

Taarika Export and anr. Vs. Union of India (Uoi) and anr.

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Court : Delhi

Decided On : May-30-2003

Reported in : 2003VAD(Delhi)261; 105(2003)DLT569; 2003(69)DRJ392; 2003(90)ECC107; 2004(171)ELT163(Del)

Judge : S.K. Mahajan, J.

Acts : Import and Export (Control) Act, 1947 - Sections 4I(1), 4I(9), 4K and 4L; Import (Control) Order, 1955; Foreign Trade (Development and Regulation) Act, 1992 - Sections 20(2); [Constitution of India](#) - Article 226

Appeal No. : Civil Writ No. 623/1998

Appellant : Taarika Export and anr.

Respondent : Union of India (Uoi) and anr.

Advocate for Def. : Maninder Singh and ; Nishakant Pandey, Adv.

Advocate for Pet/Ap. : Rajiv Dutta, Sr. Adv. and; Atul Nanda, Adv

Disposition : Petition dismissed

Judgement :

S.K. Mahajan, J.

1. This order will dispose of the writ petition filed by the petitioners to challenge the order dated 13th November, 1995 passed by the Additional Director General of Foreign Trade imposing a penalty of Rs. 45 lacs on the petitioners for their having failed to fulfill the export obligations and thus contravening Section 4-I(1)(a) of the Import and Export (Control) Act, 1947 as also the order dated 12th August, 1997 passed in appeal by the Appellate Committee. A few facts relevant for deciding this petition are :-

Under the EXIM Policy 1990-93, the Government of India had framed a duty exemption scheme. The objective of the scheme was to make available to the registered exporters, the necessary inputs needed for export production at international prices without payment of customs duty, as per the relevant Customs Notification issued in that regard so as to make the exports competitive in the international market. The importers were issued licenses to import raw material free of customs duty subject to actual user conditions. Under the policy, the petitioners also applied for issue of advance license. A license to import Dupion Yarn, Mulberry Raw Silk and Fusing Lining Ana trial was issued to the petitioners for manufacturing the resultant product, description of which was given in the duty exemption entitlement certificate (DEEC). The license was issued to the petitioner subject to the following conditions :-

'(i) They would export 5400 Nos. of mulberry mixed silk jackets/blazer with fusing lining material for an FOB value of Rs. 36,42,800/- (US \$ 1,41,603.66) within a period of nine months from the date of clearance of first consignment.

(ii) To ensure fulfillment of export obligation they would, before clearance of the first consignment, execute a bond for Rs. 42,74,529.16 with Bank Guarantee for Rs. 5,91,729.16.

(iii) The goods imported against the said Advance license would be utilised exclusively in the manufacturing of the resultant produce.

(iv) In the event of their failure (A) to fulfill the export obligation within the prescribed time limit stipulated above or (B) to produce the prescribed documents/information within 30 days after the expiry of the export obligation

period, the bond/LUT agreement condition shall be enforced and the licensee shall be liable to the different follow up, penal actions prescribed in the Import-Export Policy and Handbook of Procedures, 1990-93. The licensee shall also pay, without demur to the customs authorities, the concerned duty on the proportionate quantity of goods corresponding to the products not exported. Any shortfall will also be liable to adjustment from any application for license pending in that office or received in future.

(v) The action in clause (iv) shall be without prejudice to any other action that may be taken against the licensee under the Import (Control) Order, 1955, as amended.'

