
(1987) 03 CAL CK 0008

In the Calcutta High Court

Case No : Appeal No. 222 of 1985 in Matter No. 544 of 1984

A.K. Corporation Ltd.

APPELLANT

Vs

Controller of Imports and Exports

RESPONDENT

Date of Decision : 02-03-1987

Acts Referred:

Citation : (1989) 42 ELT 566

Hon'ble Judges : Sudhansu Sekhar Ganguly, J;Bimal Chandra Basak, J

Bench : Division Bench

Advocate : Soli J. Sorabjee, for the Appellant;M.M. Abdul Khadir, for the Respondent

Judgement

Bimal Chandra Basak, J.—In view of the final order which we propose to pass and to which the parties have also not raised any objection, we need not go into the facts in detail. The grievance of the petitioner in the main writ petition, who are the appellants before us, was regarding replenishment licence out of exports made by them. We are concerned with the year 1983-84, that is, 1983 April to 1984 March. Regarding this period in view of relevant import policy which is in paragraph 138, the petitioners were entitled to certain replenishment licence. The endorsement required is under sub-paragraph 14 of Rule 138. The Rule 138 is set out hereinbelow.

138(1). REP licences issued to manufacturer-exporters, against their exports of products manufactured by them will be valid, within their overall value for import of any items of raw materials, components, consumables, spares and packing materials, required by them for use in their factories subject to "Actual User" condition. This special facility will be subject to the conditions laid down hereunder.

(2) This facility will also be available to manufacturing Export Houses against REP licences issued to them on their exports products manufactured by them.

(3) Imports of items mentioned in Appendices 3,6 and 30 will be allowed only

upto 20 per cent of the face value of the REP licence subject to the condition that value of a single item should not exceed Rs. 1.0 lakh (or shall not exceed Rs. two lakhs in the case of manufacturer whose f.o.b. value of exports of select products in any of the two previous financial years was at least 25 per cent of the book value of his production of select products with a minimum of Rs. 10 lakhs f.o.b.), however, the aforesaid items appearing in column 4 or column 5 in Appendix 17, against the relevant export product will be allowed to be imported under this facility to the extent permitted in column 4 or column 5 or under the General Conditions laid down in Appendix 17, or to the extent permitted under this facility, whichever is more favourable to the importer. (A single item for this purpose will have the same meaning as laid down in para 31 of this policy).

(4) Import of canalised items mentioned in Appendix 8 of this policy will be permitted upto 20 per cent of the face value of the REP licence subject to the condition that the value of a single item should not exceed Rs. 1.0 lakh (or shall not exceed Rs. two lakhs in the case of manufacturer whose f.o.b. value of exports of select products in any of the two previous financial years was at least 25 per cent of the book value of his production of select products, with a minimum of Rs. 10 lakhs f.o.b.). Canalised items in Appendix 9 of this policy will not be allowed import of components/modules of Electric watches, clocks, time-pieces and import of flint buttons mentioned in Appendix 8 will also not be allowed. However, canalised items appearing in Column 4 or column 5 in App. 17, against the relevant export product, will be allowed to be imported under this facility to the extent permitted in column 4 or column 5 or under the general conditions laid down in Appendix 17, or to the extent permitted under this facility, whichever is more favourable to the importer.

(5) Items mentioned in Appendix 4 of this policy will not be allowed.

(6) Import of tools including consumable tools will be allowed under this facility subject to the value restriction on items referred to in sub-para (3) above.

(7) Import of instruments will not be allowed under this facility.

(8) Import of Items other than tools referred to sub-para (6) above, mentioned in Appendices 5 and 7 of this policy will be allowed under this facility. For this purpose, an additional value will also be allowed to the licence-holder, equal to 10% of the f.o.b. value of exports against which the REP licence in question has been issued. This additional 10% value will not be allowed to be utilised for import of any other items and will not form part of the licence value for any other purpose.

(9) Manufacturer-exporters wanting to make use of this facility should get their licences endorsed from the licensing authorities concerned. The licensing authorities will make the following endorsement on such licences:-

This licence will also be valid for import of items permissible under para 138 of Import Export Policy 1983-84 and shall be subject to "Actual User" condition as

laid down in Schedule 7 to the Imports (Control) Order, 1955."

