
(1987) 12 CAL CK 0012
In the Calcutta High Court
Case No : Suit No. 833 of 1987

Vinod Gupta

APPELLANT

Vs

Collector of Customs

RESPONDENT

Date of Decision : 24-12-1987

Acts Referred:

Citation : (1988) 17 ECC 328 : (1988) 18 ECR 198 : (1988) 37 ELT 44

Hon'ble Judges : Ajit Kumar Sengupta, J

Bench : Single Bench

Judgement

Ajit Kumar Sengupta, J.—The petitioner carries on business under the name & style of M.B. Impex as sole proprietor thereof. He obtained several REP licences for valuable consideration. All the said REP licences permit Importation of Inter alia, "seeds/bulbs/mother plant/germ plasm".

2. Under similar REP licences permitting Importation of Inter alia, seeds/bulbs/mother plant/germ plasm, S.V.A Udyog Viniyog Ltd. In the month of April 1987 Imported 8 consignments of rapeseed and all of them were cleared by Calcutta Customs upon being satisfied that the said imports were covered by relative Import licences. Similarly, Agro Impex imported 9 consignments of rapeseed on the strength of similar import licences in the month of April 1987 and Calcutta Customs cleared the same.

3. In view of express permission for importation of seed as contained In the Import licence and actual Importation of rapeseeds by M/s. S.V.A Udyog Viniyog Ltd. and M/s. Agro Impex as mentioned hereinbefore and various other organisation and clearance of the same by the Customs authorities, the petitioner entered into a contract with M/s. Cargill of France for importation of approximately 1410 M.T. of rapeseeds.

4. On 12th June, 1987 the petitioner also obtained the permit bearing No. 951/87-POP for import of about 1400 M.T. of rapeseed from Government of India, Ministry of Agriculture & Rural Development.

5. The foreign exporter shipped 15 consignments of rapeseed of French origin on board the vessel "Fresh Ocean" on 20th May, 1987 covered by 15 several Bills of Lading. The foreign exporter also raised three invoices for the said consignments of rapeseed the FOB value of which is about 2,94,731 equivalent to Rs. 38.50.000/- (approximately).

6. The petitioner is required to pay freight amounting to approximately Rs. 10 lakhs. The total involvement in the said 15 (consignment of rapeseed) is as follows:-

(a) FOB value Rs. 38.5 lakhs (b) Freight Rs. 10.0 lakhs Total Rs. 48.50 lakhs

7. The petitioner had engaged clearing Agent, M/s. Loknath shipping for clearance of the said consignments. The said Vessel "French Ocean" arrived at the port of Calcutta on or about 18th August, 1987. The petitioner through his clearing Agent submitted 15 Bills of Entry in respect of the 15 said consignments of rapeseed.

8. Bills of entry were submitted to the Calcutta Customs on 14th August, 1987. On 17th August, 1987 the petitioner was informed by his Clearing Agent that the Customs Authorities in Calcutta had verbally intimated that the rapeseed would not be allowed to be cleared under the said REP licences on the ground that the rapeseed are not covered by the said Import licence as rapeseed are canalised crop.

9. The petitioner has instituted the present suit challenging the said action of the defendants in not allowing the clearance of the said consignments of rapeseed against the said REP licences being arbitrary and contrary to law and legal. In the said sultan Interlocutory application has been made for release of the said 15 consignments covered by 16 Bills of Entry.

10. It is not disputed that the suit and the application made therein can be disposed of on the determination of a question of law, which has been raised in the suit as well as in the application. The short question is whether the petitioner is entitled to Import rapeseed under the concerned REP licences.

11. The concerned REP licences specifically authorise Importation of the following goods:

Description of Goods: G.2 (1)(A)/A/Packing Material, namely LDPE, HDPE, POLYPROPYLENE, PLASTIC POTS, GRP ROOF LITE SHEETS, KRAFT LINER AND FLUTING MEDIA, GRAPE GUARD PAPER, KRAFT PAPER. TISSUE PAPER FOR WRAPPING, PEAT MOSS./D/SODIUM METASULPHITE (10%)./D/SEEDS/BULBS/MOTHER PLANT, GERM PLASM./E/PEARL HORT /CULTURE GRADE AND VERMICULATE.

