Pradnya Bhogale

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.1873 OF 1998

1. Milton's Ltd., a company incorporated under the Companies Act, 1956 having its Registered Office at Millon House, S.K. Aher Cross Road, Prabhadevi, P.B. No.9107, Mumbai 400 025.

2. Mr. P.N. Amersey, Chairman and Managing Director of Milton's Ltd. having his place of office at Milton's House, S.K. Aher Cross Road, Prabhadevi, P.B. No.9107, Mumbai 400 025. ..Petitioners

Vs.

1. The Union of India

2. The Appellate Committee constituted by the Ministry of Commerce, Government of India having its office at Udyog Bhavan, New Delhi.

3. The Director General of Foreign Trade

4. The Foreign Trade Development Officer
Nos.3 and 4 having their offices
at the Directorate General of
Foreign Trade, Ministry of Finance
and Revenue, Udyog Bhavan, New Delhi ..Respondents

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Mr. Mehul Arvind Shah for petitioners.
Mr. J.B. Mishra for respondents.

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CORAM : S.C. DHARMADHIKARI &
M.S. KARNIK,JJ.

RESERVED ON : 14th FEBRUARY, 2019
PRONOUNCED ON : 27th SEPTEMBER, 2019

JUDGMENT (PER SHRI M.S. KARNIK,J.)

By this petition filed under Article 226 of the Constitution of India the petitioners-Milton's Limited seek quashment of the impugned orders dated 21.7.1998 and also the order dated 13.12.1996. The petitioners have prayed for consequential relief directing the respondent Nos.3 and 4 to withdraw the recovery notice dated 6.8.1998.

2. Brief facts of the case are thus :-

The petitioner No.1 claims to be a well known export house and manufacturer and exporter of readymade garments of various types for several years. It is the petitioners case that the petitioner No.1 being an export house has been regularly earning valuable foreign exchange for the country and as such also been enjoying certain benefits given by the Government of India under the Import and Export Policy of the country.

3. Respondent No.2 is the Appellate Committee constituted under Section 4M of the Import Export (Control) Act, 1947 r/w. Section 20(2) of the Foreign Trade (Development and Regulation) Act, 1992 (hereinafter referred to as 'the Act of 1992'). Respondent No.3 is the Directorate General of Foreign Trade appointed by the Central Government under section 10 of the Act of 1992. Respondent No.4 is an officer employed with the office of the Directorate General of Foreign Trade and carries on functions and discharges duties under the supervision and directions of respondent No.3.

4. The petitioner No.1 being an export house had obtained additional licence (hereinafter referred to as the main additional licence) No.0457854 dated 25.9.1981 for CIF Value

of Rs.1,02,41,700/- from the Office of the Joint Chief Controller, Import and Export, Bombay. The main additional licence was valid for a period of 12 months from the date of the said licence.

5. The Deputy Chief Controller of Imports and Exports issued a Show Cause Notice dated 17.2.1986 to the petitioner No.1 and one M/s. A.P. Trading Company alleging that petitioner No.1 and the said M/s. A.P. Trading Company had obtained two subsidiary additional licences bearing Nos.300 3756 and 300 3757 both dated 8.6.1983 for a value of Rs.20,000/- each, which was later on corrected as Rs.20 Lakhs each. The said subsidiary licences were issued on a non-transferable condition. In the said Show Cause Notice it was alleged that petitioner No.1 had issued a letter of authority in the name of the said M/s. A.P. Trading Company, Bombay. Acting under the said letter of authority M/s. A.P. Trading Company had in the Financial Years April-March 1983 and April-March 1984 imported consignments of Amoxyciline Trihydrate for an aggregate CIF Value of Rs.43,69,000/- and had claimed clearance of the goods

against the main additional licence. It is alleged in the Show Cause Notice that as per the Export and Import policy prevailing in the Financial Years April-March 1983 and April-March 1984 respectively, an Export House was not allowed to appoint agents in operating non-transferable additional licences for distribution of imported goods on their behalf and that Amoxyciline Trihydrate being a canalized item during the Financial Years April-March 1983 and April-March 1984 was not covered under the main additional licence. It was further alleged in the said show cause notice that the said letter of authority issued by petitioner No.1 in favour of M/s. A.P. Trading Company was unauthorised and both petitioner No.1 and the said M/s. A.P. Trading Company being the letter of authority holder, had committed a breach of Import Control Regulations which attracted the provisions of Clause 8(f) and (g) of the Import and Export (Control) Order 1955 dated 7.12.1955. Petitioner No.1 was called upon to show cause as to why action should not be taken against it and its Directors under Clause 8 of the said order.

6. Petitioner No.1 replied to the show cause notice by its letter dated 28.2.1986. It is the stand of the petitioner No.1 that it had no knowledge about the issue of subsidiary licences and it was not at all involved in any manner for the issuance of the said licences. By the said letter petitioner No.1 also informed that it had handed over its main additional licence to one M/s. Veena Commercial Corporation and at no point of time petitioner No.1 had given the said main additional licence to the said M/s. A.P. Trading Company as alleged in the said show cause notice.

