a hard case. The appellant has been unlawfully deprived of the possession of his valuable goods because of the illegal action of the customs authorities and thereby he could not fulfil the terms of his contract with the Cario firm as a result of which he must have suffered considerable loss. In addition, he cannot now take possession of the goods which were seized from him without paying the charges due to the Port Commissioners. We were given to understand that the charges due to the Port Commissioners amount to more than the value of the goods themselves. It is only fair and just that the customs authorities who are responsible for this situation should bear the burden; but in this writ petition we cannot give any relief in that regard. We can only leave the matter to the good sense of the customs authorities to take the appropriate steps and avoid possible further litigation."

[See Padam Kumar Agarwalla v. The Additional Collector of Customs: AIR (1972) SC 542

36. In that case of course, there does not appear to have been any prayer made

for payment of demurrage by the detaining authority. In this case the petitioner has prayed for a direction upon respondents to reimburse the petitioner or to pay the Calcutta Port Trust Authority the demurrage charges in respect to the goods and also to issue a Wharfage Rent Exemption Certificate acceptable to the Calcutta Port Trust covering the period from the date of landing of the goods to the date of release of Bills of Entry. The principle laid down by the Supreme Court in Padam Kumar Agarwalla''s case may be therefore applied to its fullest extent. It is nobody''s case that there was any delay or fault on the part of the petitioner in obtaining release of the goods.

37. I therefore, dispose of the writ petition by directing the respondents to forthwith and in any event not later than 48 hours from the date of this Order, release the three Bills of Entry and allow clearance of the goods imported by the petitioner to cover all the three Bills of Entry being Annexure ''C'' to the petition subject to the payment of Customs Duty as declared in the three Bills of Entry filed by the petitioner. The respondent authorities will be at liberty to issue the Wharfage Rent Exemption Certificate to the petitioner covering the period from the date after the free days upto the date of release of Bills of Entry. Such Wharfage Rent Exemption Certificate must be issued within seven days from the date of this Order. If the certificates are not acceptable to the Calcutta Port Trust Authorities, the respondent authorities will reimburse the petitioner the demurrage charges in respect of the goods paid by the petitioner upon the production of proof by the petitioner before the concerned authority of such payment having been made and of the refusal of the Port Authorities to accept the Wharfage Rent Exemption Certificate. The payment must be made within seven days from the date of refusal if any by the Port Authorities to accept the Wharfage Rent Exemption Certificates.

38. The writ petition is disposed of accordingly. There will be no order as to costs.

39. Stay is prayed for by the Customs Authorities. Partial stay is granted limited only to the payment of demurrage charges by the Customs Authorities. Such stay will continue till 9th March, 1992.

40. Let a xerox copy of this judgment be given to the parties upon undertaking to apply for the certified copy of the judgment and payment of usual charges.

