

**2010 (3) GLR 2273**

**GUJARAT HIGH COURT**

**Hon'ble Judges:D.A.Mehta and H.N.Devani JJ.**

Essar Steel Limited Versus Union Of India

SPECIAL CIVIL APPLICATION No. 4079 of 2010 ; \*J.Date :- APRIL 8, 2010

- [CONSTITUTION OF INDIA](#) Article - [226](#)
- [CENTRAL EXCISE ACT, 1944](#)
- [CENTRAL EXCISE RULES, 2002](#) Rule - [19](#)

**Constitution of India - Art. 226 - Central Excise Act, 1944 - Central Excise Rules, 2002 - R. 19 - goods cleared for export without payment of duty - goods could not be exported - liability to pay duty - contended that petitioner could not export goods due to reasons attributable to foreign buyer though price of goods was received in foreign currency - held, contention not acceptable - petitioner liable to pay excise duty - petition dismissed.**

**Imp.Para:** [ [13](#) ] [ [14](#) ] [ [15](#) ] [ [16](#) ] [ [17](#) ] [ [18](#) ]

**Cases Referred To :**

1. Rolcon Engineering Co. Ltd. V/s. State of Gujarat Special Civil Application No. 2033 of 2004

**Equivalent Citation(s):**

2010 (3) GLR 2273 : 2010 JX(Guj) 274

**JUDGMENT :-  
H.N.DEVANI, J.**

**1** By this petition under Article 226 of the Constitution of India, the petitioner seeks the following substantive relief :

"[18] [A] Your Lordships be pleased to issue a writ of or in the nature of mandamus quashing and setting aside the demand of excise duty raised against the petitioner in respect of 10,867,359 M.T. of different grades of steel products including galvanized coils and hot rolled plates as evidence interalia vide letter dated 31.3.2010 at ANNEXURE-N hereto and be further

pleased to restrain the respondents from raising or enforcing such demand against the petitioner."

**2** The facts stated briefly are that the petitioner is a Public Limited Company incorporated under the Companies Act, 1956 and is inter alia, engaged in the business of manufacturing steels, including hot rolled coils, sheets and plates. The petitioner entered into agreements for sale of 10,867.359 MTs of different grades of steel products, including galvanized coils and hot rolled plates (the subject goods) with Liberty Commodities Ltd. (the foreign buyer) on various dates. The export sale value was about Rs.48.54 crore. Under the contract the seller was to communicate cargo readiness to the buyer who was to nominate a vessel within the time stipulated for the purpose and in the event the buyer did not place the vessel within 15 days of cargo readiness, the seller would be entitled to claim the proceeds under the letter of credit; and that on full payment being realised as per the invoice the title of the goods would stand transferred to the buyer. The petitioner cleared about 10,867 MTs of G.P. Sheets/coils of varying thickness from its manufacturing facility at Hajira for exports without payment of duty. The clearances were made under 267 ARE-1's during the months of June and July 2008, without payment of duty against bond/letter of undertaking, and the cleared goods were stored at Pre-Shipment Storage facility of Mumbai Port trust. It is averred in the petition that the goods were delivered to the shipping agent of the buyer at Mumbai port and on fulfillment of the cargo readiness, the consideration for sale was recovered under the letter of credit in respect of the commercial invoices raised by the petitioner on the buyer. In terms of the contract between the petitioner and the foreign buyer, the buyer was to pay value before actual exports and nominate vessel for lifting the goods as the said contract was F.O.B. However, the buyer did not thereafter physically export the subject goods from the port. The steep fall in prices due to global financial crisis resulted in the cancellation of the re-sale orders of the buyer which led to the goods not being exported and as a consequence thereof, the petitioner could not produce proof of export as contemplated under Notification No.42/2001. Moreover, on account of delay in nomination of the vessel detention and demurrage charges were levied by Mumbai Port on the buyer.

**3** Since the petitioner could not produce proof of export as contemplated under Notification No.42/2001, as amended from time to time, within a period of six months prescribed therein, the petitioner addressed a letter dated 22nd January 2009 to the respondent No.2 seeking extension of time for submission of proof of export. However, the said respondent vide letter dated 20.3.2009 rejected the request for extension and raised duty demand of Rs.6,99,99,589/- along with interest from the date of removal of goods for

export from the petitioner on the ground that proof of export had not been submitted by it. The petitioner reiterated the request for extension vide letter dated 27.3.2009, whereupon the respondent No.2 granted one time extension of six months for submitting proof of export vide letter dated 16.4.2009. It appears that in the meanwhile, representations were made by the buyer to the Mumbai Port for remission/waiver of the demurrage and detention charges mainly on the ground that the accrued liability was more than the value of goods itself. Since the goods were not yet exported, the petitioner made another application vide letter dated 8.6.2009 for further extension of time for furnishing proof of export, which came to be refused vide letter dated 10.6.2009. Vide letter dated 3.7.2009, the petitioner was directed to pay central excise duty of Rs.5,82,87,812/- along with interest, being the duty payable on dutiable sheets (G.P. Sheets) cleared for export without payment of duty under bond/LUT in respect of which, proof of export had not been produced.