(10) The facilities available to manufacturer-exporters in this para will also be available to manufacturers whose products are exported by others. (This facility is meant for those manufacturers only, not necessarily a Registered Exporter, whose product was actually exported and not for other manufacturers of the same or similar product. It is also not meant for manufacturers of packing materials of the product exported.) In cases where this facility is sought to be availed of, the exporter concerned while applying for import replenishment licences, will also furnish a declaration giving the name and address of the manufacturer whose goods were exported, and stating that the REP licence may be issued in the name of that manufacturer. Upon such declaration the REP licence will be issued in the name of the manufacturer concerned with an endorsement that it will be valid for the special facilities under para 138 of Import-Export Policy 1983-84 in the same manner as laid down in sub-para (9) above.

(11) The facilities under this para will be available in respect of REP licences issued in 1983-84, irrespective of the export period to which they belong.

(12) REP licences endorsed for utilisation under this para shall be non-transferable. It is, however, open to an exporter to make use of this facility only for a part of his REP entitlement, and to get for the remaining part of freely transferable REP licence. In such cases, the REP entitlement will be split up into two separate licences, namely, transferable and non-transferable.

The transferable licence will be issued for the items as permitted in Appendix 17 against the relevant export product. The non-transferable licence will be issued for "raw materials, components, consumables, spares and packing materials as permitted under para 138 of Import-Export Policy 1983-84". In the case of such non-transferable licences, the additional value for import of restricted items referred to in sub-para (8) above will be 10% of the f.o.b. value of exports against which the main REP licence was issued, and not the proportionate part of f.o.b. value.

(13) The value limits laid down in sub-paras (3) & (4) above, for import of items appearing in Appendices 3,6,8 and 30 will not apply in a case where the concerned manufacturer of the product exported, has been exporting at least 50% of his production of select products in any of the two previous financial years, subject to a minimum of Rs. 5 lakhs f.o.b. REP licence-holders making use of this facility will be required to obtain a specific endorsement on the REP licence to this effect on production of Export Performance Certificate to the licensing authority concerned.

(14) The flexibility in the utilisation of REP licences allowed under para 138 will also be available to Export Houses and Training Houses, subject to the following conditions: -

(a) The facility will be available in respect of REP licences obtained by Export Houses/Trading Houses on their own exports of those export products which carry import replenishment rate of not more than 20% in Appendix 17.

(b) The materials imported shall be disposed of only to their supporting manufacturers, subject to "Actual User" condition. For this purpose, the Export Houses and Trading Houses shall give a list of their supporting manufacturers in advance to the licensing authority. The list once given by them shall not be liable to change in the course of the licensing period. That list shall form part of the import licence, with the condition that the materials imported shall be disposed of to the Actual Users given in that list. (In the case of Export Houses, the list shall not include more than 50 such manufacturers. This restriction shall not, however, apply to Trading Houses).

(c) The value restrictions on the import of items appearing in Appendices 3,6,8 and 30 in the case of Export Houses and Trading Houses will be the same as stipulated in sub-paras (3) & (4) above for the units exporting 25% of their production of select products with a minimum of Rs. 10 lakhs.

(d) The items allowed for import under this facility by Export Houses and Trading Houses will be those as are required as raw materials, components, consumables, spares and packing materials by their supporting manufacturers referred to above, subject to various restriction and conditions laid down in para 138.

(e) The additional 10% entitlement for import of items in Appendices 5 and 7 provided in sub-para (8) will not be available to Export Houses and Trading Houses.

(f) Each Export House and Trading House making use of this facility shall furnish a separate quarterly return to the regional licensing authorities concerned, giving the description of the items and their value imported and disposed of to Actual Users with their complete address and industrial registration number. Each quarterly report should reach the licensing authority concerned within a month from the expiry of the quarterly period, failing which the facility provided shall be liable to be withdrawn for the rest of the licensing period.

(15) Import of components under para 138 by DGTD units subject to phased manufacturing programme will be governed by the List Attestation procedure contained in Chapter 20 of this Book. In the case of Export Houses and Trading Houses, import of components shall also be subject to the conditions laid down in Chapter 18.

(16) Import of test, measuring and quality control instruments used in electronic industry will be allowed upto 20% of the licence value subject to the value of a single item not exceeding Rs. one Lakh, within the overall value of the licence under para 138 of this policy subject to "Actual User" condition."

2. In respect of 12 such replenishment licences endorsement under sub-

paragraph 14 was rejected solely on the ground of circular No. 15/83 dated 31-5-1983. The circular is as follows:

"Para 138 of Import and Export Policy (Vol.1) 1983-84, provides a measure of flexibility in the utilisation of REP licences issued to manufacturer-exporters, manufacturers and Export Houses/Trading Houses subject to the condition laid down.

