

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 21.09.2020

Delivered on: 07.10.2020

C O R A M

The Hon'ble Mr. A.P.SAHI, THE CHIEF JUSTICE
and
The Hon'ble Mr. Justice SENTHILKUMAR RAMAMOORTHY

Writ Appeal No.604 of 2020 &
C.M.P.Nos.8398 & 8399 of 2020

M/s.Sri Amman Chemicals,
9/22, C.B.Complex, New Madurai Bye Pass Road,
L.N.S. (PO) Karur-639 002.
Rep. by its Partner P.Kumaresan ...Appellant/Petitioner

Vs

1. The Additional Secretary & Appellate Authority
Ministry of Commerce & Industry
Department of Industrial Policy & Promotion
Udyog Bhawan, New Delhi-110 002.
2. The Chief Controller of Explosives
Petroleum & Explosives Safety Organization,
"A" Block, 5th Floor, CGO Complex,
Seminary Hills, Nagpur,
Maharashtra-440 006.
3. The Commissioner of Customs
Chennai III Customs Commissionerate
Custom House, 60, Rajaji Salai,
Chennai-600 001.
4. The Additional Commissioner of Customs (SIIB)
Custom House, 60, Rajaji Salai,
Chennai-600 001. ...Respondents/Respondents

PRAYER : Writ Appeal is filed under Clause 15 of Letters Patent, to set aside the order passed by this Court in Writ Petition No.11869 of 2019 dated 12.11.2019 and Writ Petition filed under Article 226 of the Constitution of India, for issuance of a writ of Certiorarified Mandamus to call for the Records of the First Respondent connected with impugned order No.1 of 2018 dated 02.11.2018 and to quash the same in so far as the said impugned order has been passed in total violation to the Principles of natural Justice, without Jurisdiction and in excess of the authority conferred on the said respondent and contrary to the provisions of law and consequently direct

the second respondent to Issue the P5 license to the petitioner Firm.

For Appellant : Mr.S.Baskaran
For Respondents : Ms.Sunita Kumari for R1 & R2
Mr.Rajnish Pathiyil for R3 & R4

JUDGMENT

SENTHILKUMAR RAMAMOORTHY J.,

The Appellant had filed an appeal under Section 6 F of the Explosives Act, 1884 (the Explosives Act) read with Rule 121 of the Explosives Rules, 2008 (the Explosives Rules) against the order bearing No.P-5(AN) Ports/2014 (A1743) dated 19.08.2015 of the Chief Controller of Explosives, Nagpur, refusing to grant a P5 licence to the Appellant.

2. The said appeal was rejected by the appellate authority by order dated 02.11.2018, and the said order was challenged in W.P. No.11869 of 2019 wherein the Appellant had prayed for a Writ of Certiorarified Mandamus to quash the order dated 02.11.2018 and, consequently, direct the second Respondent to issue a P5 licence to the Appellant. The said writ petition was dismissed by order dated 12.11.2019, which is challenged in this intra-court appeal.

3. The present writ appeal arises under the following facts and circumstances. The Appellant applied for and was granted a P3 licence by the Chief Controller of Explosives/the second Respondent herein on 03.12.2014 for the storage and sale of ammonium nitrate. Thereafter, the Appellant filed an application dated 05.08.2015 for the grant of a P5 licence. The P5 licence is required to import ammonium nitrate. The application for the P5 licence was rejected by the Chief Controller of Explosives by order dated 19.08.2015 on the ground that the Appellant is a trader and, therefore, it is not in the interest of national security to grant the licence.

4. After the rejection of the application for the P5 licence, the Appellant imported 740 MT of ammonium nitrate under Bill of Entry No.2704255 dated 24.09.2015 from Korea. The said consignment was detained by the Customs Authorities at the Chennai Sea Port. By letter dated 11.02.2016, the Chief Controller of Explosives informed the Principal Commissioner of Customs that the consignment of ammonium nitrate was imported by the Appellant without obtaining an import licence. Accordingly, the Principal Commissioner of Customs was advised to auction the consignment in accordance with the Ammonium Nitrate Rules, 2012 (the Ammonium Nitrate Rules).

