Kamath Packaging Ltd. Vs. Union of India

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Court : Karnataka

Decided On : Sep-03-1990

Reported in : 1991(31)ECC240; 1992(61)ELT548(Kar)

Judge : S.R. Rajasekhara Murthy, J.

Acts : Customs Act, 1962 - Sections 11, 12, 25, 25(1) and 111

Appeal No. : Writ Petition No. 14675 of 1990

Appellant : Kamath Packaging Ltd.

Respondent : Union of India

Advocate for Def. : Shri Ashok Haranahally, C.G.S.C.

Advocate for Pet/Ap. : Shri R. Thyagarajan, Adv.

Judgement :
ORDER

Rajasekhara Murthy, J.

1. Though the Writ Petition was heard on the interim prayer made by the petitioners, elaborate arguments were advanced by the learned Counsel for both the parties and the main writ petition is disposed of by consent of both sides.

2. The petitioner is a Company incorporated under the Companies Act and carrying on business under the name and style of B. S. Kamath and Company engaged in the manufacture of high density polyethylene woven sacks and other articles. The unit went into production in June 1987.

3. Though several contentions are urged in the writ petition relating to the seizure of documents relating to import of machinery which was cleared by the customs, and the validity of search and seizure conducted by the officers of the Customs Department on 25-4-1990, the arguments were confined to the seizure of documents relating to the import of raw materials and its utilisation and about the competency of the Customs Department to call upon the petitioners to furnish details about the same and the related enquiry/investigation about the contravention of the conditions of the import licence.

4. The main prayer of petitioners in this writ petition is for issue of a writ of prohibition restraining the respondents from proceeding with any further enquiry relating to the utilisation and the movement of the raw materials and other related matters.

5. The contentions of the petitioners in this behalf are :

(i) that the Customs Department had no right or authority to call upon the petitioners to furnish details of the import of the raw materials and the utilisation thereof. The petitioners imported the raw materials under an advance licence granted by the Controller of Imports and Exports subject to the conditions attached to the said licence/licences;

(ii) Any breach of the conditions should attract the jurisdiction of the concerned authority, namely - the Enforcement Wing of the licensing authority and it is not for the Customs Department to exercise powers of search, seizure and confiscation. For any breach of the conditions of licence, the constituted authority under the Imports and Exports (Control) Act, is vested with ample powers to investigate and initiate action for any contravention;

(iii) conditions under the licence and the breach thereof come under the immediate, direct and effective control of the Controller of Imports and Exports and the liability to pay customs duty would depend upon the nature of performance by the importer, which includes the utilisation, Mis utilization, non-utilization or diversion, as the case may be.

6. The case of the Department as put forward in the statement of objections to the interim prayer is :

(i) that the import licence is granted subject to certain conditions, one of which is that the goods imported against the advance licence should be utilised in accordance with the Customs Notification No. 116/88, dated 30-3-1988;

(ii) that the petitioner was granted exemption from payment of customs duty in accordance with the duty-exemption-entitlement-certificate, subject to the conditions imposed in the licence itself in accordance with Notification No. 116/88;

(iii) since it was detected by the Customs authorities that the petitioners had contravened the provisions of the Customs Act and the Notification No. 116/88, the Customs Department has jurisdiction to investigate into the matter on the basis of the reliable information about the misuse, and diversion of the raw materials;

(iv) the power to investigate and conduct a preliminary enquiry into the suspected evasion of duty by the Customs Department stems from Section 111(o) of the Customs Act read with Section 25 and the importer is bound to render account of the raw materials imported under the advance licence since the petitioner has obtained exemption from payment of customs duty under the Duty-Exemption-Entitlement-Scheme;

(v) though the licence was issued by the licensing authority under the Imports and Exports (Control) Act, since it involves suspected evasion of payment of customs duty, the customs authorities have, as a co-ordinate authority, power and jurisdiction to enter the premises of any importer and inspect the account books and effect search and seizure in the event of non-compliance with the terms and conditions of the licence, which may ultimately culminate in confiscation of the offending goods in exercises of the powers under Section 111(o) of the Customs Act.