**4** The petitioner challenged the order dated 3.7.2009 as well as letter dated 10.6.2009 by filing separate appeals before the Commissioner (Appeals), who vide common order dated 7.8.2009, permitted the petitioner to complete the export by 31st March, 2010 and consequently, set aside the direction contained in letter dated 3.7.2009 of the Deputy Commissioner as having become infructuous.

**5** Vide letter dated 31st March 2010, the respondent No.3 called upon the petitioner to submit documents of proof of export in respect of the subject goods on 1.4.2010 or make payment of duty along with interest and to submit payment particulars to his office, failing which the action would be taken for recovery of the same which is subject matter of challenge in the present petition.

**6** Mr. Mihir Joshi, learned Senior Advocate appearing on behalf the petitioner submitted that vide the impugned letter dated 31st March 2010, the petitioner has been called upon to submit proof of export as contemplated under the notification in question, which has become impossible of performance on account of events which cannot be attributed to the petitioner at all and therefore, compliance thereof cannot be insisted upon and the petitioner must be deemed to be relieved from such obligation. It is submitted that on account of delay on the part of the buyer in nominating the vessel and exporting the subject goods, detention and demurrage charges were levied by the Mumbai Port. Representations were made by the buyer to the Mumbai Port authorities for waiver of detention and demurrage charges which came to be rejected on 17.4.2009, however, the request for reconsideration was made on the special facts of the case. It is submitted that the buyer has thereafter preferred writ petition No.1773 of

2009 before the Bombay High Court against the Board of Trustees of the Port of Mumbai for waiver/remission of the demurrage/detention charges and for restraining the port authorities from auctioning the said goods for recovery of the same. It is submitted that the petitioner has also represented to the Central Board of Excise and Customs vide letter dated 12.3.2010 requesting them to waive the condition for producing proof of export which is pending before the Board. It is further submitted that the request has also been made to the Chairman, Mumbai Port Trust, that in case the goods are auctioned, excise duty and interest should be recovered from the successful bidder and remitted to the Deputy Commissioner of Central Excise.

**7** It is further submitted that the buyer had found it unviable to physically export the goods and appears to have abandoned them with the result that it has now become impossible for the petitioner to furnish proof of export of the subject goods as contemplated under the notification in question; that in terms of the contract with the foreign buyer, the petitioner had encashed the letter of credit and as such, the title in the goods had passed on to the buyer. That thereafter, the petitioner had no control over the subject goods and as such it has become impossible for the petitioner to perform its obligations under the undertaking. It is urged that the obligation under the undertaking having become impossible of compliance, it would be just and legal to relieve the petitioner from the obligation under the undertaking. It is submitted that, there being no deliberate or malafide breach of the undertaking on part of the petitioner, this Court may kindly consider granting the relief as prayed for.

**8** Alternatively, it is submitted that the auction by the port authorities be considered as substantial compliance of the condition of export insofar as the petitioner is concerned in view of the fact that upon the subject goods having been delivered by the petitioner to the foreign buyer, consideration in foreign exchange has been received by the petitioner and the title of the subject goods has passed to the foreign buyer under the contract. It is submitted that the principal object behind permitting removal of excisable goods without payment of duty for export is earning foreign exchange for the country. In the present case, the entire payment towards supply of goods for export has been received by the petitioner in foreign currency, hence the principal object has already been met. It is urged that it would be unjust and inequitable to saddle the petitioner with the liability of non-export of the goods in the facts of the present case, where it is evident that the default is entirely that of the buyer and the petitioner would be unable in law or facts to take any remedial measures for the purpose and in any case, the goods have not been diverted by the petitioner for any purpose other than export. In support of his submissions, learned Senior Advocate has placed reliance

upon a judgement of this Court in Rolcon Engineering Co. Ltd. V/s. State of Gujarat rendered on 2nd March 2006 in Special Civil Application No.2033 of 2004.

**9** In effect and substance the case of the petitioner is that in the aforesaid factual background, compliance of the undertaking given by the petitioner under Rule 19 of the Central Excise Rules, 2002 read with notification No.42/2001-C.E. (N.T.) cannot be expected and demanded as the same was impossible to be performed as the title in the goods had already passed on to the foreign buyer. It would, therefore, be necessary to refer to the relevant provisions under which the undertaking has been given by the petitioner.