5. In addition, the customs authorities were advised

to store the ammonium nitrate in a safe and isolated place

keeping in mind its inflammable nature. A similar letter dated 23.02.2016 was issued to the Principal Commissioner of Customs by the Joint Chief Controller of Explosives of the Petroleum and Explosives Safety Organization (PESO). Pursuant to the detention of goods, the Appellant submitted representations dated 29.04.2016 and 19.05.2016 seeking release of the goods. Meanwhile, the Appellant filed W.P. Nos.20826 and 20827 of 2016 whereby the Appellant had prayed that the order dated 19.08.2015 rejecting the application for P5 licence should be quashed and also to quash the suspension order and show cause notice dated 20.05.2016 with regard to the P3 licence. By order dated 11.08.2016, these writ petitions were disposed of by directing the competent authority to consider the Appellant's reply dated 01.06.2016 to the show cause notice dated 20.05.2016 and pass orders thereon in accordance with law. The said order was carried in appeal in W.A. Nos.1067 and 1068 of 2016. By order dated 19.10.2016, the Writ Appeals were disposed of by directing the Appellant to exhaust the appellate remedy as regards the rejection of the application for a P5 licence. As regards the suspension order dated 20.05.2016, the Appellant was permitted to submit an application and the authorities were directed to consider the application without being influenced by the views expressed by the learned single Judge.

6. Pursuant thereto, by order dated 08.02.2017, the appeal filed by the Appellant against the rejection of the application for P5 licence was rejected. Thereafter, by order dated 30.03.2017, the suspension of the P3 licence for the possession and sale or use of ammonium nitrate was revoked. Consequently, the Appellant was permitted to possess and sell ammonium nitrate in terms of the P3 licence. By another W.P. No.28851 of 2017, the Appellant challenged the appellate order dated 08.02.2017 and sought for a consequential direction to issue a P5 licence. This writ petition was allowed by order dated 05.09.2018 whereby the appellate order was set aside and the matter was remanded to the first Respondent for fresh consideration on merits. Pursuant thereto, the order dated 02.11.2018 was issued by the first Respondent. In the said order dated 02.11.2018, the first Respondent recorded that in spite of the rejection of the application for a P5 licence on 05.08.2015, the Appellant imported ammonium nitrate through the Chennai Sea Port on 24.09.2015. This amounts to a violation of Rules 4 & (6) (4) (a) of the Ammonium Nitrate Rules. In addition, the first Respondent also took note of the information regarding alleged supply of ammonium nitrate by the Appellant to stone quarry units. On that basis, the appeal was rejected. The order dated 02.11.2018 was challenged in the writ petition and upon dismissal thereof, the present appeal was filed.

7. We heard the learned counsel for the Appellant,

Mr.S.Baskaran; the learned counsel for the first and second

Respondents, Ms.Sunita Kumari; and the learned counsel for the third and fourth Respondents, Mr.Rajnish Pathiyil.

8. The learned counsel for the Appellant narrated the facts leading to the filing of the present appeal. His first contention was that the Appellant holds a valid P3 licence for the storage and sale of ammonium nitrate. Although the P3 licence was suspended on 20.05.2016, such suspension was revoked by order dated 30.03.2017. Consequently, the Appellant currently holds a valid P3 licence. As regards the rejection of the application for a P5 licence, the learned counsel contended that the order of rejection dated 19.08.2015 does not contain any reasons except that the Appellant is a trader and that the licence was rejected in national interest.

9. According to the learned counsel, neither the Explosives Act nor the Ammonium Nitrate Rules prohibit a trader from applying for or being granted a P5 licence. Therefore, he contends that the rejection of the P5 licence is arbitrary and unsustainable under applicable law. In support of this contention, the learned counsel referred to the Ammonium Nitrate Rules. By drawing specific reference to Rule 5, he contended that existing manufacturers, transporters, and sellers, such as the Appellant, are permitted to apply for a licence within a period of six months from the date of entry into force of the Ammonium Nitrate Rules and are required to comply with the provisions of the above Rules within a period of one year from the date of publication thereof. On this basis, he contended that the Appellant was entitled to import ammonium nitrate on 24.09.2015, which was within the above mentioned period and that the requirement of having a valid P5 licence became applicable to the Appellant only later. From the Ammonium Nitrate Rules, he also pointed out that there is no prohibition against the grant of a P5 licence to a trader. In these circumstances, the learned counsel for the Appellant contended that the writ petition should not have been rejected.

