
(1984) 10 BOM CK 0016
In the Bombay High Court
Case No : Writ Petition No.252 of 1981

Asian Paints (India) Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 05-10-1984

Acts Referred:

Constitution of India, 1950 — Article 226
Imports and Exports (Control) Act, 1947 — Section 4

Citation : AIR 1986 Bom 19 : (1985) 5 ECC 296

Hon'ble Judges : Jamdar, J

Bench : Single Bench

Advocate : A. Hidayatullah, J.F. Foohkhanwall and J.R Cama, of Crawford Bayley and Co, for the Appellant; M.I. Sethna, for the Respondent

Judgement

1. The petitioner Company has filed this petition under Article 226 of the Constitution of India for quashing and setting aside orders dated 27th Feb. 1974, 16 th November 1974 and 4th August 1980, passed by the Joint Chief Controller of Imports and Exports and for a Writ of Mandamus or any other appropriate Writ, Direction or Order directing the respondents to withdraw and/or cancel the said orders and to issue Import Licences of the value of Rs. 1,75,271/- for the items specified in the three import licenses bearing Nos. 2666861, 2666862 and 2666863 dated 23rd March 1973.

2. The three licences were issued to the petitioner company as a nominee of M/s. Shahidabhai & Co., M/s. Zakaria Shahid Impex Pvt. Ltd. and M/s. Pearson Traders registered exporters under the handicrafts scheme. These licences were valid for 35 items mentioned in the lists attached to the said licences. The value of the said items , as mentioned in licence No. 2666861 was Rs. 1,11,837/-, in licence No. 2666862 as Rs. 20,111/- and in licence No. 2666863 as Rs. 43,323/-. Even though these licences permitted the import of 35 items the value of each of the items permitted to be imported was not specified separately in the licences. These import licences were granted on 23-3-1973 on the application dated

23-1-1973 submitted by the petitioner company for transfer of the import entitlement of the aforesaid registered exporters of handicrafts and in pursuance of the Import Trade Control Policy for the year April 1972 to March 1973 announced by the Government of India, Ministry of foreign Trade in the Gazette of India Dt. 3-6-1972.

3. One of the items which the petitioner was permitted to import on the basis of the three licences was Nitro Cellulose Cotton which is one of the principal raw materials for manufacture of lacquers and nitro cellulose lacquer. As these two items did not figure in list of the items covered by actual users licence produced by the petitioner and as the petitioner did not produce any evidence to show that the petitioner was actually engaged in the manufacture of lacquers, the Joint Chief Controller of Imports and Exports (hereinafter referred to as the JCCIE) by his letter dated 24-4-1973, (copy annexed at Ex.E to the petition) called upon the petitioner to produce a certificate from the Director General of Trade Development (hereinafter referred to as DGTD) that the petitioner was manufacturer of lacquers. By the said letter the JCCIE directed the petitioner to resubmit the three licences within seven days without having utilised the same and to produce the required certificate from the DGTD within fifteen days. The petitioner company vide letter dt. 10-5-1973 (Ex. F to the petition) informed the JCCIE that the company had taken up the matter with DGTD but did not take any further steps to produce the required certificate from the DGTD. The JCCIE, therefore, by his letter dated 15/18th Oct. 1973 called upon the petitioner to produce the certificate from DGTD showing that the petitioner is holder of A.U. Licence/R.O. for nitro cellulose cotton other than 15-20 secs viscosity and nitro cellulose chips. The petitioner was also warned that if no reply was received within 15 days, such action as may be deemed necessary would be taken. No action was ever taken by the JCCIE and the petitioner committed the three licences by establishing letters of credit before 30th April, 1973 for Rs. 91,171/- and after 30-4-1973 for Rs. 81,228/- and utilised the three licences fully for the import of the items mentioned in the licences except item No.35 i.e. nitro cellulose cotton.

4. Thereafter the petitioner applied for Registered Export Promotion (REP) Licence for Rs. 2,82,987.00 as a nominee of registered exporters against their replenishment entitlement for export of goods during the period from April to June 1973. The JCCIE, however, granted licence only for Rs. 1,07,716.00 and informed the petitioner vide letter dated 27-2-1974 (Ex.H) that the licence was issued after adjusting the excess licence for Rs. 1,75,271.00, granted vide letter REP File No. 899/29489/AM73/Sc V. As the letter was signed by the Controller of Imports and Exports, Bombay, the petitioner company preferred an appeal to the JCCIE, contending, inter alia, that there was no excess licence in its favour and the value of the three licences cannot in law be adjusted against the value of the valid import licences issued subsequently. The JCCIE rejected the appeal, indicating for the first time that the action appealed against was taken because the petitioner failed to produce DGTD's certificate in compliance with the

undertaking given by the petitioner company in the nomination forms on the basis of which the three licences were issued in its favour. The petitioner company, therefore, preferred an appeal to the Chief Controller of Imports and Exports (hereinafter referred to as CCIE) on 26-12-1974. The CCIE, however, did not communicate anything in the matter to the petitioner company till 18-4-1980 when in reply to the petitioner's letter dated 17th Dec. 1979 the company was informed that the views of the office of the CCIE were communicated to the JCCIE, Bombay, who would inform the decision with regard to petitioner's appeal.