**10** Rule 19 of the Central Excise Rules provides for export without payment of duty. Under the said rule, any excisable goods may be exported without payment of duty from a factory of the producer or the manufacturer or the warehouse or any other premises, as may be approved by the Commissioner, subject to such conditions, safeguards and procedure as may be specified by notification by the Board.

**11** Vide Notification No.42/2001-C(N.T.) dated 26th June 2001 issued under Rule 19 of the Rules, the Central Board of Excise & Customs has notified conditions and procedures for export of all excisable goods, except to Nepal and Bhutan without payment of duty from the factory of the production or the manufacture or warehouse or any other premises as may be approved by the Commissioner of Central Excise. The conditions are:

[a] That the exporter shall furnish a general bond in the Form specified in Annexure-I to the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise having jurisdiction over the factory, warehouse or such approved premises, as the case may be, or the Maritime Commissioner or such other officer as authorised by the Board in this behalf in a sum equal to at least the duty chargeable on the goods, with such surety or sufficient security, as such officers may approve for the due arrival thereof at the place of export and their export therefrom under Customs or as the case may be postal supervision. The manufacturer - exporter may furnish a letter of undertaking in the Form specified in Annexure-II in lieu of a bond;

[b] That the goods shall be exported within six months from the date on which these were cleared for export from the factory of the production or the manufacture or warehouse or other approved premises within such extended period as the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise or Maritime Commissioner may in any particular case allow;

[c] That when the export is from a place other than registered factory or warehouse, the excisable goods are in original packed condition and identifiable as to their origin.

**12** The notification also provides for the procedure for removal without payment of duty and specifies that the letter of undertaking would not be discharged unless the goods are duly exported to the satisfaction of the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise or Maritime Commissioner or such other officer as may be authorized by the Board within the time allowed for such export or otherwise accounted for to the satisfaction of such officer, or until the full duty due upon any deficiency of goods, not accounted so, and interest, if any, has been paid.

**13** While clearing the subject goods for export without payment of excise duty, the petitioner has filed Letter of Undertaking dated 28th February 2008 in the following terms :

"[a] to export the excisable goods removed from my/our factory/warehouse/approved place of storage without payment of duty under rule 19 of the Central Excise Rules, 2002 within six months from the date of such removal or such extended period as may be permitted by the jurisdictional Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise or the Maritime Commissioner or the Central Excise Officer duly authorized by the Board.

[b] to observe all the provisions of the Central Excise Rules, 2002 and all such amendments thereto as may be issued from time to time to be observed, in respect of export of excisable goods to a foreign country and special economic Zones.

[c] to export the goods to the satisfaction of the Assistant Commissioner of the Central Excise or the Deputy Commissioner of Central Excise having jurisdiction over the factory of production or manufacture;

[d] pay the excise duty payable on the such excisable goods in the event of failure to export them, along with an amount equal to (interest prescribed under section 11AB of the Central Excise Act, 1994) on the amount of duty not paid, from the date of removal for export till the date of payment."

**14** From the facts emerging on record, it is apparent that there is an infraction of the conditions of the undertaking, inasmuch as the goods have not been exported within the extended time limit. The stand of the petitioner that in view of the title in the subject goods having vested in the foreign buyer the conditions are incapable of compliance seems to be at variance

with the conduct of the petitioner. According to the petitioner on fulfillment of cargo readiness clause, the consideration for the sale was recovered under the letter of credit and that upon full payment being realised as per the invoice the title of the goods stood transferred to the buyer; that in view of the title vesting in the buyer, it has become impossible for the petitioner to comply with the conditions of the undertaking. A perusal of the record of the case indicates that the petition has not mentioned the date on which the letter of credit has been encashed. However, in paragraph 2.2 of the order dated 7.8.2009 made by Commissioner (Appeals) whereby the period for exporting the subject goods has been extended till 31.3.2010, while recording the background of the case, it is recorded that the company realized the sale proceeds, in terms of the contract, even when goods have not been exported. Thus, it can safely be presumed that the letter of credit was encashed prior to the filing of the appeals.

**15** Thus even after the title of the goods had passed to the foreign buyer the petitioner has been requesting for extension of time to enable the petitioner to produce proof of export. Had it been the case of the petitioner that upon title in the subject goods passing to the buyer the undertaking had become impossible of compliance, the question of seeking extension for producing proof of export would not have arisen. From the conduct of the petitioner it is apparent that it had not treated the undertaking as impossible of compliance.

