

**Prabhat General Agencies Vs. Collector of Customs**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

**Decided On :** Nov-17-1983

**Reported in :** (1984)(16)ELT519Tri(Mum.)bai

**Appellant :** Prabhat General Agencies

**Respondent :** Collector of Customs

**Judgement :**

1. This is an appeal arising out of and directed against the Order-in-Appeal dated 6-7-1982 passed by the Central Board of Excise & Customs. The facts of the case leading to the present appeal, briefly stated are that the appellants imported at Bombay Port, 39 pallets (1950 Bags) of Pentaerythritol, valued at Rs. 4,96,519/- C.I.F. from U.S.A. by the vessel PRESIDENT POLK. They filed a Bill of Entry No.2354/20 dated 24-3-1981 and produced import Licence No.P/S/1908630/C/XX/74/N/79 dated 19-2-1980 for clearance of the goods.

The said licence had, however, been cancelled by the Deputy Chief Controller of Imports & Exports, Calcutta, by his order dated 10-3-1981. The Customs, therefore took the view that the goods appeared to have been imported without a valid import licence and accordingly issued show cause notice to the appellants. In response to the notice dated 11-9-1981, the appellants averred that M/s Laxmi Metals, Bhagalpur, to whom the licence was originally issued (and from whom the appellants held a Letter of Authority to import the goods) was in existence on 19-2-1980, the date of issue of the licence and that, therefore, the licensing authority could not have cancelled the licence on the ground that "the firm doe's not exist

and therefore, this licence may not serve the purpose for which it has been issued." In any event, the cancellation could take effect only from the date of the order of cancellation, namely, 10-3-1981. The Additional Collector of Customs, Bombay, on adjudication, confiscated the said goods without giving the importers an option to redeem the goods on payment of a fine. The appellants went up in appeal before the Board who, while upholding the Additional Collector's order, modified the order on absolute confiscation to one allowing the appellants the option to clear the goods on payment of a fine of Rs. 5.00 lakhs. It is against this order that the appellants have come in appeal before us.

2. The appeal was heard on 29-9-1983. Shri Talyar Khan, the learned Counsel for the appellants, submitted that the subject goods had been shipped long before the import licence was cancelled. The import licence in question was issued on 19-2-1980 to M/s Laxmi Metals of Bhagalpur who, on 27-7-1980, issued a Letter of Authority to the appellants authorising them to import goods against the said licence.

Though the date of placement of the order for the goods is not on record, the Letter of Credit covering the payment of the goods was opened on 6-11-1980. At the exporting end, the learned Counsel continued, the Bill of Lading was dated 23-12-1980 and the goods were placed on board on 8-1-1981. The goods arrived at Bombay Port on 23-2-1981 and the Bill of Entry was filed on 24-3-1981.

3. Shri Talyar Khan submitted that on 27-7-1980 when the Letter of Authority was issued by M/s Laxmi Metals, the licence holder, to the appellants, the signature of the signatory to the said Letter of Authority was duly verified by the State Bank of India as evidenced by the Bank's endorsement. Referring to the Dy. CCI&E's order of 10-3-1981, the Counsel drew our attention to Clause 9 of the Imports (Control) Order of 1955 governing cancellation of licences. It was submitted that though the Dy. CCI&E invoked Clause 9(1) (a) of the said Order to cancel the import licence, the ground adduced was really relevant for cancellation of licences in terms of Clause 9(1) (cc). The relevant portions of the Import Control Order read as follows : - (1) The Central Govt. or the Chief Controller of Imports and Exports or any other officer authorised in this behalf may cancel any licence granted under this Order or

otherwise render it ineffective : (a) if the licence has been granted through inadvertence or mistake or has been obtained by fraud or mis-representation ; (cc) if the Central Government or such officer is satisfied that the licence will not serve the purpose for which it has been granted." While the Additional Collector expressed the view in his order that the Dy. CCI&E's order of cancellation was defective (and went to say that the order was appealable and the importers could get their grievance redressed), he held, without any basis or supporting material, that the intentions of the importers were mala fide inasmuch as the order for.

the goods was placed after the licence-holder had closed the factory and that even if the goods were released to the importer who was the Letter of Authority holder, the goods could not be delivered to the Actual User (the licence holder) who had ceased to exist. The Additional Collector had no powers to confiscate the goods on this basis. No other basis had been disclosed leading to the confiscation order.