(Emphasis supplied)

It would, therefore, be evident that the REP licences specifically permit importation of "seeds/bulbs/mother plant/germ plasm".

12. The contention of the Customs authorities is that the rape-seed is a canalised item and falls under Appendix 5, Part B of the Import & Export Policy April 1985 - March, 1988 (hereinafter referred to as the Policy). The relevant part which has been relied on by the respondents is as follows:

Oils/Seeds

5. In the case of the following items, whether edible or non-edible, Import will be made by the State Trading Corporation of India (STC/Hindustan Vegetable Oils Corporation, New Delhi (A Govt of India Undertaking) under Open General Licence on the basis of foreign exchange released by the Government in its favour. Imports, distribution and their pricing will be made by the STC/Hindustan Vegetable Oils Corporation, New Delhi as per the connected policy of the Government, in the Ministry of Food and Civil Supplies, Department of Civil Supplies.

Rapeseed oil/seeds.

13. I am however unable to accept this contention of the Customs authorities for more than one reason indicated hereinafter.

14. Chapter IV of the said Policy deals with canalisation of Chapter IV provides as follows:

"76. The holder of a REP Licence may effect direct Import of those canalised items as appear in that licence, upto the extent permitted therein or which can be Imported against the licence under any specific provision in this policy. In such cases the condition referred to in sub-para 70(2) above will apply."

15. In terms of para 225 and para 226 of Import Policy, REP licences are freely transferable to any person and without any conditions for its use upon Importation. The petitioner has obtained REP import licences as a transferee. Para 225 and para 226 are provided as follows:

Para 226 : "The REP licence will be issued in the name of the Registered Exporter only and will not be subject to 'Actual User' conditions, except for cases covered by paras 196(2), 204(2) and 265(1), a licence holder may transfer the licence in full or part in favour of any other person. The licence holder or such transferee may Import the goods permitted therein but the facility of paragraph 196 and 202 shall not be available to any transferee, unless the transferee is himself a registered exporter and can satisfy the custom authorities at the time of clearance of the goods of his bona fides."

Para 226; The transfer of the licence will not require any endorsement or permission from the licensing authority i.e., it will be governed by the ordinary law. Accordingly, clearance of the goods covered by a REP licence issued under this Policy, will be allowed by the Customs authorities on production by the transferee of only the document of transfer of the licence concerned in its name. Whenever an REP licence is transferred, the transferor should give a formal letter

to the transferee, giving full particulars regarding number, date and value of the licence transferred and the name and address of the transferee, and complete description of the import Items for which the licence Is transferred. A copy of the transfer letter should be endorsed to the licensing authority who Issued the REP licence, for record. This procedure will also apply to subsequent transfers of the same licence."

16. According to the above policy as laid down, a transferee Is not entitled to Import faculties provided to registered exporter under Paragraphs 195(2), 196 and 202 unless he himself is a registered exporter. The petitioner has not claimed nor did the petitioner avail himself of the import faculties of paragraphs 195(2), 196 and 202. Nor the petitioner has claimed or availed facilities of Para 203, 263(2) and 265(1) which are permitted only to the registered exporters with actual user condition.

17. The petitioner has sought clearance of Imported materials against REP licences Issued in terms of Appendix 17 of Import Policy which are freely transferable and without any condition relating to its use upon import of items described therein on the body of the said licences.

18. Chapter XIV of the said Policy deals with the import policy for registered exporters. Paragraph 195(1) in the said chapter provides as follows:

"195(1). The items permissible for import against each export product covered by this policy are given in column 4 of the Policy statement given In Appendix 17, read with column 5."

