(1993) 01 BOM CK 0036

In the Bombay High Court

Case No : Appeal No. 648 of 1990 in Writ Petition No. 2593 of 1988

Sva Udyog Viniyog Limited — APPELLANT

Vs

Union of India — RESPONDENT

Date of Decision : 25-01-1993

Acts Referred:
Customs Act, 1962 — Section 111, 111(d)

Citation : (1993) ECR 376 : (1993) 65 ELT 20

Hon'ble Judges : S.H. Kapadia, J;M.L. Pendse, J

Bench : Division Bench

Advocate : Mr. G.K. Vahanvati, Mr. Vikram Nankani, Mr. Narayan Kumar and Mr. G.E. Vahanvati, instructed by M/s. R.G. Sheth and Co, for the Appellant; Mr. K.R. Bulchandani and Mr. R.C. Master, for the Respondent

Judgement

Pendse, J.—The appellants imported a consignment of almonds-in shell declared as ''seeds of almonds'' and claimed clearance against various REP licences for the export product covered under Appendix 17, clause G-2(i) of Import and Export Policy April 1985-March 1988. The Customs authorities felt that the goods imported are not covered by the licences and thereupon show cause notice was served on the appellants to explain why the goods should not be confiscated u/s 111 of the Customs Act. The three reasons set out in the show cause notice were :

(a) The item imported is almonds which is commercially known as dry fruit and not as seeds.

(b) Almonds are ''consumer''s goods of agricultural origin'' covered by entry 121 and required a specific licence for clearance.

and

(c) As per the provision of Paragraph 8 of Appendix 17 of Import & Export Policy, only such goods are permitted for import against REP licences as actually used in the manufacture of export products and almonds in shell do not find use in the production of fresh fruits, vegetables and flowers.

The appellants filed reply on July 7, 1988 and claimed that REP licences are specific and allow import of seeds without any restriction. It was further contended that the claim of the Department that almonds are not seeds is correct. It is also contended that the goods imported are seeds of almonds and capable of being used as such. The appellants produced in support of their claim certificate from shippers and certificate from Prof. Dele Kester of University of California; Dry Fruit Association of California as also certificate from Director of Horticulture, Poona and also relied upon extracts from certain botanical books.

2. The Additional Collector of Customs, Bombay by order dated July 26, 1988 held that the import was not under cover of valid licence and, therefore, the goods are liable to confiscation u/s 111(d) of the Customs Act. The Additional Collector granted an option to the appellants to clear the goods on payment of redemption find of Rs. 6,00,000/-. The Additional Collector also imposed a penalty of Rs. 50,000/- on the appellants. The Additional Collector held that the goods imported are dry fruits and are not seeds as claimed by the appellants. The Additional Collector also held that the goods permitted to be imported under REP licences must have nexus to the goods exported. The decision of the Additional Collector was challenged by the appellants by filing Writ Petition under Article 226 of the Constitution before a Single Judge. The petition was dismissed by impugned judgment dated March 8, 1990. The learned Judge concurred with the findings recorded by the Additional Collector and in addition, referred to the provisions of Chapter 8 and Chapter 12 of the first Schedule to the Customs Tariff Act, 1975. The decision of the learned single Judge is under challenge.

3. Mr. Vahanvati, learned Counsel appearing on behalf of the appellants submitted that both the Additional Collector and the learned Single Judge were in error in holding that the goods imported do not fall within the expression "seeds". The learned Counsel urged that the learned Single Judge was in error in referring to the provisions of the Customs Tariff Act to determine whether the goods imported are covered by REP licences. There is considerable merit in the submission of learned Counsel that to determine as to whether the goods imported are covered by REP licences, it is not permissible to refer to the provisions of the Customs Tariff Act. The contention of the appellants that the goods imported are covered by REP licences, however, cannot be accepted. Appendix 17 of the Import & Export Policy deals with the subject of import policy for registered exporters. The appendix contains the description of export products covered by the import policy for registered exporters, the percentage of import replenishment and materials allowed for import against each product as well as other conditions relating thereto. The perusal of the conditions indicate that the object of the policy or what was intended was that only those items will be permitted to be imported which are used for the relevant export product. Condition No. 7 prescribes that where packing materials is allowed for import, the REP licence will be valid for import of only such packing materials or raw

materials required for the manufacture of only such packing materials as are normally used for packing the relevant export product. Condition No. 8, inter alia, provides that while applying for REP licence, the export house must submit with the import application the list of items as are actually used as raw materials/ components in the manufacture of the products exported. It further provides that a licensing authority may, after due scrutiny of the list, exclude therefrom any item which is not actually used as a raw material/component in the manufacture of products exported. The perusal of these conditions leave no manner of doubt that the object or the intention of the policy makers was to permit import of such articles which had nexus with the articles which were exported by the licence holder. The statement of import replenishment under relevant entry is required to be set out :