On these grounds it was argued that any post-import action can be taken by the Customs Department.

7. In the light of the contentions of both sides, it becomes necessary to examine the relevant provisions of the two enactments relating to import of goods, prohibition of import of certain goods, the scheme of licensing to import and other related matters.

8. Let me first examine the relevant provisions of the Customs Act, 1962. The object of the Customs Act is to consolidate and amend the law relating to customs. 'Customs' is duty imposed on imports and exports. Law relating to customs relate back to 1878 when Sea Customs Act, 1878, was enacted. This Act was repealed after the Customs Act of 1962 was enacted by Parliament. The main object of the Act is (to) prohibit importation or exportation of goods notified by the Central Government either absolutely or partially or subject to certain conditions. Elaborate procedure is laid down in the Customs Act relating to detection, prevention and levy of duty and to take penal action for offences and contravention.

9. Section 12 is the charging section. The rates of duty of customs to be levied are provided in the Customs Tariff Act, 1975, under which are specified the goods and the duty to be levied under the Customs Act.

10. Section 25 empowers the Central Government to exempt fully or partly, the duty leviable or subject to such conditions as it may impose. The notifications and orders issued by the Central Government by virtue of the powers conferred on it under Section 25 form as volume and the Act is administered mainly on the basis of the orders and notifications.

11. Section 25(1) assumes importance in the context of the contentions raised in the present case. Several varieties of licences are issued under the various orders issued under Section 3 of the Imports and Exports (Control) Act, 1979 known as Import Control Orders. The orders and schedules appended thereto indicate the

goods which are permitted to be imported under licences issued by the specified authorities and the rates, etc.

12. Import of goods other than those specified by the Central Government is prohibited by virtue of Section 11 of the Customs Act, 1962. But import of notified goods is permitted subject to restrictions that may be imposed by the Central Government under Section 3 of the Imports and Exports (Control) Act, 1979. Under Section 3(3)(i), if any goods imported under a licence do not conform to the descriptions or value of the goods as contained in the licence, or do not con from to the other conditions contained in or applicable to the licence, the import of such goods shall be deemed to be prohibited under Section 11 of the Customs Act.

13. The meaning of the expression, 'prohibited', should be understood in the context of the meaning given to it in Section 3(2) of the Imports and Exports (Control) Act, which, in turn, makes a reference to Section 11 of the Customs Act. Both the two enactments form a complete code and are administered as forming one scheme. Both the enactments have to be interpreted harmoniously keeping in view the several provisions which may overlap in several areas which are meant to regulate the import and export of the specified goods notified by the Central Government under the Customs Act.

14. Now, coming back to Section 25(1) of the Customs Act, the Central Government is conferred with power to exempt from duty absolutely and subject to such conditions as may be specified in the notification.

15. Notification No. 116/88 dated 30-3-1988 is one such notification falling under general exemptions relating to Import Tariff issued under Section 25(1) of the Customs Act. The important clause for purposes of this case is clause (d), which is one of the conditions under which the whole of the duty payable under the Customs Tariff Act is exempt. The said condition reads thus :

'(d) the exempt materials shall be utilised for the manufacture of resultant products specified in Part 'E' of the said Certificate or for export as mandatory spares, and no portion thereof shall be sold, loaned, transferred or disposed of in any other manner.'

16. The advance issued in this case under the Import Trade Control read with Duty Exemption Scheme contains a specific condition No. 3, which reads thus :

'3. The goods imported against this advance licence shall be utilised in accordance with the provisions of the Customs Notification No. 116-Customs, dated 30-3-1988'.

Condition No. 2 in the said licence which is relevant is also reproduced below :

'2. To ensure fulfilment of export obligation as mentioned in 1 above the firm shall before clearance of the first consignment would execute a joint legal undertaking/joint for 100% customs duty backed by bank guarantee as in Appendix XIX/F/G of the Hand Book of Import Export procedures 1988-91 for a sum of Rs. .... for fulfilling export obligation and a bond mentioned in duty exemption entitlement certificate for utilisation of imported raw materials duty-free with this office. The legal undertakings backed by bank guarantee shall be valid for a period of three years.'

