

**In Re: Ruby International (India) and ors.**

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**Court : Kolkata**

**Decided On : Aug-22-1984**

**Reported in : 1985(4)ECC252**

**Judge : Ajit Kumar Sengupta, J.**

**Appellant : In Re: Ruby International (India) and ors.**

**Judgement :**

**Ajit Kumar Sengupta, J.**

1. Dilip Kumar Neotia, the writ petitioner carries on business under the name and style of Ruby International (India) at No, 32, Baranasi Ghose Street, Calcutta. One M/s. Everest Goats Skin and Company obtained an additional Import Licence bearing No. P/W/2902098/C dated 18th December, 1981. The said licence was valid for items admissible under paragraph 186 of Import Policy for 1981-82 and sub-paragraphs thereof subject to the conditions stipulated in different sub-paragraphs of paragraph 18 of 1981-82 policy. The licence originally issued had expired on 18th December, 1982. The licence was revalidated on 25th July, 1983 for six months subject to the condition that the licence would be valid for imports of item as are not permissible for import against additional licence under the Import Policy for 1983-84 (that is the period during which revalidation is being granted). The Everest Goats Skin issued a letter of authority in favour of the petitioner on 10th December, 1983. The said letter of authority was issued in terms of

paragraph 382 of the Hand Book of Import-Export Procedures 1981-82 in respect of the said Import Licence dated 18th December, 1981. After the letter of authority was issued in favour of the petitioner the two letters of indent were issued, one on 16th December, 1983 and another on 10th January 1984 and letters of credit were opened on 1st January, 1984 and 16th January, 1984. The two bills of lading in respect of two consignments were granted on 15th January, 1984 and 29th February, 1984. The goods imported by the said letters of indent are known as cyclohexanone. The two consignments arrived in Calcutta one by S.S. Indian Fortune, another by S.S. Romneburg. The first bill of entry was noted on 27th April, 1984 and the bill of entry was passed by the authority concerned on the same day and the said import licence was also debited for clearance. Similarly on 17th May, 1984 the second bill of entry was filed and the same was passed by the authority concerned on 26th May, 1984. It is alleged that the petitioner could not get delivery of the said goods and the petitioner made an application on 21st May, 1984 under Section 59 of the Customs Act, 1962 for keeping the goods in the bonded warehouse. It is alleged that the authorities concerned did not consider the same nor did pass any reasoned or speaking order and the goods were incurring unnecessary demurrage and wharfage. It is further alleged that the authorities concerned assessed the duties on the said goods on deviation from the provisions of law, and the said amount is imaginary, inflated and without any basis as the respondents in making the assessment took into consideration post importation charges incurred after the importation is complete. It has also been alleged that the increase of duty made by the notification dated 1st March, 1984 be made applicable to the consignments in question on 20th July, 1984. The writ application was moved by the petitioner on 20th July, 1984 upon notice and in presence of the respondents and the following order was passed:-

The respondents were directed to release the goods upon the petitioner making the payment of dues in cash without prejudice to the rights and contentions that some part of the dues are not payable at all. The respondents shall forthwith thereafter release the goods if they are satisfied that the licence covers the goods in question. In the event they are not satisfied they shall allow the petitioner to remove the goods at the bonded warehouse under Section 59 of the Customs Act, 1962 for adjudication over this matter, whether it is covered by the licence within 3

days from the date of communication of this order.

2. It has been alleged that in spite of the said order the goods were not released and were not even allowed to be removed to the bonded warehouse. An application for contempt has also been filed. The respondents have appeared and produced the records. A show cause notice has been issued on 31st July, 1984. Two grounds have been taken in the show cause notice:-

a) the goods have been sought to be imported under non-transferrable additional licence by the petitioner described as importer in the bill of entry, and

b) the goods in question, namely, cyclohexanone has been sought to be imported under paragraph 186(7) read with Appendix 10 under serial No. 63 of Part II of List 8, but the additional licence does not permit the importer to import the goods in question under serial No. 63 of Part II.