19. Appendix 17 of the Policy contains the description of the export products covered by the policy for registered exporters, the percentage of import replenishment and materials allowed for Import against each products as well as other conditions relating thereto. Appendix 17 has classified the export products under various product groups.

20. Thus in terms of Para 195(1) the Items permitted for Import against each product covered by the Import Policy are given in column 4 of the policy statement In Appendix 17 read with column 5. The relevant product group for the purpose of this case is G.2(1)(a).

21. There Is only one remark at column (5) which reads as

"In case of item (c) in column 4, please see para 8 of General Condition In this Appendix."

22. It Is necessary to set out paragraph 8 of the General Conditions of Appendix-17 which is as follows:-

23. Against certain export products, for example Sl. No. A 64, SI.No.B.11.1 etc. Col. 4 permits the Import of Items appearing in the Appendices 3 and 5 without mentioning the specific Items. In such cases, the export product in Col. 2 covers more than one product and It Is difficult to mention in Coil .4 Itself the specific

Items of raw materials and components which go into the production of each of the export products covered by the particular Serial Number of Sub-serial Number. Therefore, in such cases, while applying for REP licence, each exporter should submit with the import application the list of such items as are actually used as raw materials/component In the manufacture of the product(s) exported except Kerns which have been specifically excluded in Coil for Coil.5. It should be also ensured that only those Items are included In the list which are actually used as raw materials and components in the manufacture of the relevant product exported. The licensing authority may, after the due scrutiny of the list exclude therefrom any Item which In his opinion Is not actually used as raw material/component in the manufacture of product(s) exported. If at any time, It Is found that an exporter obtained REP licence under this provision for an Item which was not actually used as raw material/component for the manufacture of the product exported against which the REP licence was Issued, the licence In question, shall be liable to cancellation. If the licence has been used by the time the Irregularity comes to notice, the value of the licence shall be adjusted against the Import entitlement of the exporter in any category. These actions will be without prejudice to any other action that may be taken in this behalf under the import and export control regulations.

24. It may be noted that Item (c) of column 4 against export of G.2(i) Item permits imports of chemicals appearing in appendix 3 and used in cultivation/ growth of fresh vegetables and flowers and freshening chemicals for fruits, vegetables and flowers.

25. Paragraph 8 of Gen. condition of Appendix 17 is not for any other items mentioned in the column 4 of export product G.2.1. Thus paragraph 8 of Genl. condition of Appendix 17 is also not applicable to the subject item of import at all.

26. It would, therefore, be evident that the REP licences specifically permit importation of "Seeds/bulbs/mother plant/ germ plasm" as specifically mentioned in the Import licences and as specifically mentioned in column 4 as per entry (d) against the export product G. 2(1) of Appendix 17.

27. Against the export products specified against G.2(i)(a), materials permitted for Import Includes seeds. The products specified against column 4 under sub-heading (d) are "seeds/bulbs/mother plant, germ plasm".

Paragraph 197(1) of the Policy provides as follows:

"197(1). The holder of a REP Licence may effect direct import of these canalised Items as appear in that licence, upto the extent permitted therein or which can be imported against the licence under any specific provision in this policy. In such cases, It shall be a condition that the importer shall furnish particulars of the imports made to the canalising agency concerned in the prescribed proforma appearing in Appendix IV.F of the Hand Book of Import-Export Policies. 1985-88. At the time of clearance, the importer will be required to declare to the customs that these particulars regarding the consignment sought to be cleared have been

sent to the concerned Canalising Agency viz...vide letter No. ...dated...Failure to comply with this requirement will entail penal action under the import statute, beside the stoppage of the facility to the licence holder against current licences and denial of further licences to him.

28. It is also not In dispute that in this case the necessary particulars have been furnished by the petitioner to the Canalising Agency concerned. In other words, the provision of paragraph 197(1) have been complied with.

