
(2001) 01 CAL CK 0016
In the Calcutta High Court
Case No : Writ Petition No. 424 of 2000

Terai Overseas Limited

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 11-01-2001

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 2(18), 32, 51, 75, 75(1)
Customs and Central Excise Duties (Drawback) Rules, 1971 — Rule 2

Citation : (2001) 75 ECC 751 : (2001) 129 ELT 574

Hon'ble Judges : Kalyan Jyoti Sengupta, J

Bench : Single Bench

Advocate : Mullick, for the Appellant; Raychoudhry, for the Respondent

Final Decision : Allowed

Judgement

Kalyan Jyoti Sengupta, J.—By this Writ petition the petitioner has challenged the impugned order whereby the application for giving benefit of drawback duty has been rejected. It has got chequered history which I feel the same to be reiterated for proper appreciation of the facts and controversy involved in this matter.

2. In the year 1985-86 the writ petitioner undertook to export various textiles goods namely Polyester ladies long coats, neckties etc. to Russian customer. It is the case of the writ petitioner that the goods in question were exported to the Russian customer namely M/s. Soyuz Trade International, Moscow, T.F.C. Magnet Ogorskayastal under five several Bills of Lading. The goods in question are described as 10000 pieces of Polyester Ladies Long Coats, 5000 pieces vel vet ladies dress, 36000 pieces of gents neckties, 7500 pieces of gents neckties and 2000 pieces gents long coats. At the time of despatch of the aforesaid goods for export the Customs Authority duly cleared the same and allowed to export. After that the shipment was effected. It is stated by the petitioner that payment as against the aforesaid exports were received under irrevocable Letter of Credit, as

the value thereof in the Foreign Exchange have been realised by invocation of letter of credit. Shortly thereafter an application u/s 75 of the Customs Act 1961 was made claiming benefit of drawback duty for the goods which are excisable and which were used for manufacturing of the aforesaid exported goods. The authority concerned, however, initially refused to entertain the application, later the same was compelled to be received through the intervention of the Court by passing orders in Writ Jurisdiction. The application was rejected by the appropriate authority and an appeal was taken out against that order. The Appellate authority set aside the order and remanded back to the authority concerned. Even thereafter, the application was not disposed of, so the writ petitioner once again came to this Court for getting the application heard and decided on merit. On that writ petition late Justice B.M. Mitra (as His Lordship then was) was pleased to pass an order on 28th May, 1999 directing the original adjudicating authority to dispose of the case within a period of two months from the date of communication of the aforesaid order. It was observed by His Lordship while disposing of the said case that the said authority would keep in mind the reference of Judicial pronouncement of which mention has been made in the said order because according to the opinion of this Court the said reference will throw much light which will radiate a great area of the controversy which has been attempted to erupt in this proceedings. Apart from the aforesaid directions there are other observations recorded by His Lordship. It is observed further by His Lordship in the aforesaid order that the export is complete as soon as the ship leaves the territorial water and thereafter no other consideration can cloud the issue of factum of accomplishment of exports. Notwithstanding the aforesaid observation and recording His Lordship was pleased to direct the authority concerned to decide the same in their own way. In the context as aforesaid, the impugned order has been passed by the authority concerned preceded by a show cause notice as to why the application for giving benefit of drawback duty should not be rejected on various grounds which is amongst others and in summary form, is that the consignee concerned did not receive the goods, so there was no export and no delivery of goods, so to say, and in true sense the charges against the writ petitioner is that this was a fraudulent export. In the show cause notice various materials have been disclosed with a liberty to the writ petitioner to have inspection and copies thereof. The writ petitioner gave reply to the same and the authority concerned admittedly gave hearing and decided this matter in his own way. On the aforesaid factual background of this case Mr. Mullick assails this impugned order saying that the issuance of show cause notice for deciding and disposal of the application of this nature is unheard of under the law or the procedure laid down in the Customs Act and Rules. His client has made an application for getting benefit of drawback duty. There is no provision to issue a show cause notice. It could have been disposed of either by rejecting or by allowing on merit. There is no warrant to issue such show cause notice. This exercise according to Mr. Mullick, on part of the concerned authority is ultra vires the provision of the Customs Act, so to say, without jurisdiction. He also contends that the authority concerned rejected a claim on the premise