3. It has been contended by Mr. S. Pal, learned Counsel appearing for the writ petitioner that the customs authorities are deliberately not complying with the said order dated 20th July, 1984 for ulterior motives and the grounds mentioned in the said show cause notice which has been issued as an after-thought are wholly misconceived and untenable in law. Mr. Pal submitted that if the show cause notice is found to be bad in law as contended by him, then it should be quashed or set aside forthwith as it has the effect of nullifying the said order dated 20th July, 1984. In fact in the contempt application which has been filed by Mr. Pal's client the issuance of the show cause notice is alleged to be an instant of contumacious conduct on the part of the respondents. In aid of his contentions Mr. Pal submits that paragraph 382 of the Hand Book of Import-Export Procedures 1981-82 inter alia authorised the licence-holder to appoint any person as his agent for arranging the importation of the goods permitted by the licence. Therefore, the petitioner is entitled to import under the letter of authority issued by the holder of licence M/s. Everest Goats Skin and Company which was submitted along with the bill of entry. He has also submitted that the cyclohexanone is a solvent and is covered by serial No. 63 of Part II of the List 8 of Appendix 10.

4. It has been contended by Mr. Jatin Ghose, learned Counsel appearing for the respondents, that the licence was revalidated during the policy period of 1983-84 and the letter of authority was issued on 10th December, 1983 during the policy period 1983-84. The goods in question arrived some time in April 1, 1984. It has been submitted that when the letter of authority was issued and the goods had arrived a prohibition had been imposed under the Import-Export Procedures for 1983-84 and 1984-85 for importation of goods under an additional non-transferable licence on the basis of letter of authority. The special condition of the licence, inter alia, provides that the licence is issued without prejudice to the application of any other prohibition or regulation affecting the importation of the goods which may be in force at the time of arrival. Since the writ petitioner has claimed the benefit of revalidation under the Import-Export Procedures they are bound by the prohibition imposed by the said procedure as in force at the time of arrival of the goods. It has further been submitted that the goods in question are not covered by serial No. 63 of Part II of List 8 of Appendix 10. The goods appearing in Part II are permissible for importation to actual users (Industrial) as well as against the additional licence. There are no goods appearing in the said Part II of List 8 by the description of cyclohexanone. It may only come, if at all, under the residuary clause in Part III appearing after the item 15. However, those items are not permissible for importation by holder of an additional licence whose rights are only confined to importation of goods appearing in Part II of List 8.

5. The additional licence was issued in 1981-82. The letter of authority although was issued in December, 1983 but it was in respect of the licence of 1981-82. If the licence is revalidated without any special conditions attached to the licence at the time of revalidation then the licence-holder cannot be deprived of the privileges as granted under the relevant Import-Export Procedures when the licence was originally issued. In this case a licence was issued in December, 1981 that is, during the currency of 1981-82 Import Policy, and therefore, the Import-Export Procedures 1981-82 will be applicable in this case. Paragraph 382 of the Hand Book of Import-Export Procedures of 1981-82 inter alia provides as follows :-

Import through agents:

382. In the Import Policy, in force since 1978-79 no special provision has been made for the licensing authority to issue a letter of authority, authorising another person to import goods against a licence on behalf of the licence-holder. The licence-holder is hereby given the authority to appoint any person as his agent for arranging the imports permitted by the licence. The licence should, however, continue to be in the name of the licence-holder and the other provisions of the Imports (Control) Order, 1965, in regard to the duties and obligations of the licence-holder or letter or authority-holder will continue to apply respectively to the persons concerned. Subject to this condition and legal requirements it will be open to the licence-holders to decide upon his own firm and letter of authority. But the functions of the holder of such letter of authority shall be limited to place orders, to open letter of credit, to make remittance of payment for importing the goods, to arrange movement and to clear the same through the customs having regard to Section 147 of the Customs Act, 1962 on behalf of the licensee, and any other related matters connected with the operation of the licence in question, but not its ownership.

6. The letter of authority given by the Everest Goats Skin in favour of the petitioner on 10th December, 1983, inter alia, provides that all relevant customs documents should state that the goods have been imported on behalf of the licensee.

7. It is not in dispute that the original licence along with the bill of entry for home consumption had been submitted before the customs authorities. One bill of entry for home consumption was filed on 27th May, 1984 which was passed on the same day, after considering the grace period granted by the relevant policy for importation of the goods under the licence. The licence was issued under 1981-82 policy. Paragraph 382 of the Import-Export Procedures of 1981-82 authorises the agent to clear the goods through the customs. It is true that in the bill of entry the name of the petitioner appears and not of the licence-holder. But the fact remains that the respondents accepted the said bill of entry for home consumption on the basis of licence and the letter of authority submitted by the petitioner. Even assuming that there is a technical violation of either paragraph 382 or the terms and conditions of the letter of authority, but all the facts were disclosed by the petitioner. The letter of authority and the licence when filed with the bill of entry by

the clearing agents had shown that the importer is the Everest Goats Skin who was the holder of additional licence. In that view of the matter I am unable to accept the contention of Mr. Ghose that the import has not been made by the licence-holder, simply because in the bill of entry the name of the petitioner appears instead of the licence-holder, that is, Everest Goats Skin. It is also quite clear that this was not considered to be a breach of any provision or condition of letter of authority as bill of entry for home consumption as submitted by the petitioner, being the agent of the importer were passed by the authorities concerned.