Paragraph 197(2) provides as follows:

"197(2). In respect of Items appearing in Appendix 5 Part B, which do not specifically figure in the shopping list against various export products in Appendix 17, prior approval of the Chief Controller of Import and Exports, New Delhi will also be necessary before affecting imports as laid down in para 73, of this policy. Such prior approval will not be necessary in respect of items which appear in Advance licence issued under Duty Exemption Scheme in Appendix 19."

29. In cases where the provisions of 197(2) are applicable it will also be necessary to obtain the prior approval of the Chief Controller of Imports & Exports, New Delhi. The question is whether paragraph 197(2) has any application on the facts and circumstances of the case, it appears to me that this paragraph has no application in the instant case because the Item "seeds" appears in Appendix 5 Part B and also in Appendix 17. In Appendix 5 Part B there Is a generic reference to seeds followed by some particulars illustrations only and thereafter followed by a residuary provision. In other words, all seeds are covered by Appendix 5 Part 5 and similarly all seeds are also covered by Appendix 17. G.2(1)(a).

30. Paragraph 197(2) is appropriately applicable to the cases where item of Appendix 5 is not at all specified in column 4 of Appendix 17, e.g. export product group A.93(11). One fact cannot be lost sight of that the Importation has been made under freely transferable REP Import licences, having no condition whatsoever for the use of materials Imported under the said licences and/or for their use in the exported product. Paragraph 8 of "General Conditions" appended to Appendix 17 of the said policy are not endorsed on the licences. Thus the restrictions imposed by the "General Conditions" are not applicable to the licences under which present importation has been made. As stated hereinbefore the said REP licences obtained by the petitioner were Issued against the export of items mentioned in Column 2 of G. 2 (i)(a) as Import replenishment to aforesaid exports. Items of column 4 i.e. Seeds/Bulbs/Mother Plant/Germ Plasm have been specifically permitted for import. There is no remark whatsoever in column 5 against the aforesaid item i.e. seeds etc. restricting the import of items In question or for applicability of paragraph 8 of "General Conditions" of Appendix 17. The "General Conditions" are applicable to only those entries in Column 4 which describe the Items in general terms as items of Appendix 3 and 5. For examples column 5 remark at A-46, A-56, A-64(1), A-64(11) a, A-70,

A-71. A-85, A-93, A-102, B.11.1, B.11.2. B.17.3. B.20.B. 0) also column 5 remark is found but It is specifically for item (c) i.e. Chemicals appearing in Appendix 3. It is therefore evident that no (?) General Condition as contained in para 8 was not intended to be applicable to item (d) I.e. "seeds/bulbs/mother plant/germ plasm" as made applicable to Item(c)of G.2.(1)(a).

31. It would be evident from Appendix 17 that so far as Items seeds/bulbs/ mother plant/germ plasm are concerned there Is no restrictive condition In Column 5. There is also no qualification regarding the seeds/bulbs/mother plants/ germ plasm which have been used in generic sense. It may be mentioned under G.2(11)(a) the seeds for germination/planting are allowed subject to the restriction Imposed in Column 5. Similarly in G.2(III)(b)the product mentioned Is "stock seeds for parent lines and nucleus materials/seeds/plants and germ plasm. Thus wherever the government Intended to provide restriction in the shopping list In Appendix 17 the same has been taken care of either by qualifying the Items or by adding paragraph 8 of the "General Conditions" of Appendix 17 to such Items. Accordingly In my view items in question can be imported under the REP licences even though such Items are canalised Items. Otherwise freely transferable REP licences will have no value at all.

32. There is another aspect of the matter. The petitioner caused rapeseed to be imported after obtaining permit from the Government of India, Ministry of Agriculture & Rural Development.