2. The petitioners requested for amendment of the advance license on 21st February, 1992 as they intended to import only Dupion Yarn 1100 Kgs. and mulberry raw silk of 250 Kgs. and did not intend to import the fusing lining material of CIF value of US \$ 6,750. The petitioners committed to fulfill the export of the resultant product for a FOB value of US \$ 41,603.66. The request of the petitioner was considered by the office and on 31st March, 1992 the license was, accordingly, amended. The petitioner failed to fulfill its export obligations inasmuch as against 5400 Nos. of mulberry mixed raw silk jackets/blazer, the petitioner could export only 2429 Nos. of mulberry mixed silk garments and there was a shortfall in the export obligations to the tune of Rs. 27,20,462/-. On 22nd December, 1992 petitioners made a request for grant of extension of six months to enable them to export the balance quantity by April 30, 1993. As the export obligations could not be fulfilled even up to that period, the petitioners again approached for extension of time to fulfill its export obligations but the petitioners' request was rejected and on 29th December, 1994 the petitioners were asked to produce documents/information in respect of the advance license. The petitioners, however, failed to send the requisite information/documents. A show cause notice dated 2nd May, 1995 was, accordingly, issued in the exercise of powers under Section 4-K of the Import and Export (Control) Act, 1947 and clause 8 of the Imports (Control) Order 1955 requiring the petitioners to show cause under Section 4-L of the Act and under clause 10(1) of the aforesaid order as to why penalty be not imposed upon them under Section 4-I(1)(a) of the said Act and why

the petitioners be not debarred from importing any goods, receiving import license and allotment of imported goods through STC/MMTC or any other similar agency under clause 8(1) of the Imports (Control) Order 1955 read with Section 20(2) of the Foreign Trade (Development and Regulation) Act, 1992.

3. In the show cause notice it was stated by the respondents that 'as you have failed to fulfill the remaining export obligation imposed under the said license, there are, prima facie, reasons to believe that the duty free imported goods valued at Rs. 9,10,125/- (CIF) have been utilised by you and also failed to fulfill the balance export obligation for fob value of Rs. 27,20,462/- within stipulated time and thus violated the conditions of advance license/LUT'. Reply to the show cause notice was filed by the petitioner on 14th June, 1995. After giving personal hearing to the petitioners, the Additional Director General of Foreign Trade passed the order dated 13th August, 1995 and considering the shortfall in export to the tune of Rs. 27,20,462/-, he held the petitioners guilty of contravening Section 4-I(1)(a) of the Imports and Exports (Control) Act, 1947 read with Section 20(2) of the Foreign Trade (Development and Regulation) Act 1992 and clause 8(1)(f) and (g) of the Imports (Control) Order, 1955 and in exercise of the powers under Section 4-K of the Imports Exports (Control) Act and penalty of Rs. 45 lacs was imposed upon the petitioner No. 1 firm and its partners. This order was challenged by the petitioners by filing an appeal before the Appellate Committee. After hearing arguments of learned counsel for the petitioners, the Appellate Committee by its order dated 12th August, 1997 rejected the appeal. Aforesaid two orders, namely, the order dated 13th August, 1995 passed by the Additional Director General of Foreign Trade and the order dated 12th August, 1997 passed by the Appellate Committee of the Ministry of Commerce, Government of India are now challenged by the petitioners by filing the present writ petition.

4. Contention of learned counsel for the petitioners is that firstly the original order could not have been passed by the Additional Director General of Foreign Trade as he was the appellate authority and had no jurisdiction to adjudicate and decide the show cause notice given to the petitioner and secondly action under Section 4-I(1)(a) of the Imports and Exports (Control) Act could be taken against the petitioner only if the petitioner had misused the imported goods. It is submitted that

nowhere in the show cause notice it is alleged by the respondents that the imported goods were misused by the petitioners and until and unless allegations were made in the show cause notice that the goods imported under the policy were mis-utilised, penalty could not be imposed under Section 4-I(1)(a) of the Act. For this reliance is placed upon a judgment of this Court in Optina Impex Private Limited Vs . Union of India, : 2003(151)ELT493(Del) .

5. To elaborate the first argument, it is contended by learned counsel for the petitioners that the Additional Director General of Foreign Trade did not have any jurisdiction to try, entertain and adjudicate upon the show cause notice and by doing so, one right of appeal of the petitioners had been taken away. It is submitted that since the value of the goods in relation to which the power was exercised were of the value of less than Rs. 10 lacs, it was the Joint Director General of Foreign Trade who had the power to entertain and adjudicate upon the show cause notice and an appeal against the order of Joint Director General of Foreign Trade was to lie to the Additional Director General of Foreign Trade. It is submitted that since the show cause notice has been adjudicated upon the Additional Director General of Foreign Trade, the petitioners have been deprived of their right to appeal to the Additional Director General of Foreign Trade and thus prejudice has been caused to them.

