

Blue Blends (India) Ltd. Vs. Cc

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Sep-17-1999

Reported in : (2000)(89)LC46Tri(Mum.)bai

Judge : S T Gowri, J S Murthy

Appellant : Blue Blends (India) Ltd.

Respondent : Cc

Judgement :

1. The appellant imported a consignment of polyester filament yarn, in September, 1987 and presented for its clearance a REP import licence.

The licence had been issued to M/s. Overseas Enterprises, 266 Jawahar Nagar, Hyderabad and apparently, had been transferred in accordance with law to the importer. The Custom House declined to clear the goods pending enquiries on the information it had received that the licence obtained by M/s. Overseas Enterprises was on the basis of false and forged documents submitted by it. These enquiries and subsequent enquiries with the licensing authority resulted in the issues of orders by the Deputy Chief Controller of Import and Exports, Hyderabad, suspending initially the operation of the import licence in question along with some other licence issued to Overseas Enterprises and subsequently cancelling the import licences on the basis of ground that the licence was obtained on the basis of fraud and misrepresentation of facts and that the firm itself is fictitious.

2. Accordingly, notice was issued to the appellant proposing confiscation of the goods on the ground that the licence was not valid for their clearance. Penalty was also proposed on the ground that it acted in collusion with Shyam Bihani and other persons in obtaining the import licence. Shyam Bihani was a broker, through whom the licence was obtained and apparently known to A.G. Khan of Overseas Enterprises.

Notice alleged that importer was well aware that bona fide of Mr. Khan and its firm are doubtful; and purchased the licence at rates much cheaper than the rates prevailing in the markets. Adjudicating on the notice the Collector in the impugned order, has held the goods not to covered by the licence produced and ordered their classification (sic).

He has not imposed any penalty on its employee.

3. Mr. Harikumar, Export Manager of the appellant contends that the goods were imported when the licence was valid. Any subsequent cancellation of the licence could not affect the validity of the import made under that licence. He relies upon the judgement of the Supreme Court in Union of India v. Sampat Raj Dugar and Anr. 1992 (39) ECR 189 (SC) : ECR C Cus 1875 SC, and other decisions of the Tribunal following this.

He contends that the ratio of these judgements is that a licence is followed till it is cancelled and the licence obtained by fraud or misrepresentation is voidable, and till it is a voided it continues to be valid. Therefore imports made against a licence prior to cancellation are covered by the licence. He also contends that there is insufficient evidence to show that the appellant was connected with the acts of Overseas Enterprises, in its acts of falsification of the documents and the mere fact that Shyam Bihani who was the broker for the licence, having connection with Khan of Overseas Enterprises and the fact that the appellant did not pay the full amount for the licence is not sufficient to impose penalty.

4. The departmental representative contends that the Supreme Court's judgement in East India Commercial Corporation v. CCE is not applicable to the facts of the case. The Court in that case was not concerned with the cancellation of licence

because the licence had not been cancelled.

He cites judgement of the Supreme Court in *Fedco (P) Ltd. and Anr. v. S.N. Bilgrami and Ors.* *Kanta International v. CC* obtained by fraud or misrepresentation is void and any imports made against such licences are therefore unauthorised imports. He placed reliance upon the Commissioner's finding that the appellant had colluded with Khan in the acts of forgery or falsification of the facts to obtain licence justify imposition of penalty.

5. It is no doubt, true that the Supreme Court in *East India Commercial Corporation v. Union of India* was not required to pronounce upon a validity of the licence which has already been cancelled. The facts in that case were that East India Commercial Company, the appellant had applied for, and been granted, a licence to import fluorescent tubes and fixtures. The application for licence mentioned that goods were used for its own use and are only raw material and accessories; stated that the goods were required for the mill at Yellore in Madras for updating lighting system. The licence was issued on condition that the goods were to be used as accessories in the factory, no portion was to be sold after importation. Proceedings were commenced against the importer on the ground that part of the goods imported had been sold. The notice also alleged that the condition according to which the licence was granted that the goods will be utilised as raw material or accessories in the factory was contravened and the licence had been caused to be issued by fraudulent means and hence the goods were liable to be confiscated. Discussing these aspects, the Court in its majority view held that there was no legal basis for the contention that licence obtained by misrepresentation makes the licence non est, with the result that the goods should be deemed to have been imported without licence. The Court, on the assumption that the principles of law of contract apply to the issue of a licence under the Act, said that the licence obtained by fraud is only voidable; it is good till avoided in the manner prescribed by law. The same view has been adopted by the Supreme Court in *Sampat Raj Dungar v. Union of India*; Bombay High Court in *Bansilal Jesasingh v. Union of India* 1980 (16) ECR 393; Madras High Court in *Gemini Metal Works v. Union of India* and *Sneh Sales Corporation v. Union of India* *Fedco Pvt. Ltd. v. S.N. Bilgrami*. The Petitioner had challenged the cancellation of the

licence issued to the first petitioner on various grounds; which are set out in 4 main grounds; these are as follows: a) Clause 9(a) of the Import Control Order under which the order of cancellation has been made is itself unconstitutional, being violative of the petitioner's rights under Article 19(1) and Article 31 of the Constitution; b) The order of cancellation has been made without compliance with the mandatory requirement of clause 10 of Imports Control Order to give the licensee "a reasonable opportunity of being heard"; c) The first respondent had no authority in law to make any order under clause 9 of the Import Control Order.

d) The petitioners have been denied equal protection of laws under Article 14 of the Constitution and other similar persons had been given a proper opportunity and a personal hearing before taking any action against them.