7. Petitioner No.1 by its further letter dated 7.2.1987 addressed to the Deputy Chief Controller of Import and Export also furnished a statement showing the details of the imports and exports affected by it in the main additional licences. This in order to demonstrate that M/s. A.P. Trading Company did not figure in the list of actual users in whose favour the letter of authority was issued.

8. The Deputy Chief Controller of Imports and Exports by an order dated 31.7.1987 debarred petitioner No.1 with

effect from the date of the said order from importing goods or receiving import licences or allotment of import goods through STC, MMTC and other similar agencies for two licencing periods to the extent of 25% of petitioner No.1's entitlement. In the said order it is specifically observed that one of the reason for passing of the aforesaid order was that as Amoxyciline Trihydrate had been shifted to a canalised list w.e.f. 16.10.1981 vide Public Notice dated 16.10.1981 and as such the said item could not have been imported under O.G.L. after 30.1.1982. In the instant case as the import was made between the period January 1983 and July 1983, that is during the extended validity period of licence, the import was therefore unauthorised and illegal. The said order also referred to an adjudication order dated 10.6.1984 passed earlier by the Collector of Customs, Calcutta by which he had held that though the import of the said item was unauthorised, an option was given to the importer to redeem the goods imported for home consumption on payment of a fine of Rs.1 Lakh.

9. Petitioner No.1 filed an Appeal against the order dated 31.7.1987 before the Joint Chief Controller of Import and Export. By order dated 20.10/16.11.1987, the Appeal was dismissed. The petitioner filed further Appeal before the Additional Chief Controller of Imports and Exports. By order dated 21.10.1988 the Appeal was partially allowed. By the said order the period of debarment was reduced from two licencing period to one licencing period i.e. April/March 1988. By the said order Additional Chief Controller held that it was not a fit case for invoking the provisions of Clauses 6(1)(d) and (e) of the Import (Control) Order 1955 against petitioner No.1.

10. The Import and Export (Control) Act, 1947 was repealed by the Foreign Trade (Development and Regulations) Ordinance 1992. Subsequently the said Foreign Trade (Development and Regulations) Ordinance 1992 was repealed by the Foreign Trade (Development and Regulations) Act, 1992.

11. On 28.2.1992/4.3.1992 the Additional Chief Controller of Import and Export issued another show cause

notice to petitioner No.1 to show cause as to why penalty should not be imposed on petitioner No.1 under Section 4 I of the Import and Export (Control) Act, 1947. According to the petitioner, the said show cause notice was issued on the same facts as the earlier show cause notice.

12. Petitioner No.1 through his Advocate replied to the said show cause notice. In the reply dated 20.5.1992 the attention of the Additional Chief Controller was specifically drawn to the order dated 21.10.1988 wherein it was held that though the import of goods by the importer was unauthorised it was cleared by the customs authority merely on the payment of fine. It was further stated in the letter that as the said show cause notice was issued after a period of eight years, hence it was an after thought and therefore the show cause notice was required to be withdrawn.

13. Thereafter petitioner No.1 on 22.11.1995 through its Advocate submitted a detailed written submission in furtherance

of the arguments which were advanced at the time of personal hearing. The Additional Director General of Foreign Trade by the impugned order dated 13.12.1996 imposed a penalty of Rs.20 Lakhs on petitioner No.1.

14. Being aggrieved by the oder dated 13.12.1996, petitioner No.1 filed an Appeal before respondent No.2. Respondent No.2 dismissed the Appeal by order dated 21.7.1998. In furtherance of the dismissal of the Appeal the respondent No.4 issued a recovery notice dated 6.8.1998 calling upon petitioner No.1 to pay sum of rs.20 Lakhs within a period of 20 days from the date of the receipt of the said recovery notice.

15. The respondents filed an affidavit in reply in response to this petition duly affirmed by Shri A.S. Shinde, Deputy Director General of Foreign Trade. The affidavit in reply supported the impugned orders challenged in this petition. Briefly it is the stand of the respondents, that it came to the

notice of the Customs Authorities that petitioner No.1 had issued a letter of authority in the name of M/s. A.P. Trading Company, Bombay who imported Amoxyciline Trihydrate for a CIF Value of Rs.43,69,000/- during the Policy period AM-83 and AM-84 and claimed clearance of the goods against the subject import licences. It is further the stand that in terms of the conditions of licence, only such items could be imported under the licences which were permissible for import against Additional Licences as per AM-83 Policy. Amoxyciline including Amoxyciline Trihydrate was canalized item. Import thereof was permitted only through State Chemicals and Pharmaceuticals of India Limited. Import of canalized items was not allowed against Additional Licences issued to Export House. Under AM-83 and AM-84 Policy, Export Houses/Trading Houses are not allowed to appoint agents for operating non-transferable additional licences for distribution of the imported goods on their behalf. The licencee violated the conditions of the licences and unauthorisedly made imports through letter of authority holder which is a violation of the condition of the licences. M/s.