6. It is not in dispute that under the Notification dated 31st December, 1993 the Joint Director General of Foreign Trade could adjudicate upon and entertain the show cause notices in respect goods of the value of up to Rs. 10 lacs and an appeal against his order could lie to the Additional Director General of Foreign Trade. However, can it be said that simply because the show cause notice had been adjudicated upon by the Additional Director General of Foreign Trade, any prejudice has been caused to the petitioners or the order passed by him is without jurisdiction? The answer, in my view, has to be in the negative. In my opinion, there cannot be any doubt about the proposition that the superior authority has the power to adjudicate on matters which his juniors had the power to adjudicate. In case, the Joint Director of Foreign Trade had the jurisdiction to entertain and adjudicate the defaults up to Rs. 10 lacs, Additional Director General of Foreign Trade will naturally have the power and jurisdiction to adjudicate the same. It is

only if a right of appeal has been taken away that the petitioner may have some case for setting aside the orders of the Additional Director General of Foreign Trade. The appeal against the order of Additional Director General of Foreign Trade has been provided to the Appellate Committee. Petitioners having exercised their right by filing an appeal against the order of Additional Director General of Foreign Trade to the Appellate Committee, no prejudice, in my view, has been caused to the petitioners. Under the Act, there was only one right of appeal to the aggrieved party and that right of appeal having been exercised, the petitioners now cannot complain that their right of appeal to the Additional Director General of Foreign Trade has been taken away and thus prejudice has been caused to them. I, therefore, do not find any merits in the contention of learned counsel for the petitioners that show cause notice having been adjudicated upon by the Additional Director General of Foreign Trade, the same was without jurisdiction or was liable to be set aside on that ground alone.

7. The second argument, as already noted above, of the petitioners is that nowhere in the show cause notice it was stated that the petitioner had mis-used the imported goods and until and unless allegations were made in the show cause notice that the goods were mis-used, penalty could not be imposed under Section 4-I(1)(a) of the Imports and Exports (Control) Act. As already mentioned above, reliance for this has been placed by the petitioner upon the judgment of this Court in *Optina Impex Private Limited v. Union of India* (Supra). In *Optina Impex Private Limited v. Union of India* (Supra), the facts were that in the show cause notice it was alleged that 'the unit commenced their production in March, 1990 and have made imports of capital goods and raw material for Rs. 102.88 lakhs and made exports to the tune of Rs. 59.64 lakhs resulting in net foreign exchange loss of Rs. 43.24 lakhs. The unit achieved value addition of (-) 26.56% against the stipulated value addition of 26.56%'. It was while interpreting this show cause notice that the Court observed that nowhere in the show cause notice it was averred that the petitioners had mis-used the imported goods and if that was the case then the same would not fall under Section 4-I(1)(a), as there was no allegation that the goods had not been used for the purpose for which they were imported. The Court, therefore, held that until and unless allegations were made in the show cause notice that the goods imported under the OGL license were mis-utilised,

penalty could not be imposed under Section 4-I(1)(a) of the Act. This judgment, in my view, would not in any manner assist the petitioner. In the present case, the show cause notice clearly states that as the petitioners had failed to fulfill the remaining export obligations imposed under the license, there were, prima-facie, reasons to believe that the imported goods had been utilised by the petitioners and they had thus violated the conditions of advance license. Paragraph 5 of the show cause notice, which have a bearing on this case, reads as under :-

'As you have failed to fulfill the reamaining export obligation imposed under the said license, there are, prima-facie, reasons to believe that the duty free imported goods valued at Rs. 9,10,15/- (cif) have been utilised by you and also failed to fulfill the balance export obligation for fob value of Rs. 27,20,462/- within stipulated time and thus violated the conditions of advance license/LUT this violation on your part attracts the Section 4-I9a) of the Imports & Exports (Control) Act, 1947, as amended and Clause-10 for action under Clause-8 of the Imports (Control) Order, 1955, read with Section 20(2) of the Foreign Trade (Development & Regulation) Act, 1992.'