-- Sr. Export Import Materials Remarks No. Product replenishment permitted percentage for import -- 1 2 3 4 5 -- G-2 (i)(a) Fresh 10% (a) Packing (1) in case of Fruits, material namely item (c) in vegetables EDPE, HDPE, column 4 please and flowers Polypropylene, see para 8 plastic pots, of ''General GRP roof lite Conditions'' in sheets, kraft this Appendix. liner and flutting media, Grape guard paper, kraft paper, Tissue paper for wrapping, Peat moss. (b) Sodium Metabisulphate (10%) (c) Chemicals appearing in Appendix 3 and used in cultivation/growth of fruits, vegetables and flowers, and freshening chemicals for fruits, vegetables and flowers. (d) Seeds/bulbs/mother plant germ plasm. (e) Pearlite horticulture grade and vermiculate. (b) Individually 10% (a) Same as items Same as remark quick frozen (a) to (e) against (1) in column 5 vegetables. Sl. No. G-2 (i)(a) against above. Sl. No. 2(i)(a) above. -- 4. The perusal of items in clause G-2 makes it clear that the materials permitted for import under clause 4 are those which had nexus to the goods which were exported and in respect of which REP licence was granted. Each of the item covered under (a), (b), (c), (d) and (e) leaves no manner of doubt that it had direct nexus or relation to the export product of fruits, vegetables and flowers. Clause (d) under item 4 refers to "seeds/bulbs/mother plant germ plasm". It is obvious that expression "seeds" must be read as referring to seeds of fruits, vegetables and flowers. Mr. Vahanvati submitted that the expression "seeds" is a generic term and it need not have any nexus to the export products under clause 1. It is not possible to accede to the submission of the learned Counsel. The contention that once the item imported fall under generic terms "seeds" then, the imported goods are in accordance with the licences cannot be accepted. We will assume for the purpose of this case that seeds of almonds will fall under the generic term "seeds" but that would not entitle the appellants to claim benefit of the licences which have been issued for the purpose of import of items covered under G-2. The expression "seeds" used in item G-2 is obviously not a generic term but circumscribed by limitations contained in the clause itself. The expression "seeds" have a nexus to fresh fruits, vegetables and flowers and such seeds are permitted to be imported provided they are to be used for the purpose of germination or plantation. It is not the claim of the appellants that seeds of almonds are imported for the purpose of germination or plantation. The appellants do not dispute that the seeds of almonds will be sold as dry fruit but claims that once the imported goods fall under the category of "seeds", then, irrespective of the purpose for which they are imported, the import must be held to be in accordance with the licence. It is not possible to accede to the submission. In our judgment, the limitation or the restriction in respect of import of seeds are intrinsic in clause G-2 and the seeds to be imported cannot be de hors the export products referred to in clause G-2. Under these circumstances, the contention of the appellants that the seeds of almonds fall under G-2 cannot be accepted. In this view of the matter, it is not necessary to examine whether the contention of the Department that the seeds of almonds are not seeds is correct or otherwise.

5. Mr. Vahanvati referred to the decision of the Division Bench reported in Bussa Overseas and Properties (Private) Limited and another Vs. Union of India and another, in the case of Bussa Overseas and Properties (Private) Limited and Another v. Union of India and Another. The decision, in our judgment, has no application to the facts of the present case. In the case before the Division Bench, the item permitted to be imported under REP licence was a generic term of Ethyl Alcohol. The Division Bench held that as the licence was issued simpliciter for Ethyl Alcohol without restricting its meaning or scope, the import for whatever purpose cannot be faulted. In the present case, the expression "seeds" though is a generic term, the plain reading of item G-2 under appendix 17 establishes that the expression is used for restricting its meaning. The object and intention of the policy makers being extremely clear, it is not possible to accede to the submission that seeds of whatever nature can be imported under REP licence.

Under these circumstances, in our judgment, the conclusion recorded by the Additional Collector and the learned Single Judge are not required to be disturbed.

6. Mr. Vahanvati then submitted that the redemption fine levied by the Additional Collector as well as the penalty imposed is extremely heavy and is required to be suitably modified. We have heard Mr. Bulchandani, learned Counsel for the Department on this aspect and the learned Counsel fairly stated that the question as to what should be the quantum of redemption fine and the penalty is left to the discretion of the Court. Taking into consideration all the facts and circumstances of the case, in our judgment, the proper order would be to reduce the redemption fine and the penalty to 50% of what was levied by the Additional Collector. It is required to be stated that while admitting the appeal, the Division Bench of this Court had directed that the appellants should pay 50% of the

redemption fine and personal penalty and for the remaining 50%, bank guarantee should be furnished. It is not in dispute that the appellants have paid 50% of the redemption fine and the penalty. In our judgment, such payment is sufficient in the facts and circumstances of the case.

7. Accordingly, appeal is partly allowed and while upholding the order passed by the Additional Collector and the learned Single Judge, the amount of redemption fine and penalty is reduced to 50% of the amount levied by Additional Collector. The bank guarantee furnished by the appellants stands discharged. In the circumstances of the case, there will be no order as to costs.

