

(2010) 03 BOM CK 0029
In the Bombay High Court
Case No : Writ Petition No. 1481 of 1992

Ashok Kumar Jain

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 08-03-2010

Acts Referred:

Citation : (2010) 253 ELT 767

Hon'ble Judges : F.I. Rebello, J;D.G. Karnik, J

Bench : Division Bench

Advocate : A.J. Rana, instructed by Pandya and Co, for the Appellant; P.S. Jetly and Rohit Pardeshi, for the Respondent

Judgement

D.G. Karnik, J.—The petitioner is an Electronic Engineer and is engaged in the business of producing Advertising Films, TV Serials and Documentaries. The petitioner desired to import TV Broadcast and studio equipments as permissible Non-OGL capital goods against a REP licence, purchased by the petitioner, which carried specifically a flexibility endorsement under para 177 of Import and Export Policy for April 1988-March 1991 (for short "AM 88-91) permitting import of goods. On import of the goods, the petitioner filed a bill of entry for home consumption under Rotation No. 3559 Line No. 23 dated 15th June, 1992 along with the REP Licence (License No. 3343737 dated 13-2-90 valid for 18 months) and requested for clearance of the goods. The Custom Authorities - the respondent Nos. 2 and 3 herein, however refused to assess the bill of entry and allow the imports, though previously similar goods were allowed to be imported by the petitioner himself as well as few other persons. Petitioner has therefore approached this Court for a mandamus directing the respondents to allow the clearance of the goods. While admitting the petition, by way of an interim relief, by minutes of the order dated 6th July, 1992 this Court permitted the petitioner to clear the goods against the REP licence dated 13th December, 1992 subject to the petitioner executing an I.T.C. Bond for 100% of the C.I.F value of the goods. This Court also granted permission to the respondents to adjudicate but not to

enforce the order pending the final disposal of the petition. We are informed at the bar that in pursuance of the said interim order, the goods have already been cleared by the petitioner by executing the I.T.C. Bond.

2. Learned Counsel for the petitioner invited our attention to the 10 similar orders, copies of which are annexed at Exhibit-A 1 to A 10 to this petition, wherein under similar circumstances this Court has allowed the clearance of similar goods. Perusal of the orders show that they all were interim orders, all of which except one appears to have been passed on the minutes submitted by the parties. In our view, they are not relevant for the purpose of final decision of the petition which has to be decided on merits.

3. The Imports and Exports (Control) Act, 1947 empowers the Central Government to prohibit, restrict or otherwise control the imports and exports of goods in and out of India. In exercise of the powers conferred by the Imports and Exports (Control) Act, 1947 the Imports (Control) Order, 1955 has been issued. Schedule I to the said order contains the list of articles of which imports are controlled. Imports of such items is prohibited except (i) under and in accordance with the licence or a Customs Clearance permit issue under the said order or (ii) if they are covered by an Open General Licence (subject to such conditions as may be stipulated) or (iii) if they are covered by savings Clause 11 of the Imports (Control) Order. In pursuance of the Imports and Exports Act 1947 and the Imports (Control) Order, 1955 the Government of India issues imports and exports policy which at the relevant time used to be valid for a period of three years. Accordingly, in the year 1988 the Government of India issued import and export policy for the period April, 1988 to March, 1991 (for short AM 88-91) which was to remain in force for a period of three years from 1st April, 1988 till March, 1991.

4. Mr. Jetly learned Counsel appearing for the Revenue submitted that the importing question would be governed by the import and export policy applicable for the year AM 91-94 as the import had taken place in June, 1992 i.e. after expiry of AM 1988-91. He submitted that though REP licence was issued when AM 1988-91 was in force, since the import had taken place in June 1992 the RET licence as well as import made under the REP licence would be governed by the port and export policy in force on the actual date of import and not on the date when the REP licence was issued. Per Contra, Mr. Rana submitted that import would be governed by import export policy AM 1988-91. In support of his submission he referred to and relied upon by a decision of the Supreme Court in Jain Exports (P) Ltd. and Another Vs. Union of India (UOI) and Others, . In that case, two consignments of natural coconut oil were imported from Sri-lanka and arrived at port of destination on 22nd September 1981 and 10th September, 1982 respectively. The import was effected in pursuance of a licence which was issued in the year 1980-81 but the goods were actually imported after the policy had expired and new policy had come into force. In paragraph No. 2 of the decision, Supreme Court posed the questions which had arisen for its

consideration. The question No. 1 was

(1) The import policy of which year would be applicable to the present case - the period during which the licences were issued or the time when the import actually took place

In paragraph No. 3 of the decision, the Supreme Court held that the High Court had come to the correct conclusion to the terms of import policy of 1980-81 (i.e. period during which the licence was issued) would apply. In view of the decision of the Supreme Court, we have no doubt that the import in question which was effected in pursuance of a REP Licence dated 13th December, 1990, would be governed by the import export policy of AM 1988-91.