**16** Assuming that upon the title passing on to the buyer, the petitioner is faced with an impossible situation, it is a situation of its own making. It is the petitioner who has created a situation whereby the title to the subject goods has passed on to the buyer before the actual export having taken place. The petitioner had availed of the benefit of Rule 19 of the Rules as well as the notification No.42/2001 and cleared the subject goods for export without payment of duty. It was therefore, incumbent upon the petitioner to export the said goods in terms of the undertaking. The obligation to export was of the petitioner, and not of the buyer. The petitioner cannot now be heard to say that it has transferred the title to the goods prior to export and it has now become impossible for it to export the goods. Since the petitioner has undertaken to export the subject goods, it was for the petitioner to ensure that such a situation does not arise. Even if the petitioner has sold the goods prior to their export, the petitioner is liable to ensure that the same are exported in terms of the undertaking, and in case it is not possible to export the goods the liability to pay the central excise duty rests solely on the petitioner and the petitioner cannot be heard to say that the same be recovered from the successful bidder in case the goods are auctioned by the Mumbai Port Trust. The contract between the petitioner and the foreign

buyer is a matter between the petitioner and the buyer alone, and the authorities under the Central Excise Act are not concerned with the same. Insofar as the authorities under the Central Excise Act are concerned, they are concerned only with the petitioner who has undertaken to export subject goods in terms of the undertaking submitted by it. In case of failure to export goods within the period granted by the competent officer, the petitioner in terms of the undertaking is bound to pay the excise duty payable on the subject goods along with equal amount of interest on the amount of duty not paid from the date of removal for export till date of payment. If at all the petitioner has any claim, it is against the buyer and the public exchequer cannot be made to suffer on account of the petitioner's folly. The decision of this Court in Rolcon Engineering Co. Ltd. (supra) does not carry the case of the petitioner any further inasmuch as in the facts of the said case it had become impossible for the petitioners therein to generate electricity as their windmills had been destroyed on account of a devastating cyclone. Thus, contrary to the facts of the present case, in the said case the situation had arisen on account of a natural calamity which was an act of God and not on account of the situation created by the petitioners therein.

**17** Another contention advanced on behalf of the petitioner is that in view of the fact that the petitioner has received the consideration for the subject goods in foreign exchange, the principal object behind permitting removal of excisable goods without payment of duty is already met with hence the export obligation is deemed to be discharged. In this regard it may be noted that even after the petitioner had received the consideration, the petitioner has time and again been seeking extension of time from the excise authorities for production of proof of export. Vide order dated 7th August, 2009, the last extension has been granted upto 31st March 2010. The fact that the petitioner was throughout pursuing the authorities for extension of time till 30th March 2010 is a clear pointer to the fact that even according to the petitioner, the export obligation had not been discharged. If, as contended before this Court, the petitioner was of the view that the export obligation stood discharged upon receipt of foreign exchange, the petitioner would certainly have applied to the central excise authorities for discharge from the undertaking. However, the fact that the petitioner has not thought it fit to do so, indicates that even according to the petitioner, the export obligation had not been discharged. Besides, receipt of foreign exchange is only a consequence indicative of the principal act having been performed, it does not in fact amount to the principal act having been performed. In the circumstances, the contention that in view of the fact that the foreign exchange has been received, there is a deemed export does not merit acceptance.



**18** Another notable aspect of the matter is that the petitioner had all the while been pursuing the central excise authorities for extension of time till the last extension was granted upto 31st March 2010. Now, in a complete somersault, this petition has been filed on 1st April 2010 immediately after the expiry of the extended period of time challenging the authority of the central excise officers to enforce the undertaking. In this regard, it may also be pertinent to refer to the Order in Appeal dated 7th August 2009 made by Commissioner (Appeals) pursuant to the appeals preferred by the petitioner challenging the demand of excise duty and rejection of its application for extension of time to submit proof of export. While exercising discretion in favour of the petitioner and extending the period to complete the export of the subject goods upto 31st March, 2010 the factors which weighed with the Commissioner as recorded in the order are thus: "this is not a case where exporter is a flight by night operator. The exporter is a large manufacturer of Steel Sheets with large net worth. Extension of time for export would provide a helping hand to the exporter company to export the goods which is the need of the hour. If eventually exporter is unable to make exports, the duty along with interest can be recovered in terms of the bond / LUT and there is hardly any risk to the revenue." Having availed of the benefit of the said order, the petitioner cannot now be permitted to wriggle out of its obligation under the undertaking. In the opinion of this Court, though it is not necessary to enter into details, the entire exercise appears to be a part of a larger design.

**19** In view of the aforesaid discussion, no case is made out for grant of the relief prayed for in the petition. The petition fails and is accordingly, summarily rejected with no order as to costs.