In respect of some export products in Appendix 17 of the Import and Export Policy (Vol. I), additional import entitlement has been allowed in Column 5 meant for import of specified items only, for example, 15% additional entitlement has been allowed for import of OTS Containers in product Group "G", likewise, additional entitlement of 15% has been allowed for import of sugar in the same product group. It is clarified that such additional import entitlements are not allowed to be used for import under the flexibility provision of para 138 referred to above. Against such additional entitlements, only the items specifically permitted in Column 5 will be allowed.

"In Sub-para 138(11) of the current Policy, it has been provided that facilities in this sub-para will be available in respect of REP licences issued in 1983-84, irrespective of the export period to which they belong. It is also clarified that the endorsements made under para 138 on or after 15-4-1983 on REP licences issued prior to that date, will also be subject to the conditions laid down in the policy for 1983-84 and not the policy of 1982-83."

3. The learned judge dismissed the writ petition.

4. The main condition of the appellant before us is based on a judgment of the Supreme Court in *Oswal Woollen Mills Ltd and Another Vs. Union of India (UOI) and Another*, . There the Supreme Court held as follows :-

"Paragraph 140 clearly states that (REP) Licence will be issued in the name of the Registered Exporter only and will not be subject to "Actual User" condition and that except for cases covered by paragraphs 136(2), 185(2) and 186(1) the licence holder may transfer the licence in full or in part in favour of any other person and that the licence holder or such transferee may import the goods permitted therein but the facility of paragraphs 136,137 and 146 shall not be available to any transferee unless the transferee is himself a Registered Exporter and can satisfy the Custom Authorities at the time of clearance of the goods of his bona fides. The goods sought to be imported by the first petitioner on the basis of (REP) Licence in question do not fall under paragraphs 136(2), 137, 146, 185(2) and 186(1) mentioned in paragraph 140 of the Import Policy, 1981-82. Paragraph 195(4) (ii) grants to Trading Houses like the first petitioner the facilities under Import Policy, viz., the import replenishment (REP) Licences transferred to them by others. Thus the first petitioner is entitled under paragraphs 140 and 195(4)(ii) to the facility of the Import Policy as a transferee of the (REP) Licence issued in the name of the actual manufacturer-exporter against exports made by that manufacturer-exporter. The contention of the

respondents that under paragraph 138(1) the facility to import raw materials etc. under the (REP) Licence is available only to the actual manufacturer-exporter against whose exports the (REP) Licence was issued amounts to reading into paragraph 138(1) the words "against the exports of products manufactured by them" after the words "manufacturer-exporters" and before the words "will be valid". That is what is sought to be done by the impugned Circular dated 31-8-1981. The present contention of the respondents is that the Circular dated 31-8-1981 only clarifies paragraph 138(1) of the Import Policy, 1981-82 and does not amend or modify that paragraph. That is not how the learned judges of the High Court have understood the Circular in their judgment under appeal. The learned judges have stated in their judgment that the Circular dated 31-8-1981 appears to change the Import Policy and that the contention of the petitioners before them that the condition mentioned in the impugned order dated 15-10-1981 is not found in paragraph 138 of the Import Policy 1981-82 is not acceptable to them. The learned Judge were right in saying that the Circular appears to change the Import Policy but they have erred in saying that the condition mentioned in the impugned order dated 15-10-1981 is found in paragraph 138(1) of the Import Policy, 1981-82. We are unable to find any such condition in paragraph 138(1) of the Import Policy, 1981-82. It is significant to note that paragraph 138(1) was not mentioned in paragraph 140 of the Import Policy, 1981-82. It is also significant to note that the Import Policy for the subsequent year 1982-83 the said words "against their exports of products manufactured by them" have been actually inserted in paragraph 138(1) after the words "REP Licences issued to manufacturer-exporter" and before the words "will be valid within the overall value for import of any items of raw materials, components, consumables, spares and packing materials required by them for use in their factories subject to "Actual User" condition". In view of the respondents' contention that the Circular dated 31-8-1981 is only clarificatory of paragraph 138(1) of the Import Policy, 1981-82 and does not amend or modify that paragraph it is unnecessary for us to go into the question whether the Circular issued by the Joint Chief Controller of Imports and Exports can validly amend the Import Policy, 1981-82. On a perusal of the relevant paragraphs of the Import Policy, 1981-82 mentioned above we agree with Mr. Soli J. Sorabjee, Senior Advocate for the appellants that the condition mentioned in the third respondent's impugned letter dated 15-10-1981 is not there in paragraph 138(1) of the Import Policy, 1981-82 and that the Circular dated 31-8-1981 is invalid and that the rejection of the petitioners' request made in the letter dated 23-9-1981 by the third respondent in the letter dated 15-10-1981 is unwarranted, and the request should have been complied with. We are unable to agree with Mr. M.M. Abdul Khadir, Senior Advocate for the respondents that the condition mentioned in the letter dated 15-1-1981 is to be found in paragraph 138(1) of the Import Policy, 1981-82. Accordingly, we allow the appeal with costs and the Writ Petition without costs."