dehors the provision of law and the conclusion arrived at is patently conflicting with the ratio and the principles decided by the Supreme Court of India reported in Collector of Customs, Calcutta Vs. Sun Industries, . He also draws my attention to the provision of Section 75 and corresponding rules thereunder and submits that it is not the authority or jurisdiction of the authority concerned to examine whether the export has been effected really or not. The authority concerned is to examine as to whether the goods have been entered for export and in respect of which an order permitting clearance and loading thereof for exportation has been made u/s 51 by the proper officer. So he is to examine those areas only nothing more or less. But the authority concerned sadly enough, has undertaken such exercise which is not permissible under the aforesaid section. The said authority has adopted such improper procedure that amounts to breach of principles of natural justice. He contends that the Customs Authority has cleared for export and there is no dispute that the consideration of the aforesaid goods have been received. The allegations of non-receipt of the goods by the consignee is of no consequence in view of the aforesaid Supreme Court decision. Apart from as above Mr. Mullick submits that the authority concerned has relied on those documents which are no evidence for his conclusion that there was fraudulent export or rather it is a device of mock export in order to get advantage of the drawback duty. Therefore, reasons given by the appropriate authority is not correct. These reasons are no reason and in fact no prudent man can come to such a conclusion exercising power and jurisdiction as provided u/s 75 of the said Act. Therefore, he concludes by citing a decision of the Supreme Court reported in A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhwani and Another, that existence of alternative remedy by way of appeal against this order is no bar at all as it is a case of violation of principle of natural justice and further a case of without jurisdiction. This court in exercise of power under Article 226 is competent enough to come to such conclusion. So the order is liable to be set aside and the matter should be remanded to the appropriate authority to decide the question as to the quantum of the amount to be ascertained for giving draw back duty treating there was an export in fact and without questioning the genuineness of the transaction.

3. Mr. Roy Chowdhury, learned Senior Counsel appearing on behalf of the department while opposing vehemently submits that this Court should not entertain this writ petition as this preliminary objection had been taken at the first available opportunity and this objection is recorded at the time of passing order admitting the writ petition. He has drawn my attention to the authority reported in Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, and contends that this case must be dealt with by the appellate authority as because it is a statutory right, not a common law right and statute has prescribed for this effective machinery and this must necessarily mean that the same is to be decided by the appellate authority not by this Court. So he contends that I cannot and I should not exercise discretion in view of the

existence of the effective alternative machinery and in view of the judgments of the Supreme Court reported in Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others,

4. His further contention is that upon proper investigation it was found that the consignee did not receive the goods. Indian High-Commission at London at the request of DRI investigated into the matter. Appropriate department of Russian Government has reported that the goods were not received by the consignee. So in substance, there was no export though the consideration has been received. He submits that no person can take the benefit of a fraud and the fraud can be detected and set at right at any time whenever it is drawn to the attention of the Court. In support of this proposition he has relied on three decisions of the Supreme Court reported in 2000 JT Vol. III 152, JT 1997 SC P 135 and JT 1993 (6) SC 33.