10. In reply, the learned counsel for the first and second Respondents submitted that ammonium nitrate is an explosive. By notification dated 21.07.2011, the Ministry of Commerce and Industry declared that ammonium nitrate is an explosive within the meaning of Section 17 of the Explosives Act. In view of the fact that it is an explosive, she submitted that traders are not permitted to import ammonium nitrate. Her next submission was that the application of the Appellant for a P5 licence was admittedly rejected by order dated 19.08.2015 on the ground that he is a trader and that it is not in national interest to grant an import licence to a trader. In this regard, she also submitted that the P5 licence had not been granted till date to a trader.

11. With regard to the Ammonium Nitrate Rules, she pointed out that Rule 5 stipulates that no licence would be

granted unless all the relevant provisions under the Rules and all the conditions contained in the licence forms annexed to the Rules are complied with. Rule 6(4) specifies that no person shall import or export any ammonium nitrate except under and in accordance with the conditions of the licence under the Rules. In the case at hand, the undisputed position is that the Appellant imported 740 MT of ammonium nitrate on 24.09.2015 from Korea. Such import was subsequent to the rejection of the application for a P5 licence. The appellate authority duly considered the fact that the Appellant had imported the consignment without a licence and that such import was in violation of Rules 4 and 6(4)(a) of the Ammonium Nitrate Rules. In addition, she contended that the appellate authority adverted to the fact that specific information had been received that the Appellant had sold ammonium nitrate to stone quarrying units and to fire cracker manufacturing units. Therefore, she submitted that the rejection of the appeal was in consonance with the Explosives Act and the Ammonium Nitrate Rules. She concluded her submissions by pointing out that the learned single Judge adverted to the relevant provisions of the Explosives Act and also took into consideration the proceedings dated 16.09.2016 while rejecting the writ petition, and, consequently, no interference is warranted as regards the impugned order.

12. Mr. Rajnish Pathiyil pointed out that the Appellant had admittedly imported ammonium nitrate without the requisite import licence. Consequently, it is tantamount to the import of prohibited goods as defined in Section 2 (33) of the Customs Act, 1962 (the Customs Act). Every importer is required to present the bill of entry along with the declaration as to the truth of the contents of the bill of entry. This is specified under Section 46(4) of the Customs Act. Further, as per Section 46 (4) (A) thereof, the importer who presents a bill of entry shall ensure the following namely:--

- (a) the accuracy and completeness of the information given therein;
- (b) the authenticity and validity of any document supporting it; and
- (c) compliance with the restriction or prohibition, if any, relating to the goods under this Act or under any other law for the time being in force.

In this case, the import of ammonium nitrate is prohibited under the Ammonium Nitrate Rules without a P5 licence. Consequently, the importer, namely, the Appellant was required to ensure that no prohibited goods are imported. Once the customs authorities became aware of the fact that the Appellant did not possess a valid licence, the goods were detained and, subsequently, auctioned by the customs authorities in accordance with the directions of the Chief

Controller of Explosives, PESO. For all these reasons, he submitted that the appeal is liable to be rejected.

13. We considered the submissions of the learned counsel for the respective parties and examined the materials on record.

14. The first question that arises for consideration is whether the Appellant was entitled to import ammonium nitrate. The Ammonium Nitrate Rules came into force on 11.07.2012. Rule 6 (4) (a) of the Ammonium Nitrate Rules prohibits the import of ammonium nitrate without a licence. The said Rule 6(4) (a) is as under:

"No person shall import or export any Ammonium Nitrate except under and in accordance with the conditions of license granted under these rules."

15. The learned counsel for the Appellant relied upon the proviso to Rule 5 to contend that the Ammonium Nitrate Rules are not applicable until the expiry of one year from the date of publication of rules. The said Rule 5 is as under:

"5. Pre-requisite for grant of licence:-- No Licence shall be granted unless all the relevant provisions laid down under these rules and all conditions contained in the license forms under Part-2 of Schedule II annexed to these rules are complied with.