5. The learned advocate appearing in support of the appeal has submitted before

us that following the said Supreme Court judgment we should also allow the appeal and set aside the impugned order on the ground that the rejection of the application of the petitioner has not been made on any ground but only on the ground of the Circular. Therefore, by the said circular some bar is sought to be introduced which was not there in 138. The learned advocate appearing on behalf of the respondents submitted that this application should be rejected. However, he admitted that the impugned rejection, in the facts of this case, has been made solely on the ground of that circular of 1983.

6. In our opinion, in view of the judgment of the Supreme Court in *Oswal Woollen Mills Ltd. and Anr. v. Union of India and Ors.* (supra) this appeal must be allowed and the impugned order must be set aside. In that case the Supreme Court dealt with the judgment of the High Court. The High Court stated in their judgment that the Circular dated 31-8-1981 appeared to change the Import Policy and that the contention of the petitioners before them that the condition mentioned in the impugned order dated 15-10-1981 was not found in paragraph 138 of the Import Policy was not acceptable to the Supreme Court. In this context, the Supreme Court observed that the learned judges of the High Court were right in saying that the Circular appears to change the Import Policy but they have erred in saying that the condition mentioned in the impugned order dated 15-10-1981 is found in paragraph 138(1) of the Import Policy, 1981-82. The Supreme Court observed that they were unable to find any such condition in paragraph 138(1) of the Import Policy, 1981-82 and in this context pointed out that in subsequent Import Policy the words "sought to be introduced" by the impugned orders were there. In this context the Supreme Court observed that in view of the respondents' contention that the circular dated 31-8-1981 was only clarificatory of paragraph 138(1) of the Import Policy, 1981-82 and does not amend or modify that paragraph, it was not necessary for the Supreme Court to go into the question whether the Circular issued by the Joint Chief Controller of Imports and Exports can validly amend the Import Policy of that particular year. On a perusal of the relevant paragraph of the Imports Policy the Supreme Court agreed with the learned advocate for the appellant that the condition mentioned in the third respondent's impugned letter dated 15-10-1981 was not there in paragraph 138(1) of the Import Policy and that the Circular dated 31-8-1981 was invalid and that the rejection of the petitioners' request made in their letter dated 23-9-1981 by the third respondent in the letter dated 15-10-1982 was unwarranted.

7. Here, the position is also the same. The application of the petitioners for endorsement under sub-paragraph 14 of paragraph 138 of the Import Policy was rejected solely on the ground of the circular. Therefore, it proceeds on the basis that because of the circular such rejection has taken place and not for any other reason in Rule 138. Accordingly, it follows that such rejection was not made on the ground of anything contained in paragraph 138 of the Import Policy but because of something new introduced by the circular of 31-5-1983. This is, in our opinion, bad as it sought to impose a condition which was not there in

original para 138 of the Import Policy.

8. For the aforesaid reasons we allow the appeal and set aside the impugned order of the learned trial judge. The writ petition is allowed. The Rule is made absolute. There will be an order quashing the orders passed by the respondents rejecting the prayer of the appellants-petitioners to endorse in terms of para 138(14) on the supplementary licence in view of the Circular No. 15/83, dated 31st May, 1983. They are restrained by an order of Mandamus from giving any effect or further effect to such rejection. However, we make it clear that the applications made by the petitioners before the Authority for such endorsement under sub-paragraph (14) shall be treated to be pending before the Authorities concerned and they are directed to dispose of the same in accordance with law after giving the petitioners appellants a personal hearing. Such hearing shall take place, the order passed and communicated to the petitioners-applicants either directly or through their Advocate-on-record within a period of three months from this date. If the order is made against the petitioners-appellants, then reasons must be given.

9. Let it be made clear that this order is applicable in respect of 14 rejections of 14 licences, particulars of which would appear from Annexure "B" to the petition at page 27 of the Paper Book and the impugned order being Annexure "F" to the petition.

Sudhansu Sekhar Ganguly, J.

10. I agree.