17. The licence was issued to the petitioners under the Customs Exemption Entitlement Scheme. Condition No. 3 specifically mentions that the goods imported against the advance licence shall be utilized in accordance with the provisions of the Customs Notification No. 116/88 dated 30-3-1988. The said notification is issued by the Central Government in exercise of the powers conferred by Section 25(1) of the Customs Act.

This provision should be read along with Section 111(o) of the Customs Act, which reads thus :

'111. Confiscation of improperly imported goods, etc.

The following goods brought from a place outside India shall be liable to confiscation :

xx xx xx xx

(o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer;'

18. The said section confers power of confiscation of imported goods, if they are not properly utilised and the conditions of the licence not observed. Such goods, wherever contravention is proved by the Department would be liable to confiscation as 'improperly imported goods'.

19. The contention of the Central Government in this case is that the goods imported were found to have been sold to other parties in contravention of the terms of the conditions of the exemption notification. It is, therefore, argued that the raw materials found to have been not utilised for the purpose for which it was permitted to be imported without payment of duty, are liable to confiscation in exercise of powers conferred under Section 111(o) of the Customs Act. It was, therefore, argued that the investigation and other enquiries conducted by the Customs Department on the basis of the tangible material in their possession are actions authorised under the provisions of the Act and all proceedings taken by the Department in this direction are within its powers. It is therefore, contended for the Department that the investigation now being carried on relating to the diversion of the raw materials is being done to collect evidence, and no show-cause notice is yet issued to the petitioners.

20. Elaborating the contentions of the petitioners it was argued that the customs have no authority to call upon them to furnish details of the utilisation of the raw materials and its movement. Their main plank is that the licensing authority alone is competent to investigate into the utilisation of the raw materials also. They have quoted in extenso the provisions of the Imports and Exports Control Act and the rules and orders issued thereunder to show that the competent authority under the Act is empowered to take action to penalise the petitioners and recover the customs duty payable besides power to confiscate the goods.

21. No doubt, the Imports and Exports (Control) Act does empower the adjudicating authority to confiscate the imported goods or materials for any contravention of the conditions of licence, which includes non-utilization/diversion of such goods or materials.

But the question that still remains to be decided is, whether the customs have power to investigate for the very same contravention and initiate action under the Customs Act

22. The adjudicating authority under the Imports and Exports (Control) Act, can take action for the contravention of the conditions of licence or letter of authority under which the goods are imported. The contravention covers utilisation or distribution of such goods or materials and the authorities under that Act can exercise powers relating to any of the contraventions coming under purview of that Act including confiscation of the goods or materials.

23. Identical powers are conferred on authorities under the Customs Act also. In this case, the Customs Authorities on the basis of credible information effected search of the various premises of the petitioner-company and seized some documents which are now being processed by the Department and in that connection have issued letters calling upon the petitioners to furnish more information about the utilisation of the raw materials.

24. As stated by the respondents in their objections, the matter is under investigation and the Department is yet to form an opinion whether a show cause notice is required to be issued to initiate further action.

25. No doubt, there is some overlapping with regard to the powers vested on the authorities administering both the enactments. The scheme for enquiry and the action taken by the officers of either of the two Departments for contravention of the conditions of licence may culminate in penal action, levy of customs duty and also confiscations of the goods in question.

26. I have examined various provisions of the Customs Act and the Imports and Exports (Control) Act, and the Customs Tariff Act and the various orders and notifications issued by the Central Government under these enactments. What emerges is that for any contravention of the conditions under which and subject to which the advance licence is issued to the petitioner-company, would be amenable to the jurisdiction of the Customs Authorities. It is not possible to agree with the contentions of the learned Counsel for the petitioners that it is the

exclusive jurisdiction of the licensing authority alone to take any follow-up action and the Customs have no jurisdiction whatsoever to investigate into a case where non-utilization or diversion of the raw material imported under the duty exemption scheme, is detected.

