

(1997) 10 BOM CK 0071

In the Bombay High Court

Case No : Writ Petition No. 1234 of 1997

Upendra K. Parekh

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 16-10-1997

Acts Referred:

Citation : (1997) 73 ECR 273 : (1998) 97 ELT 49

Hon'ble Judges : S.D. Gundewar, J;M.B. Shah, J

Bench : Division Bench

Advocate : Shri S.N. Kantawala, instructed by M/s. Kantawala and Co, for the Appellant; Shri S.M. Shah, instructed by L.S. Shetty, for the Respondent

Judgement

1. Heard the learned Counsel for the parties.
2. Rule.
3. At the request of the parties, fixed for hearing forthwith.
4. The petitioner has made the following submissions :-

(a) The petitioner's concerns are transferees of a Value Based Advance Licence issued to one M/s. Lotus Construction. The export obligation having been fulfilled by the said Lotus Construction, the licence was endorsed and made duly transferable by the licensing authority as per the provisions of paragraph 67 of the Import Export Policy 1992-97 to the extent of U.S. \$ 159,375.00 only. The item imported by the petitioner's concerns duly figures in the licence i.e. Titanium Dioxide, Rutile Grade. The licence also permitted import of other items. The DGFT authorities have also issued a clarification that the item imported by the petitioner's concerns is an essential raw material for the paint industry especially for synthetic white colour paints and is used for importing opacity and exterior durability to the paint. It was, therefore, categorically held by the DGFT that Titanium Dioxide, Rutile Grade cannot be treated as a pigment and is hence not covered under the list of sensitive items of the Handbook of Procedures Vol.

2, 1992-97.

(b) Despite having produced a valid licence to cover the import of this item which was being regularly imported by the petitioner's concerns in small quantities, the Assistant Commissioner of Customs issued a query memo dated 14th September, 1995 seeking to deny duty-free clearance to one of the petitioner's consignments covered by Bill of Entry bearing Thoka No. 3773, dated 11th December, 1995 filed for the clearance of 5 M.T. of the said item/goods.

(c) Written submissions were filed by the petitioner before the 4th respondent, who ultimately passed an order denying duty-free clearance to the said goods.

(d) Being aggrieved by the order, the petitioner's concern preferred an Appeal before the Commissioner of Customs (Appeals) who, after considering the wealth of technical data provided by the petitioner allowed the Appeal filed by the petitioner. Though the order was binding on all the lower authorities including the 4th respondent, the 4th respondent chose not to act upon the order passed by a higher authority. As the petitioner's concerns were regularly importing the said goods and as the Assistant Commissioner of Customs was not implementing the order passed by the Commissioner of Customs (Appeals), upon the direction of the Assistant Commissioner of Customs, the petitioner's concerns having no choice/alternative, had to perforce execute several bank guarantees equivalent to approximately 25% of the duty amount for each consignment imported by them. Totally, 7 consignments were imported by the petitioner's concerns for which bank guarantee amounting to Rs. 9,81,488/- have been executed and are lying with the 4th respondent and only thereafter the goods were allowed to be cleared by the 4th respondent.

(e) The 3rd and 4th respondents thereafter preferred an Appeal before the CEGAT i.e. the 2nd respondent and also preferred a stay application which stay application was dismissed by a speaking order dated 11th April, 1996. Despite specific liberty having been granted to the Department to move for earlier hearing of the Appeal, no such application has been filed. On the contrary, to perpetuate the illegality, the bank guarantees despite several requests were not discharged.

(f) An application, therefore, invoking inherent jurisdiction of the CEGAT was moved but by order dated 17th September, 1996, the prayer for directing the 3rd and 4th respondents to discharge the bank guarantees was rejected on the ground that as the CEGAT had dismissed the stay application filed by the Department, this could be urged administratively with the Customs authorities. As no action was forthcoming, another application was moved before the CEGAT and by an order dated 28th January, 1997, once again, the application was rejected on the presumption that the bank guarantees appeared to have been given at the importer's volition even before the dismissal of the stay application by the CEGAT. Once again, a representation was made before the 3rd respondent by letter dated 15th May, 1997 giving the entire schedule of the bank

guarantees. Till the date of filing of the petition, there was no reply to any of the representations made by the petitioner's concerns. Hence, the present petition has been filed.

5. Opposing the aforesaid averments/prayers, on behalf of the respondents, one P. K. Khera, Assistant Commissioner of Customs, DEEC Section has filed an affidavit in reply. In the affidavit in reply, it has been admitted that the Tribunal has refused to grant stay of the operation of the order passed by the Appellate Collector by its order dated 28th December, 1995. On the basis of the said order, the petitioners' goods were released. However, it is pointed out that as the appeal filed by the respondents is pending before the Tribunal and in the event the respondents succeed finally in the appeal, it would be difficult for the respondents to recover huge amount of duty from the petitioner which is estimated at Rs. 40 lacs from the petitioner if the bank guarantee furnished by the petitioner is not renewed. It is, therefore, prayed that this Court should not interfere at this stage. It is also pointed out if the bank guarantee furnished by the petitioner is kept valid and subsisting till the appeal is decided, it would not prejudice the petitioner in any way.

6. As against this, the learned Counsel for the petitioner submitted that for keeping the bank guarantee valid and subsisting, the petitioner is required to deposit 100% amount with the bank and this blocks the entire amount of the petitioner even though the petitioner has fully succeeded in the appeal. He has pointed out that once the stay order is not granted by the Tribunal, the respondents are bound to return the bank guarantee furnished by the petitioner.

7. Considering the aforesaid facts, in our view, there is no justifiable reason for withholding the bank guarantee furnished by the petitioner. Admittedly, the appeal filed by the petitioner is allowed and the Tribunal has refused to grant stay of the order. In this set of circumstances, the respondents are required to release the bank guarantee furnished by the petitioner.

8. In the result, the petition is allowed. The respondents are directed to release the bank guarantee furnished by the petitioner on the petitioner's executing a bond equal to the amount of the bank guarantee.

9. The learned Counsel for the petitioner states that the petitioner would execute the bond on or before 6th November, 1997. As soon as the petitioner executes the bond, the respondents are directed to release the bank guarantee.

10. Rule made absolute to the aforesaid extent with costs.

11. Issuance of certified copy of this order is expedited.