5. Having heard the learned Counsels and considering the materials placed before me I am to first address the question of entertainability of the writ petition in view of existence of alternative remedy. This question has to be answered inasmuch as this point had been taken specifically at the first available opportunity when this writ petition was admitted by Justice Lala on earlier occasion. Mr. Mullick has drawn my attention to a reported decision of five judges Bench delivered by Supreme Court reported in A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhwani and Another, . The aforesaid judgment of the five [Judges] Bench has laid down amongst other that the existence of an alternative remedy is a bar to the entertainment of the petition under Article 226 of the Constitution of India unless No. (1) there was a complete lack of jurisdiction in the officer or authority taking the action impugned, or (2) where the order prejudicial to the writ petitioner has been passed in violation of the principles of natural justice and could, therefore, be treated as void or nonest and that in all other cases Courts should not entertain petitions under Article 226, or in any event nor grant any relief to such petitioners cannot accepted. The existence of alternative remedy is not rule of law or bar, but rule of convenience, this Court has discretion whether it should exercise its power under Article 226 of the Constitution of India. The broad lines of the general principles on which the Court should exercise having been clearly laid down by this time by the Apex Court and various High Courts.

6. Mr. Roychowdhury on the aforesaid subject has drawn my attention to a decision of three judges Bench of the Supreme Court reported in Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, in support of his preliminary point. The aforesaid latter decision of the Supreme Court has amongst others observed that the Act provides for complete machinery to challenge an order of assessment. An aggrieved person should to resort to this mode prescribed by the Act and not by a petition under Article 226 of the Constitution. In view of the aforesaid two apparent inconsistent view of the Supreme Court in my view it would be safer for me to follow the former decision

of larger Bench which has expressly laid down the general principle of entertainability of a writ petition where alternative remedy exists. Moreover later judgment of Supreme Court did not take note or consider the above decision of the Larger Bench.

7. The exceptions have been explained by the said Supreme Court, which are lack of jurisdiction and breach of principle of natural justice. Apart 14/129/3 from these two exceptions still the discretion is left with the Court as to whether this should be entertained or not.

8. The petitioner has complained of lack of jurisdiction on part of the appropriate authority. Now I am to examine as to whether the authority concerned lacks its jurisdiction to entertain or dispose of this matter. It is not correct to contend that the authority concerned does lack of inherent jurisdiction. Lack of jurisdiction contemplates two things-one is lack of the authority to entertain complaint, and another is jurisdiction to decide the subject matter. In other words power of entertaining such disputes emanates from within four corners of the section which conferred power upon the authority concerned. It appears in this case it has been alleged that appropriate authority has decided this matter in such a manner which could not lawfully be possible according to real intention and purport of Section 75 of the said Act. So, I hold that in this case question of jurisdiction of the authority is involved and the writ petition should be entertained.

9. Moreover, I am inclined to exercise my discretion to entertain this writ petition in view of the fact that the impugned order passed purporting to comply with the order passed previously by this Court and this Court has directed the authority concerned to decide the case in accordance with law. So, whether this has been done in deference to the wishes of this Court or not can only be examined, on a complaint, by this Court alone not by other forum. Had this Court by the earlier order left this matter expressly, for scrutiny of adverse order in accordance with provision of the said Act then existence of alternative remedy would have been barred.

10. The application of the petitioner has been rejected on the ground in substance that the consignee and /or the recipient did not receive the materials which were said to have been exported. The validity and legality of the order can be decided upon plain reading of the impugned order. The granting of benefit of the drawback duty can be given in the event the conditions u/s 75 of the aforesaid Act are fulfilled by exporter. So, it would be appropriate to quote Section 75 hereunder :-

"Drawback on imported materials used in the manufacture of goods which are exported. - (1) Where it appears to the Central Government that in respect of goods of any class or description (manufactured, processed or on which any operation has been carried out in India) (being goods which have been entered for export and in respect of which an order permitting the clearance and loading

thereof for exportation has been made u/s 51 by the proper officer), (or being goods entered for export by post u/s 82 and in respect of which an order permitting clearance for exportation has been made by the proper officer) a drawback should be allowed of duties of customs chargeable under this Act on any imported materials of a class or description used in the (manufacture or processing of such goods or carrying out any operation on such goods), the Central Government may, by notification in the Official Gazette, direct that drawback shall be allowed in respect of such goods in accordance with, and subject to, the rules made under Sub-section (2)."