8. Under Section 4-I(1)(a) any person who in relation to any goods or materials which have been imported under any license or letter of authority, uses or utilises such goods or materials otherwise than in accordance with the conditions of such license or letter of authority, shall be liable to pay penalty not exceeding five times the value of the goods or materials. Section 4-I(1)(a) of the Imports and Exports (Control) Act reads as under :-

'4 -I(1). Liability to penalty. - Any person who,-

(a) in relation to any goods or materials which have been imported under any license or letter of authority, uses or utilises such goods or materials otherwise than in accordance with the conditions of such license or letter of authority; or

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xxxxxxxshall be liable to penalty not exceeding five times the value of goods or materials, or one thousand rupees, whichever is more, whether or not such goods

or materials have been confiscated or are available for confiscation.'

9. From a bare reading of the aforesaid Section, it is clear that unless the imported goods were used or utilised otherwise than in accordance with the conditions of license, a party may not be liable to penalty under the Act. In the show cause notice in *Optina Impex Private Limited v. Union of India (Supra)*, no allegations were made in the show cause notice that the imported goods were used or utilised otherwise than in accordance with the conditions of license. All that had been said was that the unit achieved value addition of (-)26.56% against the stipulated value addition of 26.56%' and the Court while interpreting that show cause notice, has observed that 'nowhere in the show cause notice it has been averred that the petitioner had mis-used the imported goods. If that is the case, then the case of the petitioner would not fall under Section 4-I(1)(a), as there was no allegation that the goods had not been used for the purpose for which it was imported under the OGL license'. That judgment was, therefore, given on the basis that no allegations were made in the show cause notice that the goods had been used for the purpose for which they were imported under the license. In the present case, the show cause notice clearly says that the duty free imported goods valued at Rs. 9,10,125/- have been utilised by the petitioners and they have also failed to v the balance export obligation within the stipulated time and thus violated the conditions of the advance license attracting provisions of Section 4-I(1)(a) of the Imports and Exports (Control) Act. Allegations having been clearly made in the show cause notice about the utilisation of the imported goods by the petitioner and their having violated the conditions of the advance license, in my opinion, the judgment of this Court in *Optina Impex Private Limited v. Union of India (Supra)*, will not be applicable to the present case. Petitioners having thus used or utilised the goods otherwise than in accordance with the conditions of the advance license, in my opinion, were rightly held to be liable under the provisions of the Imports and Exports (Control) Act, 1947.

10. Next contention of learned counsel for the petitioners is that the goods are still lying with the petitioners and there was thus no question of the petitioners having used or utilised them in violations of the conditions imposed by the license. The stand taken by the petitioners appears to be clearly an afterthought. Neither in the

reply to show cause notice nor in appeal before the Appellate Committee, the petitioners had taken the plea that the goods were still lying with them. Had that been the position, the petitioners would have definitely taken the plea in reply to the show cause notice as well as in appeal that since the goods were lying with them, there was no question of the same having been used or utilised in violation of the conditions under the license. The petitioners cannot be permitted to raise this plea for the first time in this writ petition, same having not been taken either in the reply to show cause notice or in appeal before the Appellate Committee.

11. It is lastly contended by learned counsel for the petitioners that the penalty of Rs. 45 lacs imposed upon them is highly disproportionate to the value of material about which the petitioners have not fulfilled their export obligations. Under the Act, the appropriate authority has the power and jurisdiction to impose a penalty not exceeding five times the value of the goods or material. In the exercise of its power under Article 226 of the [Constitution of India](#), this Court will not sit as a Court of appeal to examine whether on the basis of the material before the appropriate authority or the Appellate Committee the penalty of five times could be imposed upon the petitioners. Once the legislature has conferred powers upon the appropriate authority to impose penalty not exceeding five times the value of the goods, in my opinion, no fault can be found with the same. The powers being vested with the appropriate authority to impose penalty and that power having been exercised under the Act, in my view, no case is made out to interfere with the same.

12. I, therefore, do not find any ground to interfere with the order of the adjudicating authority or the Appellate Committee. There are no merits in this Writ Petition and the same is, accordingly, dismissed with no order as to costs.