A.P. Trading Company, Bombay who are the letter of authority holders are abetted by the Licencee's act of violation of conditions of the licences and misutilisation of the goods imported thereagainst.

16. It is the further case of the respondents that the M/s. A.P. Trading Company had by some means obtained re-validation of the original licence and that way it illegally overstepped or over utilized the letter of authority. This wrongly procured subsidiary licence was utilized by an unauthorized and unrecognized party. It is the case of the respondents that the licence holder that is the petitioners cannot be absolved of the responsibility as the licence holder is primarily responsible for the proper utilization of the licence. The liability for any act of commission and omission rests on the licence holder. The item was canalized item w.e.f. 16.10.1981. In view of these facts, the Adjudicating Authority imposed a fiscal penalty of Rs.20 Lakhs on the petitioner firm.

17. Heard learned counsel for the parties.

18. The impugned orders are passed on the footing that the petitioner No.1 had issued letter of authority in favour of M/s. A.P. Trading Company and were primarily responsible for the proper utilization of the licences issued to them. The petitioner No.1 has categorically denied of having issued any letter of authority in favour of M/s. A.P. Trading Company. It is the petitioner No.1's case that it had given the licence to M/s. Veena Commercial Corporation. We do not find any material on record to show that the petitioner No.1 had issued letter of authority in favour of M/s. A.P. Trading Company. The penalty has been imposed on the petitioner No.1 on the ground that the petitioner No.1 is primarily responsible for the proper utilization of the licence issued to them. From the impugned order it is revealed that the request for re-validation and for issue of subsidiary licence was made by letter of authority holder. Amoxyciline Trihydrate which was a canalized item at that point of time was imported. The same was imported by the letter of authority holder. There is nothing on record to establish that the petitioner No.1 has any concern with the import of the canalized

item. It is also not the case of the respondents that the request for re-validation and issue of subsidiary licence was made by the petitioner No.1. In fact such a request, even according to the respondents was made by the letter of authority holder. No doubt Amoxyciline Trihydrate was a canalized item at that point of time. However there is nothing on record to indicate that the import was made at the instance of the petitioner No.1 or that the petitioner No.1 had any concern with the said import except that the letter of authority holder had made a request for re-validation and for issue of subsidiary licence who in turn had imported a canalized item. Thus only because the main additional licences are in the name of petitioner No.1, it is the petitioner No.1 who is held to be primarily responsible for the proper utilization of the licences issued to them.

19. From the order dated 21.10.1988 passed by the Additional Director General of Foreign Trade it reveals that the petitioner No.1 had an unblemished past track record and that the petitioner No.1 was not directly involved in the import. In

fact in respect of all the goods imported by or on behalf of petitioner No.1 had been fully accounted for and it had given a complete statement of the utilization of those goods in its letter dated 3.2.1987.

20. The Apex Court in the case of **Hindustan Steel Ltd. V. State of Orissa** reported in ***1978 (2) ELT (J.159) (SC)*** held that the discretion to impose a penalty must be exercised judicially. A penalty will, ordinarily, be imposed in cases where the party acts deliberately in defiance of law or is guilty of contumacious or dishonest conduct, or acts in conscious disregard of its obligation but not, in the cases where there is a technical or venial breach of the provisions of the Act or where the breach flows from a bonafide belief that the offender is not liable to act in the manner prescribed by the statute. Further the Apex Court in the case of **Akbar Badruddin Jiwani V. Collector of Customs** reported in ***1990*** **(47) ELT 161 (SC)** held that mens rea has to be established in imposing penalty.

21. The facts therefore clearly reveal that the letter of authority holder had made request for re-validation and for

issue of subsidiary licences. The Petitioner No.1 claims that it had not issued any letter of authority in favour of M/s. A.P. Trading Company and there is no evidence available on record to show this. The petitioner No.1 had given the licence to M/s. Veena Commercial Corporation. Therefore, unless it is shown or established that the import of the canalized item is at the instance of the petitioner No.1 or they are involved in some manner with the import or that the petitioner No.1 is in some way concerned with M/s. A.P. Trading Company in the matter of import of the canalized goods, in our opinion, imposing the penalty on the petitioners in the absence of mens rea is unsustainable. As the licence is misused by the letter of authority holder M/s. A.P. Trading Company, in the absence of mens rea which is an essential ingredient of the offence, the petitioner No.1 cannot be held liable to pay the penalty.

22. The present petition therefore succeeds and is allowed in terms of prayer clause (a) and (b).

(M.S. KARNIK, J.) **(S.C. DHARMADHIKARI, J.)**