Provided that all the existing manufacturers, converters, users, transporters, stevedores, sellers, possessors, importers and exporters shall apply for licence within six months and shall comply with the provisions of these rules within a period of one year from the date of publication of these rules."

16. On examining Rule 5, it is clear that an existing importer is entitled to apply for a licence within six months from the date of entry into force of the Ammonium Nitrate Rules and to comply with the provisions of the Rules within one year from the date of publication thereof. In the case on hand, the Appellant applied for a P5 licence on 05.08.2015, and the said application was rejected on 19.08.2015. Once the application for a licence was rejected, in our view, the Appellant is not entitled to rely upon the proviso to Rule 5, which provides for additional time during the transitional period to enable persons dealing with ammonium nitrate, as of the date of entry into force of the Ammonium Nitrate Rules, to apply for a licence and to comply with the Rules. In fact, the proviso to Rule 5 was deleted by a subsequent amendment with effect from 27.09.2018. Even otherwise, on facts, the time limits in the proviso do not apply. As stated earlier, the undisputed position is that the Appellant imported 740 MT of ammonium nitrate under bill of entry No.2704255 dated 24.09.2015 from Korea. Thus, it is clear that the import of ammonium nitrate was subsequent to the rejection of the

application for a licence. Consequently, there is no doubt that the Appellant violated Rule 6(4)(a) of the Ammonium Nitrate Rules which prohibits a person from importing ammonium nitrate without a valid licence and without complying with the conditions of such licence.

17. In addition, we note that ammonium nitrate having the chemical formula NH_4NO_3 or any combination containing more than 45% of ammonium nitrate by weight shall be deemed to be an explosive as per the Explosives Act. This position emerges from the notification dated 21.07.2011 of the Ministry of Commerce and Industry which was issued under Section 17 of the Explosives Act. Keeping in mind the fact that ammonium nitrate is an explosive in any combination containing more than 45% of ammonium nitrate by weight and the admitted fact that the application for import licence was rejected, we conclude that the Appellant was not entitled to import 740 MT of Ammonium Nitrate on 24.09.2015 and, consequently, the detention and subsequent auction of the consignment of ammonium nitrate by the Customs authorities cannot be faulted.

18. However, the question remains as to whether the application for an import licence can be rejected on the ground that the Appellant is a trader. On perusal of the original rejection order dated 19.08.2015, we find that the said order refers to the fact that the Appellant is a trader and that an import licence is granted to users and not traders.

19. Upon perusal of the Ammonium Nitrate Rules, we do not find any provision that prohibits the grant of licence to a trader. However, it needs to be borne in mind that ammonium nitrate is an explosive. The learned counsel for the first and second Respondents pointed out that the import licence has not been granted to any trader so far on the ground of national security. She explained that ammonium nitrate is used in the manufacture of explosives and, therefore, it would be difficult to track the end use and end users of ammonium nitrate if traders are permitted to import ammonium nitrate for sale to their customers. Upon perusal of Rules 34 and 35 of the Ammonium Nitrate Rules, we find that Rule 34 provides that the District Authority shall verify the antecedents of the applicant including the genuineness of the purpose before granting a no objection certificate. Under Rule 35, the License Issuing Authority is empowered to conduct an enquiry and grant a licence only upon being satisfied with the documents received. Rule 34(2)(a) and 35 read as follows:

"34(2)(a) On receipt of the application for issue of no objection certificate or grant of License, the District Authority shall verify the antecedents of the applicant, lawful possession of the site, genuineness of the purpose, interest of the public any other matter as deemed necessary and carry out any other verifications

or enquiries as may be specifically required or deemed necessary by the license issuing authority.

35. Grant of a License:--

(1) The License issuing Authority, on being satisfied with the documents received for grant of License, in the Form specified in Schedule II and after making such inquiry, if any, as it may consider necessary, shall, subject to the other provisions of the Act and these rules, by order in writing either grant the License or refuse to grant the same.

(2) License for transport of Ammonium Nitrate or Ammonium Nitrate melt in Form P-4 shall be granted only to the valid license holders in Form P1, P-2, P-3 or P-5.