33. The Ministry of Agriculture & Rural Development of the Department of Agriculture & Co-operation issued the permit on 12th June, 1987 whereby the petitioner was allowed to Import seeds/fruits specified therein produced In France from Antwerp. The said permission was "subject to devitalization of seeds using available fumigants at the appropriate dosages". The quantity and description to be imported is "1400 MT"s Rape-seeds". This permission could not have been granted If the contention of the respondents Is correct that rape-seed being canalised item cannot be Imported by any private agency at all. The Policy of 1985 came Into force prior to the said permit given to the petitioner by the Government of India, Ministry of Agriculture and Rural Development It cannot be the intention of the Government that In one hand the permit was given to import the rape-seed and on the other such permission is taken away or withdrawn by not allowing the Import of the rape-seed on the ground that mere is a prohibition under the said policy. In view of the specific permit to import rape-seed, the petitioner Is entitled to import rape-seed. That apart, the Customs authorities have allowed direct importation of several consignments of rape-seed in April 1987 under similar REP licences. M/s. Udyog Viniyog Ltd. In the month of April 1987 imported 8 consignments of rape-seed and all of them were cleared by Calcutta Customs upon being satisfied that the said imports were covered by relative import licences. Similarly, Agro Impex imported 9 consignments of rape-seed on the strength of similar Import licences In the month of April 1987 and Calcutta Customs cleared the same.

34. It is, however stated in the affidavit by the respondent that the clearance was made by mistake, but no particulars have been given when and how the alleged mistake was detected.

35. The holders of REP licences buy such licences at a consideration. Unless they are allowed to Import the items mentioned In the REP licences they would not have purchased such licences. It is not that because the Items are canalised no Import can be made by any private agency. The only conditions as would appear from the Policy as well as the affidavit by the respondents is that the REP licence holders are not entitled to import canalised items unless specifically authorised by the Chief Controller of Imports & Exports, New Delhi or upon compliance With the conditions laid down In the said Policy. The goods have already been imported. They have arrived at the destination. There Is no other allegation against the petitioner except that it is a canalised item and accordingly It cannot be imported by the private agency, like the petitioner without first obtaining the permission of the Chief Controller of Imports & Exports. The petitioner has cited the previous practice In allowing clearance in the month of April 1987 of such Items under the authority of REP licences, although It has been said that It was done by mistake. But apart from this highly technical point taken regarding the permission of the Chief Controller of Imports and Exports, no other ground has been mentioned by the clearance shall not be made. Even assuming that there was any mistake, but so long as those orders are not set aside by the appropriate authorities, the Customs authorities are bound to follow the practice which was prevalent at the material time. One cannot Ignore the permit given by one department of the Government. It Is very unfortunate that permit was granted by one department of the Government and the consignment has been withheld by another department of the same Government.

36. Another contention has been raised by the Customs authorities that a telex message was received on 11th June 1987 from the Joint Chief Controller of Imports and Exports, New Delhi wherein It is clarified that rapeseed is not covered by shopping list In Appendix 17. The said telex message is as follows:

"Kindly refer to your telex dated 22nd May 1987. Regarding clearance of Rapeseed seeds against REP licence Issued under S.No.G2(i)(a)(.) It Is clarified that rapeseed is not covered by the shopping list In Appendix 17(.) Import Is unauthorised Its clearance should not be allowed (.)"

The Customs authorities cannot take advantage of such clarification. This clarification cannot be relied on by the Customs authorities firstly because no public notice has been issued on the basis of such clarification. Secondly the said telex message would show that the authorities were in doubt as to whether the rape-seed was covered by Appendix 17 or not and accordingly a clarification has been made. Had the position been clear then the question of issuance of any clarificatory circular would not have arisen at all and lastly, even assuming that the clarification is effective and binding, that would only be effective from the date when such clarification was made on 11th June, 1987. However the said

clarification does not have any force of law as it was firstly an Inter-departmental communication. Secondly, public in general were not informed by subsequent Issue of any REP Circular and/or Public Notice to the effect that Seeds. ...in column 4 against export product G.2(i)(a) would not cover Rape Seeds. No such circular or public notice was issued by licensing authorities nor was any trade notice issued by the Customs authorities.