5. Mr. Jetly, learned Counsel for the applicant submitted that even assuming that import was governed by import export policy AM 1988-91, the import of the goods viz. T.V Broadcast & Studio Equipment was not permitted under the REP licence. We proceed to consider the submission hereinbelow.

6. The import and export policy for AM 88-91 is published in two Volumes. Volume 1 contains Import and Export Promotion Policy and Volume 2 contained policy in respect of items under Export licensing. The first volume contains 343 paragraphs divided into 23 chapters and 12 Appendices. Chapter I titled as "Introduction and definitions" inter alia contains definitions of certain words. Paragraph 6(8) defines capital goods to mean any plant, machinery equipments or accessories required by an investor for the production of goods or for rendering services, including those require for replenishment or extension. Chapters XI to XXIII of AM 88-91 contain Import Policy for registered exporters. Paragraph 164 of Chapter XV titled as "Import Policy for Registered Exporters" says that the object of the scheme is to provide to the registered exporters, by way of import replenishment, the essential inputs required in the manufacturing of the products exported and also to allow certain flexibilities to enable diversification of export goods. As a measure to promote exports, the registered exporter is granted a licence commonly known as "REP Licence" which enables him to import goods. The value of the REP licence i.e. to say the extent to which import is permitted is determined inter alia on the of value and nature of the goods exported by the registered exporter. Paragraph 175 of AM 88-91 provides that Import Replenishment Licence (for short "REP Licence") issued under the policy will carry an in built flexibility except in cases covered by paragraph 182(1). Paragraph 177(1) provides that within the permitted flexibility, the REP licence can be utilised for import of items listed in Appendices 3 Part A, 3 Part-B and 5 Part-A subject to certain conditions. Paragraph 177(2) of AM 88-91 provides that out of the value of flexibility allowed, the REP licence can also be utilised for import of capital goods without the recommendation of the sponsoring authority subject to the conditions mentioned in the said subparagraph. Paragraph 183 provides that REP licences will be issued in the name of registered exporter and will not be subject to "actual user" conditions. A licence holder may transfer the licence to any other person. The licence holder or

the transferee may import the goods permitted therein. Transfer of REP licence will not require any endorsement or permission from the licensing authority. Clearance of the goods covered by REP Licence issued under this policy will be allowed by the Customs Authority on production by the transferee of only the documents of transfer of REP licence in his name.

7. As stated earlier, paragraph No. 8 of the AM 1988-91 defines the expression "capital goods" and reads as follows:

Capital Goods" means any plant, machinery, equipment or accessories required by an investor for production of goods or for rendering services, including those required for replacement or expansion.

8. Mr. Rana, learned Senior Advocate appearing for the applicant handed over to us the product literature of T.V broadcast and Studio equipment (Modern BETACAM SP 2000 PRO manufactured by Sony) which was imported under the REP licence. It describes the product and purposes for which it is used. The TV Broadcast and Studio Equipment in question is used for the purpose of recording and playing the cinematographic films contents of which are recorded on video audio tapes. Films are recorded on cassettes with the help of the equipment in question. The equipment in question which is used for production of films recorded on cassettes would therefore fall within the definition of capital goods.

9. Paragraph No. 177(2) of AM 1988-91 provides that within the value of flexibility allowed, the REP Licence can be utilised for import of capital goods without the recommendation of the sponsoring authority and without indigenous clearance subject to a condition that the total value of the import shall not exceed Rs. 10 lakhs and the capital goods imported do not fall in Appendix I (Part A) or Appendix 8 or is not an office machine as defined in paragraph 11.8. It is not the case of revenue that the TV broadcast and studio equipment in question falls in Appendix-I (Part A) or Appendix 8 or is an office machine as defined in paragraph 11.8. TV broadcast and Studio equipment in question, being a capital good could therefore be imported as a capital good in view of paragraph No. 177(2) of AM 1988-91.

10. Mr. Jetly, learned Counsel for the applicant submitted that the equipment in question would fall under Entry No. 148 of Appendix II (Part B) of AM 1988-91 which covers all electrical equipments, systems, howsoever described (including consumer and professional types) excluding specifically allowed under OGL or specified elsewhere. In our view, the TV broadcast & Studio equipment does not fall under Entry No. 148 as mentioned. Even if it is assumed that it falls under Entry No. 148 of paragraph Appendix II, it is not an equipment import of which is banned. It would not cease to be capital goods the import of which under REP licence was permitted under para 177(2) of AM 1988-91. Consequently, custom authorities erred in refusing to allow the import which ought to have been permitted under the REP licence.

11. For these reasons, rule is made absolute in "terms of prayer Clause (a). ITC

bonds executed by the petitioner be returned, to him duly cancelled.