8. Mr. Ghose relied on paragraph 383(2) of the Hand Book of Import-Export Procedures 1983-84, relating to imports through agents. It provides that the export house/trading houses are not allowed to appoint agents or issue letters of authority, for operating on the licence or for distribution of imported goods on their behalf. Such function should be performed by the export houses/trading house itself, where an export house or trading house is in need for appointing an agent for any valid reasons in respect of any particular licence or item to be imported, it should approach the Chief Controller of Imports and Exports, New Delhi for prior permission which Chief Controller of Imports and Exports, New Delhi may consider, on merits subject to such conditions may be imposed. Therefore, there is no absolute bar of appointment of agents. The Chief Controller of Imports and Exports may consider on merits whether an agent should be allowed to be appointed by the importer. Thus the contention raised by the respondents that there is an absolute bar for appointment of agent cannot be accepted. However in this case the question of the importer taking the prior permission of the Chief Controller of Imports and Exports would not and did not arise inasmuch as the letter of authority will show that the trading house/export house issued the letter of authority in accordance with the provisions of Import-Export Procedures of 1981-82 as the licence in question is governed by 1981-82. It may be mentioned that the said licence was revalidated on 25th July, 1983 but at the time of revalidation no condition was imposed that the importer would not be entitled to appoint any agent or the mode and method of clearance of the goods would be covered by the conditions of 1983-84 policy or procedure. In the absence of any such restriction in the licence itself and having regard to the facts and circumstances of this case as

mentioned hereinabove I am of the view that the petitioner in this case has validly acted as an agent- for the import of the goods in question.

9. The next contention of the respondents is that there are no goods appearing in Part II of List 8 of Appendix 10 by the description of 'cyclohexanone'. It may only come if at all under the residuary clause in Part III appearing after the item 15. However, those items are not permissible for importation by the holder of an additional licence whose rights are only confined to importation of goods appearing in Part II of List 8.

10. The licence is valid for items admissible under paragraph 186 of the Import Policy Book for 1981-82 and its sub-paragraph subject to the conditions stipulated in different sub-paragraphs of paragraph 186 of 1982 policy. At the time of revalidation on 25th July, 1983 a condition was imposed that the licence shall cease to be valid for import of items as are not permissible for import against additional licence under the Policy for 1983-84.

11. Under paragraph 186(5) of 1981-82 Policy the additional licence will be valid for import of the items appearing in Appendices 5 and 7 excluding however, the items appearing in Appendix 26. Paragraph 186(7) of the said Policy provides;

(7) The additional licences will also be valid for import of raw materials, components, consumables and spares (excluding items covered by Appendix (5) which have been placed on open general licence for actual users (Industrial).

12. In view of the aforesaid conditions the importer can import the goods which are covered by the open general licence for actual users (Industrial). Appendix 10 of 1983-84 Policy specifies the items permitted under open general licence. List 8 is raw materials, components and consumable allowed under open general licence. Part I of List 8 contains the list of items , allowed for import by actual users (Industrial) only subject to actual user condition. Part II contains the list of items allowed for import by actual user (Industrial) subject to actual user condition and export/houses trading houses against REP/additional licences as per policy for sale to eligible actual users (Industrial) subject to actual user condition. According to Mr. Pal cyclohexanone comes under serial No. 63 of Part II of List 8. Item

described at serial No. 63 is 'solvent'. According to Mr. Pal cyclohexanone is solvent. The contention of the respondents is that the petitioner can only import goods appearing in Part II of List 8. It has been contended since there is no item described as cyclohexanone in Part II this item cannot be imported. When the bill of entry for warehousing were being processed, the customs authorities ordered the examination of the goods and also obtained the test report of the same. In fact the endorsement in one of the bills of entry by the Appraiser Group I of the respondent No. 2 shows that sample tested conformed to the characteristic of cyclohexanone.

13. It is not disputed by Mr. Ghosh that the items in question will come under the residuary clause in Part III of List 8 but the contention is that the additional licence-holder is only permitted to import items coming under Part II of List 8. I am unable to accept the contention. Part III of List 8 contains the residuary clause to the following effect. 'All other items permitted under open general licence in terms of the import policy in force, other than those covered by Parts I and II above.'