(3) The licensing authority may verify the facilities of the licensed premises and on satisfaction shall endorse the licence.

(4) The licensing authority, if necessary, may impose additional conditions to the license.

(5) The District Authority may refer to the Chief Controller for seeking any expert opinion, if required."

On perusal of the aforesaid Rules 34 and 35, it is clear that considerable discretion is vested on the Licensing Authority with regard to the grant or rejection of a licence under the Ammonium Nitrate Rules. The learned counsel for the first and second Respondents also relied upon the correspondence of PESO with regard to the grant of licence. In particular, the learned counsel relied upon the communication dated 16.09.2016 from the Chief Controller of Explosives to the Under Secretary of the Ministry of Commerce and Industries wherein it is stated, inter alia, as under:-

Relevant policies under Explosives Rules, 2008:

With respect to import & export of explosives under Explosives Rules, 2008, the following practices are being followed for more than 10 years, based on the policy decisions arrived at by PESO in the year 2005.

1) Export license under Explosives Rules, 2008 are not granted to the traders. License for export of explosives is granted only to the explosives manufacturers to export authorized explosives manufactured by them, with the exclusion in case of safety fuse. Safety fuse is allowed for export by other explosives manufacturers, if the item safety fuse is part of their regular export consignment.

2) Import license under Explosives Rules, 2008 is granted only to the respective users not to the traders, other than import of Marine Distress Signals.

By the aforesaid practice of granting export license to the explosives manufactures and import license to the respective users, export/import of

explosives has become a level playing field for every manufacturer & user in the country and it was well accepted by the industry. Further regulating & monitoring mechanism of export/import of explosives becomes effective and no issues related to security threats cropped up in the transaction of explosives during export & import, so far.

Ammonium Nitrate Rules, 2012:

a) The Explosives Rules, 2008 and Ammonium Nitrate Rules, 2012 framed under Explosives Act 1884 are sharing equal importance in terms of National Security. The national internal and external security concern becomes more crucial, when Ammonium Nitrate is allowed for import by traders for domestic sale and for export by traders.

b) In view of the above, the same policy adopted for export & import of explosives under Explosives Rules, 2008 is being extended to the export & import of Ammonium Nitrate was granted to Traders and Converters of Ammonium Nitrate.

d) License for export of Ammonium Nitrate is being granted only to Ammonium Nitrate manufacturers and license for import of Ammonium Nitrate is being granted only to the bona fide users viz., explosives and nitrous oxide manufacturers for their captive consumption.

Necessary amendments in the Ammonium Nitrate Rules, 2012 in line with the aforesaid practice has already been proposed under Rule 6(4).

All the related note sheets arriving at these policies by PESO from time to time are enclosed herewith, for your kind perusal."

20. In addition, the learned counsel relied upon the Note indicating the Demand and Supply of ammonium nitrate in the year 2016-2017 wherein it is stated that explosives manufacturers imported 3.17 MT (28.7% of their requirement) of ammonium nitrate for their captive consumption which was only to meet the gap between the demand and supply of ammonium nitrate in the Country. It is further stated that if traders are allowed to import ammonium nitrate, they need to import in several thousand metric tonnes by the sea route and that this would lead to dumping of an excess of ammonium nitrate in the country. This, in turn, would lead to the unsafe and illegal practice of supplying ammonium nitrate to the mining and quarrying industry, which position prevailed prior to the notification of the Ammonium Nitrate Rules.

21. While rejecting the appeal on 02.11.2018, we find that the appellate authority recorded as follows:

"iv) It was also reported by the Principal Commissioner of Customs, Chennai that M/s.Shri Amman Chemicals had imported 696 MT of Ammonium Nitrate through Chennai Sea Port during the period

from 09/10/2012 to 16/05/ 2014 and 500 MT of Ammonium Nitrate through Visakhapatnam Sea Port during the period from 26/04/2012 to 04/10/2012 with false declaration as "Fertilizer":

v) Further, investigation of Special Intelligence & Investigation Branch of Customs had brought out the unauthorised sale of Ammonium Nitrate imported during the years 2012 to 2014 by M/s Sri Amman Chemicals to various individuals and firms not holding Form P-3 licence for possession and use sale of Ammonium Nitrate under Ammonium Nitrate Rules. 2012:

vi) PESO had not granted any licence in Form P-5 for import of Ammonium Nitrate to any trader ;

(vii) Import licences under the Explosives Rules, 2008 were granted to users only and not to traders. The Explosive Rules, 2008 and Ammonium Nitrate Rules, 2012 framed under the Explosives Act, 1984 are of equal importance in terms of national security . Therefore, PESO had decided not to grant licence to any trader for import of ammonium nitrate.