37. In this case, the Importers have imported rape-seed prior to 20th May, 1987 and accordingly this clarification cannot govern this present shipment. It is only on 11th August, 1987 the Clearing Agent informed the petitioner as follows:

"With reference to the above we have to Inform you that Customs are taking a negative stand and we do not expect them to dear Rapeseed against REP licences. We understand that they have recently filed an appeal against their previous order of clearance In the case of Agro Impex and M/s. S.V.A Udyog Viniyog Ltd."

This is has been relied on by the Customs authorities but as Indicated earlier the consignment had already been Imported and arrived at much prior to the said inter-departmental clarification received by the Customs authorities. Even if appeals o revisional applications were filed by the Customs Authorities against the orders releasing previous consignments, but that cannot be a ground as no decision in appeals or register contrary to the decision of the assessing authority if any, has been communicated. Merely because an appeal or revision hasten filed does not clothe the customs authorities to change the views already taken or review their own decision. It is only after the decision in appeal or revision by the appellate authority or revisional authority is rendered, such decision can be relied on by the respondents as fresh information that may be used as a ground for not releasing the subsequent consignments. But that Is not the case here. The Customs Authorities have not been provoked by any such information. The respondents have not brought any material before this Court to show that in any appeal or revision, If any filed, any decision has been rendered and if there be any decision unless ft is communicated to the persons affected it cannot have any effect at all.

38. In my view, having regard to the facts and circumstances of this case, the Customs authorities cannot be allowed to ignore their past practice and to adopt different standard and to take different views at different point of time with regard to the Importation of the same commodity. It is, their duty to inform the general public who are importing the goods and making It quite clear that what types of goods would not be allowed. Even If there is a dispute as to the interpretation of the Policy and the licence, the dispute should be resolved in favour of the subject. There is no allegation, as I said, against the importer excepting the doubt raised or expressed whether the REP licences covered the import of the goods or not. Reliance may be placed on several decisions where the Courts have taken a consistent view that if their is a long standing practice of the Customs House to release similar goods against similar licence and two views

about the validity of the Import are possible in that event it cannot be said that the Import is in contravention of the provisions of the Customs Act. Reference may be made to the decisions in (1) Gujarat State Export Corporation Ltd. and another Vs. Union of India and another, (2) In Re: S.S. Kothari reported in 1985 (6) ECC 81 and (3) Impex International v. Collector of Customs reported in 1985 (4) ECC 60.

39. I am, therefore, of the view that even If there be any doubt which the Customs department and the Chief Controller of Imports & Exports allegedly entertained on the question whether the rapeseeds can be imported under REP licences in view of the provisions contained in the import Policy, such doubt has to be resolved in favour of the petitioner and the Customs authorities, therefore, cannot withhold the release of the consignments already imported. In other words if the interpretation of a fiscal enactment is open to doubt, the construction most beneficial to the subject should be adopted.

40. Admittedly the subject goods are exempt in terms of the Notification No. 127/77 read with Notification No. 207/87 from Customs duties and accordingly the question of evasion of duty does not arise in this case. The only ground on which the imports are held to be unauthorised is that goods have not been imported with the previous permission of the Chief of Controller. This objection hi my judgment has no basis at all having regard to the permission obtained from the Government and the terms of the REP licences. Whether or not after the release of the goods, the petitioner will be able to sell the goods In view of the restrictions imposed by the Essential Commodities Act is a matter for the State Government to decide. But this cannot be a ground for holding that the importation is unauthorised or withholding the release of the goods.

41. For the reasons aforesaid, this application is allowed. The respondents are directed to release the consignments forthwith. Let the assessment be made within a week from the date and let the goods be released forthwith thereafter.

42. Mr. Sunil Chatterjee who was appointed Receiver shall make over the goods to the petitioner in terms of this order within a week from date. The Receiver will stand discharged after delivery of such goods to the petitioner. The Receiver shall be entitled to a further remuneration of 200G.Ms. to be paid by the petitioner.

43. The Receiver and parties shall act on a signed copy of the operative part of his judgment and order upon the undertaking of the Advocate on records of the parties D apply for and obtain certified copy.