14. There is note appended to List 8 to the following effect:

(1) It is clarified that entries in this List (Part I, Part II and Part III) allow only those items and their specifications, sizes, types, varieties, compositions, categories, etc., as are covered under open general licence for actual users (Industrial) vide items 1 and 2 of the Appendix 10, i.e., the items or their specifications, etc., which do not appear in Appendices 3 to 9 and 15, read with the clarifications contained in Chapter 22 of this Book.

15. There is, therefore, no bar in importing the items under the residuary clause of Part III by the additional licence-holder.

16. It has been alleged in the show cause notice that cyclohexanone is not solely used as solvent and therefore not covered by item at serial No. 63 of Part II of List 8 of Appendix 10 mentioned above. The end-use of an item is not the criterion to decide whether it is a permissible item or not. It is to be seen whether the item imported has got the characteristics of solvent. It has not been disputed nor can it be disputed that cyclohexanone is solvent particularly in view of the test report.

Whether the cyclohexanone is solely used as solvent cannot be a decisive factor in determining the nature and character of the item. Serial No. 63 speaks of solvent and cyclohexanone is a solvent but it may be used for different purposes. In my view the item is either covered by serial No. 63 or under the residuary clause of Part III. Since the item is covered by open general licence much of the controversy raised regarding the letter of authority will have no bearing at all.

17. I am, therefore, unable to accept the contention of the customs authorities.

18. There is one other aspect of this matter. On 27th April, 1984 and 17th May, 1984 the relevant bill of entry for home consumption with regard to the said two consignments which had been presented to the customs authorities for clearance of the said consignments were duly noted and passed and the said additional licence was duly debited with the value of the concerned consignments. At the request of the petitioner the bill of entry for home consumption were cancelled and the petitioner was permitted to file the bill of entry for warehousing.

19. On 13th June, 1984 two several bills of entry for warehousing were filed. Towards the end of June, 1984 the examination of the goods were made and the test report was obtained. The sample tested conformed to the characteristic of cyclohexanone. The writ application was filed on 20th July, 1984 and order was passed by me which has been set out hereinabove.

20. On 23rd July, 1984 the Customs authorities made their assessments on the said bills of entry for warehousing filed on 13th June, 1984 accepting the value declared by the petitioner. On 23rd July, 1984 there are the following common noting made by the Appraiser Group I in both the said bills of entry filed on 13th June, 1984.

(i) Party to pay duty and accounts to receive duty on this BE vide Honourable High Court's order dated 20-7-1984.

(ii) The said Appraiser was directed to open four drums and for checking of drums and to allow warehousing if the concerned goods were otherwise found in order.

21. On 25th July, 1984 further common notings on the said bill of entry for warehousing were made to the following effect:

(i) As per Honourable High Court's order Chalan released from Licensing Section without debiting licence.

(ii) Licence is not pre-audited.

(iii) Licence under dispute in the High Court case.

22. From the records produced before me it appears that subsequently the Appraiser Group I purported to cancel the endorsements made debiting the value of the licence.

23. Having regard to the facts and circumstances of this case, I am of view that the show cause notice is ex facie misconceived in law and has been issued without any jurisdiction. The respondents have not cleared the goods even after they accepted the bill of entry and debited the licence. The grounds which are put forward now are not valid grounds in law and cannot be sustained.

24. Show cause notice is set aside.

25. The respondents are directed to release the goods on the basis of the assessment made within three days after payment of the assessed duties of Rs. 4,33,165.13 p.

26. It is the contention of the customs authorities that the goods have been detained by them for investigation and some preliminary examination and that the default is not attributable to any fault of the writ petitioner. In the circumstances, the Assistant Collector of Customs, Calcutta is directed to issue Wharf Rent Exemption Certificate by way of Special exemption from the date of lading till the date of delivery of the goods, stating that the goods have been detained for the purpose of some preliminary investigation and examination and that such detention was not attributable to any fault or negligence on the part of the importer or its representative. In the facts and circumstances the petitioner would also be at liberty to apply to the Shipping Company for remission of rent if permissible.

27. This order is made without prejudice to the rights and contentions of the parties with regard to the questions in controversy in the main writ petition.

28. Let a plain copy of this order countersigned by the Assistant Registrar (Court) be handed over to the learned Advocates appearing for the parties concerned.

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