A licence in P-5 Form was required to import ammonium nitrate, which M/s Sri Amman Chemicals did not possess. Despite refusal to grant import license by CCE. Nagpur on 19th August, 2015, the Appellant had imported the aforesaid AN consignment of 740 MT through Chennai Port on a later date i.e., 24" September. 2015 which amounts to violation of Rules 4 & 6(4)(a) of the Ammonium Nitrate Rules. 2012:

Bill of Lading is prepared in advance and is not a valid document evidencing date of dispatch from the country of export. Moreover, as per written submission by the appellant vide their letter dated 27/1/2015, due to slackness of their staff they could not intimate their supplier in Korea for not dispatching the consignment and it was dispatched from Korea on 9th September, 2015 and arrived at Chennai port on 24" September. 2015. The explanation offered by the Appellant is not satisfactory.

Appellant knowing well that his application for grant of P-5 License has been refused by the Chief Controller of Explosives, did not stop dispatch of consignment from Korea;

Special Intelligence & investigation Branch (SIIB). Principal Commissioner of Customs vide letter No.Enq/56/2015-SIIB & INV/01/2016-SIIB dated 17th May, 2016 informed CCE, Nagpur that the Appellant had earlier cleared 696 MT of Ammonium Nitrate through Chennai Port and 500 MT through Visakhapatnam Port without a valid licence in Form P5 under the Ammonium Nitrate Rules, 2012. The investigation of Special intelligence & Investigation Branch Customs revealed that the Appellant had sold the entire AN imported earlier by them to various individuals and to companies involved in stone quarrying, constructions & mining activities and the same was not used for agricultural purpose. Further, the said investigation categorically brought out the entire list of sale of imported Ammonium Nitrate made by the Petitioner to various individuals and firms not holding Form P-3 License for possession and use/sale of Ammonium Nitrate which is violation of Ammonium Nitrate Rules, 2012

As per Gazette Notification vide S.O.1678 (E) dated 21st July, 2011, Ammonium Nitrate is an explosive and regulating import of the same on reasonable grounds including security of the country is justified:

After careful perusal of records and considering the facts of the case, the provisions of the Explosives Act, 1984 and Ammonium Nitrate Rules, 2012, the appeal is dismissed and the order dated 19th August, 2015 of Chief Controller of Explosives is upheld."

22. Keeping in mind the Ammonium Nitrate Rules, the facts of this case and the documents on record, we find that the rejection of the Appellant's appeal is in order. We also find that the learned single Judge duly considered the provisions of the Explosives Act, the Ammonium Nitrate Rules, the communication dated 16.09.2016 of the Chief Controller of Explosives and the order impugned in the writ petition while rejecting the writ petition. Considering all of the above, we find that the said order does not warrant interference and there is no merit in the appeal. Therefore, the appeal is dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar

//True Copy//

To

1. The Additional Secretary & Appellate Authority
Ministry of Commerce & Industry
Department of Industrial Policy & Promotion
Udyog Bhawan, New Delhi-110 002.

2. The Chief Controller of Explosives
Petroleum & Explosives Safety Organization,
"A" Block, 5th Floor, CGO Complex,
Seminary Hills, Nagpur,
Maharashtra-440 006.

3. The Commissioner of Customs
Chennai III Customs Commissionerate
Custom House, 60, Rajaji Salai,
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4. The Additional Commissioner of Customs (SIIB)
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Chennai-600 001.

+1cc to M/s.Sunita Kumari, Special Central Government
Advocate, S.R.No.32938

+1cc to Mr.Rajnish Pathiyil, Senior Central Government
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Pre-delivery judgment in
Writ Appeal No.604 of 2020 &
C.M.P.Nos.8398 & 8399 of 2020

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