27. An authority which grants exemption is also equally competent to cause enquiries to be made for the purpose of satisfying itself whether the importer has complied with the conditions of the licence. That such enquiry and investigation could be necessarily a post-import enquiry cannot be disputed.

28. I now proceed to examine the decisions cited by Sri Thyagarajan for the petitioners. He laid great stress on the decisions of the Supreme Court in :

(i) M/s. East India Commercial Co. Ltd., Calcutta & Anr. v. Collector of Customs & Anr. : 1983(13)ELT1342(SC) ,

(ii) Bennett Coleman and Co. Ltd. & Ors. v. Union of India & Ors. : [1973]2SCR757 , and

(iii) Union of India v. Oceanic Export Corporation. (Writ Appeal Nos. 1043 to 1049/1988 of Madras High Court).

In the first case, Sri Subba Rao, J. (as he then was), delivering the majority Judgment held, that the customs had no jurisdiction to initiate proceedings under Section 167(8) of the Sea Customs Act read with Section 3(2) of the Imports and Exports (Control) Act. That was also a case wherein the petitioners had prayed for issue of a writ of prohibition restraining the Customs Authorities from continuing with the proceedings initiated under Section 167(8) of the Sea Customs Act.

29. It has got to be noticed that the Supreme Court was dealing with the Sea Customs Act, 1878. The Supreme Court was not dealing in that case with the provisions of S. 23 of the Sea Customs Act, which is in pari materia with Section 25(1) of the Customs Act.

30. It was held on the facts of that case that the Chief Controller of Imports may refuse permanently or for a specified period refuse further licence for

contravention of any of the conditions of licence. Conditions similar to conditions 2 and 3 under which the advance licence is issued in this case came up for consideration. Hence, it was held, that the Customs had no jurisdiction to initiate proceedings under Section 167(8) of the Sea Customs Act.

31. This decision was referred by this Court K.A.S., J. in Pooja Exporters v. Asstt. Director, DRI - 1989 (41) E.L.T. 21. That was also a case, more or less, identical on facts and the prayer in the said case was also for issue of writ of prohibition restraining the Assistant Director, DRI, for conducting/holding any proceedings/enquiry with respect to the raw silk imported by the petitioner therein under an advance licence issued under the Duty Exemption Scheme. The licence in that case was issued subject to similar conditions, as in the present case. Notification No. 44 dated 19-12-1987 issued under Section 25(1) of the Customs Act, 1962, imposed conditions identical to those that are imposed under Notification No. 116/88.

32. This Court held, that the provisions of Section 25 read with Section 111(o) of the Customs Act, 1962, can be pressed into service by the Customs Authorities to assume jurisdiction under the said provision to investigate into any alleged contravention of the conditions of licence and the notifications issued under the Customs Act.

33. The decision of the Supreme Court in M/s. East India Company : 1983(13)ELT1342(SC) , was distinguished by His Lordships having regard to the conditions of the licence that were imposed in the licence in that case. Sri K. A. S., J. held that it was case of contravention of the conditions of the licence and the notification issued under the Customs Act and the Customs Authorities had every authority to seize the goods and proceed with the further investigation in accordance with the provisions of the Act.

34. I respectfully agree with the views expressed by Sri K. A. S., J. and supplement my order with additional reasons.

35. The second case relied upon by Sri Thyagarajan is Bennett Coleman & Co. Ltd. : [1973]2SCR757 . The Supreme Court was dealing with the challenge made

to the Newsprint Policy of the Government of India as violative of Articles 19(2) and 14 of the Constitution. While dealing with the scope of Section 3(1) of Imports and Exports (Control) Act, 1947, the Supreme Court observed that the power under that Section is not restricted merely to prohibit or restrict imports but extends also to controlling the subsequent disposal of the goods imported and further observed that the importer would be amenable to the jurisdiction of the licensing authority in the matter of utilisation of those goods.

36. Same is the view expressed by the Supreme Court in the two other decisions of the Supreme Court in :

(i) Abdul Aziz v. State of Maharashtra : 1963 CriLJ403 , and

(ii) State of West Bengal v. Mothilal Kanoria : 1966 CriLJ1210 , which dealt with the conditions of licence under Imports and Exports (Control) Act, 1947, and the Import (Control) Order, 1955 and the consequences of such contravention and the effect of transfer of the licence.