4. Turning to the Board's order in appeal, Shri Talyar Khan submitted that paras 5 and 11 of the Order were contradictory to each other. Para 5, which was a reproduction of the Dy. CCI & E's order, stated that M/s Laxmi Metals, Bhagalpur was issued an import licence as a SSI new unit on the basis of recommendation from the General Manager, District Industries Centre, Bhagalpur, para 11 stated that the licence had been obtained by M/s Laxmi Metals when the firm had been closed and even the machinery had been disposed of, the Proprietor had not only de-registered the firm but was not even traceable. In other words, the firm was not in existence when it obtained the licence. Similarly, it had been incorrectly stated in para 13 of the Order that the Show Cause Notice had been issued on 1-1-1981 whereas the goods had been shipped on 22-2-1981, the actual position was that the Show Cause notice was issued on 11-9-1981 and the goods were shipped on 8-1-1981.

(We may observe here that the show cause notice dated 1-1-1981 was evidently the notice of that date issued by the licensing authority in the matter of cancellation of licence and not the notice of 11-9-1981 issued by the Customs authorities).

5. Shri Talyar Khan stated that the goods had since been auctioned by the Customs authorities for a sum of Rs. 10,49,000/-.

6. Shri Talyar Khan then made a few legal submissions. Unless goods were imported at a time when a prohibition was in force, the import could not be said to be against Section 111(d) of the Customs Act. In the present case, the goods were imported on 23-2-1981 on which date the import licence was valid (not having yet been cancelled and in existence. In this connection, the learned Counsel relied upon the Bombay High Court judgment in *M.S. Sawhney v. Sylvania Laxman Ltd.*, 1975 (Vol. 72) BLR P. 380 and the judgment of the Calcutta High Court in *Addl. Collector of Customs v. M/s Sita Ram Agarwal*-MR 1962 CAL 242-and submitted that the event of "import" took place outside India and carrying vessel entered the Indian Customs Waters (Section 2(23) and 2(28) of the Customs Act). It was this date on which the event of import took place that was relevant for determining whether the import had infringed any prohibition. The infringement could be said to have taken place only if, on such relevant date, there was a prohibition in force. In the present case, the licence, not having been cancelled on the date of import, was valid on that date and, therefore, Section 111(d) of the Customs Act was not attracted.

The learned Counsel then submitted that an import licence could not be voided retrospectively ; it could be made void only from the date of cancellation. That was the correct position in law even in a case involving fraud or misrepresentation as laid down by the Supreme Court in *East India Commercial Co. v. Collector of Customs*-AIR 1962 SC 1983.

7. Concluding, Shri Talyar Khan submitted that, in the present case, having regard to what had happened, Clause 10(c) of the Import (Control) would apply and the Tribunal should be pleased to order that, after deduction of the expenses of auction and the duty leviable on the goods, the balance of the sale proceeds should be returned to the appellants.

8. Appearing on behalf of the Respondent, the learned Departmental Representative submitted that the order of cancellation of the licence had the effect of making the licence invalid ab-initio. If the appellants were aggrieved with the order of cancellation, they could have preferred an appeal to the competent authority but the Tribunal was not the forum for agitating this matter. It was not

correct to say that the event of import was complete when the goods entered the Indian Customs Waters. "Imported goods", according to Section 2(25) of the Customs Act, meant any goods brought into India from a place outside India but did not include goods which had been cleared for home consumption. Section 111(d) of the Customs Act dealt with goods imported in contravention of any prohibition in force. Since there was no valid licence for clearance of the goods, the goods were correctly held to be imported without a valid licence. Even if it was held that cancellation of the licence took effect only from the date of cancellation of the licence, i.e. 10-3-1981, and not ab-initio, on the date the Bill of Entry for clearance was filed, i.e. 24-3-1981, there was no valid licence for clearance of the goods.

9. Shri Krishna Kumar further submitted that the benefit of Clause 10(c) of the Import (Control) Order was available only to the actual licence holder and not the Letter of Authority holder. The relief under the said clause had to be given by the Chief Controller of Imports & Exports and not the Tribunal. The goods having been validly confiscated, the sale proceeds could not be ordered to be made over to the CCI & E.10. The D.R. referred to certain exchange of correspondence between Laxmi Metals, the District Industries Centre, the State Bank of India and the appellants. Shri Talyar Khan objected to their being admitted at this stage since the order of the lower authorities or even the order of cancellation of the licence did not refer to these documents, though the said correspondence was in existence on the date of the order of the Addl. Collector as also on the date of the order of the Board. We have seen that these letters which constitute correspondence between the Asstt. Collector of Customs, Bombay and the Dy. CCI & E Calcutta (dated 20-2-1982 and 24-3-1982) were apparently not disclosed to the appellants, though they were in existence before 2-4-1982, the date the Addl. Collector of Customs made the order of confiscation and that they have not been adverted to in his order. We, therefore, uphold Shri Talyar Khan's objection.