7. The question as to whether as a consequence of cancellation of licence, goods imported under that licence would be unauthorised before such cancellation was not agitated before the Court. We are not able to find in any portion of the judgement, the view that is attributed to it by the departmental representative. The Court said with regard to licence obtained by fraud: The entire scheme of control and regulation of imports by licences is on the basis that the licence is granted on a correct statement of relevant facts. That basis disappears if grant of the licence is induced by fraud or misrepresentation. Whether the licensee himself or some other party is responsible for the fraud or misrepresentation, the fact remains that in such cases the basis of the grant of licensee has disappeared. It will be absolutely unreasonable that such a licensee should be allowed to continue. We are therefore of opinion that the provision that licence may be cancelled, if it is found, after giving a reasonable opportunity to the licensee to be heard, to have been obtained by fraud or misrepresentation is a reasonable restriction in the interests of the general public on the exercise of the fundamental right of a citizen guaranteed under Article 19(1)(f) and (g) of the Constitution. The cancellation being under a valid law there can be no question of any right under Article 31 of the Constitution having been infringed.

8. We are unable to find from this extract and anywhere else in the judgement any support for the proposition put forth by the departmental representative. Kanta

International v. CC Commercial Company v. Collector and Fedco Pvt. Ltd. v. S.N. Bilgrani i.e., whether import of goods claimed under a licence prior to its cancellation would be covered by the licence or not? The Tribunal was of the view that the Supreme Court judgement in East India Commercial Company v. Collector and UOI v. Sampat Raj Dugar had been confined to facts of those cases. It preferred to rely upon what is understood to be the ratio of Fedco Pvt. Ltd. v. S.N. Bilgrani case. As we have noted it is not possible to say that the judgement in Fedco Pvt. Ltd. v. S.N. Bilgrani dealt with arguments advanced as to the effects of the cancellation of the licence obtained by fraud or misrepresentation on the legality of the imports made under that licence prior to such cancellation. We have already indicated about that, in our view, the questions for consideration of the Supreme Court in that decision, did not included this question.

10. It is also not possible to hold that this judgement of the Supreme Court in East India Commercial Company v. Collector and UOI v. Sampat Raj Dugar to be limited to the facts of those cases; there is no such indication in the judgement, that they were limited to facts of those cases. On the contrary, the clear and categorical proposition laid down in East India Commercial Company v. Collector and UOI v. Sampat Raj Dugar are of general applicability. Nor it is possible to appreciate the view expressed by the Tribunal in paragraph 5.1 of its order (referred to above) that, even applying the principles of contract, a licence obtained by fraud and misrepresentation is void ab initio.

Reference has been made in that paragraph to the book Indian Contract Act, by Singhal and Subramanian, 2nd edition, volume II (publisher not cited) in which the decision (by name) Harnathkhar v. Inder Bahadur Singh was cited to say that provisions of Section 65 of the Contract Act do not apply to contracts which were ab initio void to the knowledge of contracting parties. That proposition, if correct, would not apply to cases where one of the parties to the contract was not aware that it was ab initio void. This principle would only apply if it were shown that the government while issuing the licence was aware that it was being issued on the basis of fraud or misrepresentation. That was not the case here, nor was that the case in East India Commercial Company v. Collector or UOI v. Sampat Raj Dugar.

11. It is also to be noted that provisions of the Imports (Control) Order provides for cancellation of a licence obtained by misrepresentation. They had not provided specifically for cancellation, ab initio, nor did they contain any provision that the effect of a cancellation is to invalidate right from the date of issue, a licence that had been issued and thus render unauthorised any imports that may have been made already, prior to such cancellation.

12. On the contrary, there are many decisions of the Tribunal taking the opposite view, stating categorically that the consequences of cancellation of licence do not reach back so as to affect the imports during the currency of licence. Some of these are K.K. Manufacturing Co. v. CCSneh Sales Corporation v. Union of India . The Bench deciding Kanta International v. CC distinguished it on the ground that the seizure of the goods took place (in the matter before it) after they were cleared from the Customs. It took the view, that if the goods have already been cleared the Bench itself might have taken a different view. This aspect had been embodied in paragraph 5.3 of its order. With the greatest possible respect we are unable to understand this reasoning. If it is held (as the Tribunal had already done) that the effect of the cancellation is to render the licence invalid for any imports of goods made before such cancellation, it would make no difference whether the goods were pending clearance or were seized after they were cleared. In either case the same consequences would follow. The relevant date for considering the validity of a licence is the date of shipment.

13. Going by the decision in East India Commercial Company, we would have to take the view that the licence did not cease to be valid for the goods only because it was subsequently cancelled. We are unable to accept the departmental representative's view. There is, however, one aspect of the matter, which the departmental representative has not argued before us. In East India Commercial Company the Court had applied the principles of contract to grant of licence. One of the essential requirements of a contract is that there must be consensus between the contracting parties. Each of the parties must be aware of the true identity of the other party or parties. In the absence of this there is no meeting of minds as to the nature of the contract and what results is not in law, a binding contract. The finding of the licencing authority is that there was no such firm as

Overseas Enterprise and its stated office was occupied by persons entirely unconnected with it has not been challenged. It would then follow that the application for licence was not made by the Overseas Enterprises and licence granted to it. The application that was made and licence was granted was therefore to a non-existent party. There was, therefore, no contract at all between the Government of India, which issued the licence, and the persons to whom it issued. That being the case the licence which has been issued is not a valid licence. Any imports made under such a document are not authorised by law for the purpose of licence. The goods under consideration therefore would be liable to confiscation.

14. No material has been offered to us as to why the redemption fine of Rs. 4 lakhs should be reduced. The amount appears commensurate with the value of the goods of Rs. 9 lakhs approximately, and other factors. We therefore see no reason (to) reduce it.

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