37. Two decisions of the Madras High Court and the decision in The Union of India v. M/s. Cayvero Southern Corporation (W. As. 1126 and 1127/85) were cited by Sri Thyagarajan.

38. In the said cases also the petitioners had prayed for issue of a writ of prohibition against the Customs Authorities from taking any proceedings under the Customs Act. The Customs authorities had searched and seized from the petitioners various files licences and in some cases impounded the imported articles. The seizure of documents and goods was effected on the basis of information in the possession of the Customs Department that the goods imported were not utilised for the purpose they were permitted to be imported and in some cases they were also sold to others.

39. Similar contentions were advanced by the petitioners in those cases and against the order of injunction issued in the writ petitions, writ appeals were field by the Union of India and Collector of Customs. The Customs Department had been restrained from conducting or holding any enquiry in respect of the goods

imported under the Duty Exemption Scheme against the detention certificates issued by the Department to detain them in the harbour.

40. The learned Advocate General, who appeared for the Union of India contended that the Customs Department had authority to investigate whether the imports made under the scheme had been properly utilised. It was further argued that the Department has the necessary jurisdiction to investigate into the Mis utilization or diversion of the goods imported since under the Import-Duty Entitlement Scheme, customs duty will have to be paid for any contravention of the conditions of the licence. It was also the case of the Department that the Chief Controller of Imports and Exports have certain powers to monitor the transactions of the imports.

41. But the High Court upheld that contention of the petitioners that the obligations of the licensees and the contravention, if any, come under the immediate, direct and effective control of the Controller of Imports and Exports and the liability to pay customs duty would have to be decided only by the licensing authority depending upon the performance of the importer in relation to the import obligations. It was also observed by the High Court that the licence was issued by the Co-ordinate Authority, viz., the Controller of Imports and Exports, and, unless a decision was taken by that authority, whether Customs Duty had become payable or not, the Customs Authority had no jurisdiction to entrench upon the powers of the Controller. It was, therefore, held that the Customs Department would have no jurisdiction to seize the goods or choose to exercise any of the powers under the Customs Act, even in the case of information about misutilisation, mis-application or even sale of the raw materials to third parties.

42. It was ruled by the Madras High Court that even in cases of gross irregularities or evasion of customs duty, the Customs Department will have to forward the particulars of such information to the Controller of Imports and Exports and will have to take the follow-up action only after the Controller decides, whether any duty had become payable.

43. Against the Judgments the Division Bench of the Madras High Court, petitioners, filed special-leave-petitions before the Supreme Court and by order

dated 4-9-1986, it was ordered that the SLPS, be listed along with the connected-SLPS, and in the meanwhile, adjudication-proceedings may not go on. The information as to what happened later, to the SLPS, and to the interim order is not furnished by either of the party before me.

44. However, on the important question as to the jurisdiction of the Customs Department to search, seize and investigate and take action under the provisions of the Customs Act in similar circumstances, is not decided by the Supreme Court so far. With all respect to their Lordships of the Madras High Court, and, after a careful study of all the relevant provisions of both the enactments which are supplemental to each other, I am of the opinion that the Principal Act is the Customs Act under which import of certain notified goods is prohibited and contravention of the conditions of licences issued under the Imports and Exports (Control) Act in respect of the prohibited goods has necessarily to be investigated by the authorities under the Customs Act.

45. The argument of the petitioners that the jurisdiction of the Customs Department is altogether excluded merely because both the enactments contain similar and parallel powers conferred on the respective authorities administering the particular act is, therefore, rejected. As already explained, it is the primary and statutory responsibility of the Customs Department to investigate into any irregularities committed by the licencees which may result in evasion of customs duty.

46. In this view of the matter, I uphold the action taken by the Customs Authority to unearth evasion of duty and to take all such proceedings as empowered by the Act.

47. The Writ Petition is, therefore, dismissed.