11. We have carefully considered the submissions of both sides. The crucial question to be answered is whether the subject goods could be said to have been imported without a valid licence attracting the mischief of Section 111(d) of the Customs Act. We are not concerned in these proceedings with the correctness or

otherwise of the order of cancellation of the licence passed by the Dy. CCI & E, Calcutta. We have to notice the order as it stands. The order, though it purports to be under Clause 9(a) of the Import (Control) Order, is really one under Clause 9 (cc) in view of the clear ground expressly stated therein. The order does not, on the face of it, show anything to indicate that the cancellation was to take effect from a prior date -the date of issue of the licence. It is relevant to note here that Clause 9(3) of the Import (Control) Order provides that the competent authority may, by order, render ineffective, or suspend the operation of any licence, where proceedings for cancellation of such licence have been initiated under sub-clause (1). This clearly implies that unless an order in terms of Clause 9(3) is made, the licence continues to be operative till an order of cancellation is made in terms of Clause 9(1). No evidence has been produced before us to show that such an order under Clause 9(3) was made in the case of the present licence. The licence should, therefore, be deemed to have been operative and valid till 10-3-1981 on which date the Dy. CCI & E made his order of cancellation of the licence. The Department's contention that the cancellation order rendered the licence void ab-initio must, as a consequence, be rejected.

12. The appellants' contentions that they were not served with a show cause notice by the Dy. CCI & E, that they came to know of the cancellation of the licence only when the Customs authorities made this fact known to them after they filed a Bill of Entry for clearance of the goods and that, as the Letter of Authority holders, they had, in good faith, proceeded to import the goods in the meanwhile have not been controverted by the Department. Nor has any evidence negating these contentions been placed before us. We see from the appellants' reply to the Customs show cause notice that they were willing to comply with any directions for the appropriate utilisation of the goods on being reimbursed of all expenses incurred by them. The Customs, however, do not seem to have taken any notice of this submission.

13. Shri Talyar Khan has cited before us several judicial decisions in support of his stand. It appears, however, necessary to refer only one of them for, that settles the point beyond doubt. In the case of East India Commercial Co. Ltd.,-1983 ELT 1342 (S.C.), the Supreme Court, by- a majority judgement, observed in para 35 :-

"35, Nor is there any 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 in contravention of the order issued Under S. 3 of the Act so as to bring the case within cl. (8) of S. 167 of the Sea Customs Act. Assuming that the principles of law of contract apply to the issue of a licence under the Act, a licence obtained by fraud is only voidable: It is good till voided in the manner prescribed by law. On May 1, 1948 the Central Government issued an order in exercise of the power conferred on it by S. 3 of the Act to provide for licences obtained by misrepresentation, among others, and it reads : "The authorities mentioned in the Schedule hereto annexed may under one or other of the following circumstances cancel licences issued by any officer authorised to do so under Clauses (viii) to (xiv) of the notification of the Government of India in the late Department of Commerce, No. 23/ITC/43, dated 1 July, 1943, or take such action as is considered necessary to ensure that the same is made ineffective, namely :- (i) When it is found subsequent to the issue of a licence that the same has been issued inadvertently, irregularly or contrary to rules, fraudulently or through misleading statement on the part of the importer concerned; or (ii) When it is found that the licensee has not complied with any one or more of the conditions subject to which the licence may have been issued.

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#### SCHEDULE

Clauses	Licensing	authority	Cancelling
Clause (xiii)	Any officer authorized	Chief Controller of Im-	by the Central Govern-

ports and/or Govt. of This order, therefore, authorised the Government of India or the Chief Controller of Imports to cancel such licences and make them ineffective. The specified authority has not cancelled the licence issued in this case on the ground that the condition has been infringed. We need not consider the question whether the Chief Controller of Imports or the Government of India, as the case may be, can cancel a licence after the term of the licence has expired, for no such cancellation has been made in this case. In the circumstances, we must hold that when the goods were imported, they were imported under a valid licence and therefore it is not possible to say that the goods imported were those prohibited or

restricted by or under Ch. IV of the Act within the meaning of cl. (8) of S. 167 of the Sea Customs Act." When the Court has held that even a licence obtained by fraud is only voidable, that it is good till voided in the manner prescribed by law, there is no basis whatsoever for taking the view, as the Department wants us to do, that the licence in the present case should, by reason of its cancellation by the order of 10-3-1981, be deemed to have been invalid ab initio from 18-2-1980, the date of its issue. When the goods were shipped from abroad and even when the goods arrived in India, the licence was in force. It cannot, therefore, be said that the goods were imported without a valid licence. In this view of the matter, the order of confiscation is bad in law. The orders of the lower authorities are set aside.

14. The appellants did not redeem the goods as allowed by the Board. In due course, the goods were disposed of by the Customs authorities in auction. The appellants would, therefore, be entitled to receive the sale proceeds after deducting the expenses of sale and the duty leviable on the goods. We order accordingly and direct that the Addl.

Collector of Customs shall give effect to this order within 3 months from the date of communication of this order.

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