11. It would explicitly clear upon plain reading of the aforesaid section the conditions are provided for granting draw back duty. Conditions amongst other are (1) goods have been entered for export (2) and in respect of which an order permitting the clearance and loading thereof for exportation has been made u/s 51 by the appropriate Officer, (3) or being goods entered for export by post u/s 32 (which is not applicable here).

12. If the proviso of Sub-Section (1) of Section 75 are read together with Sub-section (1) then it would appear that whole idea to grant the benefit of drawback duty is to increase, permit and develop the export. So, when the Customs Authority is satisfied that the goods are brought for export and the clearance thereof is permitted and particularly when the consideration for export has been released and /or ensured then nothing is to be looked into for the purpose of granting benefit of drawback duty, no matter whether the goods have been received by the consignee concerned. In this connection I find a Supreme Court decision cited by Collector of Customs, Calcutta Vs. Sun Industries, . In that case the Supreme Court in an extreme situation has held amongst other the export means that the goods must be taken out to a place outside India. The expression "taking out to a place outside India" would also mean a place in High Seas if it is beyond the territorial waters of India. The meaning of the word "export" for this purpose has been defined in both Section 2(18) of the Act and Rule 2(c) of the Drawback Rules, 1971, as "Export" with its grammatical variations and cognate expressions means taking out of India to a place outside India and includes loading of provisions or store or equipment for use on board vessel or aircraft proceeding to a foreign port.

13. In my view, the authority concerned need not look into as to whether the goods have been received by importer or consignee and it would be a case and/or dispute between the importer and exporter that is to say consignee or consignor, I do not find any material that the Russian Consignee had taken any action for alleged non receipt of the goods. Non receipt of goods is one thing and non existence of goods for export is another thing for the purpose of adjudicating the issue here. It is nobody's case that there was no despatch of the goods or non receipt of the consideration of the export value. It is rather admitted that the goods were taken out of India to a place outside India. On this I find that the export value has been received by letter of credit and such letter of credit has

been honoured and payment have been realized. The appropriate authority with his ingenuity has tried to make an effort to unearth the case of bogus export and a machinery to divert the black money in shape of the export. In my view the authority concerned cannot decide the question within the four corners of the aforesaid Section 75. The goods were duly cleared by Customs Authority for export and clearance was permitted and it is nobody's case that the aforesaid exercise of the Customs Authority are fraudulent one.

14. However, Mr. Roychowdhury submits that it is a clear case of fraud and the fraud can be set at right at any time by any person. I am unable to accept this argument in this matter for the observations as recorded above. Therefore, the decisions cited by Mr. Roychowdhury on the question of fraud do not have any application here.

15. I appreciate the officers' concerned anxiety to do something and to find out some element of fraud in the transaction but such exercise cannot be undertaken by him in exercise of his power u/s 75 of the said Act.

16. The materials on the basis of which he has come to a conclusion even if it is accepted on its face value, do not endorse the case of fraud, so such a finding on the basis of unacceptable materials in my view tantamounts to finding on no evidence. There is no doubt in my mind that this order rejecting the application on the aforesaid ground of non-receipt of materials is not sustainable under the law and this needs fresh determination by the authority concerned within the parameter of Section 75 and the rules framed thereunder for granting benefit of drawback duty. Therefore, I set aside the impugned order. I accordingly direct the authority concerned to consider this application afresh and strictly following the observation of Justice B.M. Mitra and Justice Gupta (as Their Lordships then were). The authority concerned shall treat this case as export has taken place and accordingly decide the same in accordance with the law. The authority concerned shall examine as to whether the conditions as explained by me have been fulfilled in this case or not, if it is so then they will quantify the same in accordance with the rules as provided.

17. This application, therefore, succeeds. There will be no order as to costs.

18. Xerox certified copy of this Judgment if applied for be supplied to the parties as expeditiously as possible.