6. Some months later the JCCIE vide his letter dt. 4-8-1980 informed the petitioner as follows:-

"With reference to your interview with D.C. (Shri N.K. Jagtap), I write to inform you that the Chief Controller of Imports and Exports, New Delhi, has already decided your 2nd appeal and has recorded that "as the applicant is not reported to be eligible for the nomination, the matter of regarding adjustment has been intimated to you." "

6. The petitioner, therefore, was constrained to file this petition for the aforesaid reliefs.

7. The respondents did not file any affidavit in reply and did not controvert the factual position stated in the petition. It is not disputed that neither the JCCIE nor CCIE heard the petitioner company before disposing of the appeals. There is nothing on record to show that the CCIE himself decided the appeal and passed the order rejecting the second appeal preferred by the petitioner. As mentioned above, the petitioner filed the second appeal to the CCIE on 26-12-1974 and on 18-4-1980 for the first time the petitioner company was informed that the views of the office of the CCIE were communicated to the JCCIE and that the said authority would inform the decision with regard to the petitioner's second appeal. There is no mention that the appeal was decided by the CCIE. Thereafter, the only communication which the petitioner received was the one quoted above which for the first time makes a reference to the decision of CCIE. No order passed by CCIE in the second appeal preferred by the petitioner was ever produced on record. Moreover the orders in appeal were passed without hearing the petitioner. They are, therefore, non est. This aspect of the matter, however, loses its significance because the first order Dt. 27-9-1974 passed by the JCCIE adjusting the three licences against the fresh one applied for the year 1973-74 was itself not appealable.

8. The imports and Exports (Control) Act, 1947, provides for an appeal vide Section 4 M only against an order of adjudication, while Import Control Order provides vide Cl. 10 (2) for an appeal against action taken under Cl.8 or 8A of the said Order. Clause 8 empowers the Central Government or JCCIE or CCIE to debar a licensee or an importer or any other person from receiving licences or allotment of imported goods for specific period on the grounds mentioned in sub-cl. (a) to (h) of the said clause. While Cl.8 A confers power on the Central

Government or CCIE to suspend the grant of licence or allotment of imported goods pending investigation into one or more of the allegations mentioned in Cl.8. Neither the Act nor the order provides for appeal against any other action taken in exercise of the powers conferred on the various authorities. No appeal is provided against the adjustment of previous licences against new ones. As the appeals were not maintainable, the orders passed by the appellate authority are of no consequence and it is not necessary to quash the orders. It must, however, be said that as the appeals were entertained it was incumbent upon the appellate authority to hear the petitioner before deciding those appeals.

9. This takes me to the original order Dt. 27-2-1974 by which the value of the three licences issued on 23-3-1973 was adjusted against the import entitlement of the petitioner for the year 1973-74. This order was also passed without hearing the petitioner. Admittedly, no notice was issued to the petitioner calling upon it to show cause why value of the three earlier licences should not be adjusted against the import entitlement for the subsequent years. Such an opportunity was necessary even assuming that the said order was an administrative order because it did affect the civil right of the petitioner to import goods to the extent of Rs. 1,75,271/-. As mentioned above, though the petitioner was warned by letter Dt. 15-10-1973 that suitable action would be taken against it if the company failed to produce DGTD certificate, no action in respect of the three licences issued on 23-3-1973 was taken. There is also nothing in the Order Dt. 27-2-1974 as to on what basis the earlier licences were considered as excess licences. The said licences were not cancelled as contemplated by Clause 9 of the Import Control Order. The Order Dt. 27-2-1974, therefore, deserves to be quashed on this ground alone.

10. Neither the Import Export Control Act nor the Import Control Order 1945, as they stood at the material time, empowered the respondents to adjust the value of the previous licences against the subsequent licences. The powers conferred on various authorities by the Import Control Order in respect of applications for import licences and allotment of imported goods and licences already issued are enumerated in Clauses 6 to 9 of the Import Control Order Cl.6 empowers the Central Government or CCIE to refuse to grant licences or direct any other licensing authority not to grant licences on the grounds mentioned in its (a) to (f) of Clause 6. Clause 7 empowers the licensing authority to amend the licence granted under the said order in such manner as it may be necessary either on its own motion or on an application from licensee . Clause 8 empowers the Central Government or CCIE to debar a licensee or importer or any other person from receiving licenses or allotment of imported goods for a specific period on the grounds mentioned in Cls. (a) to (h). Cl.8-A empowers the Central Government or CCIE to suspend the grant of licence of allotment of imported goods pending investigation into one or more of the allegations made in Clause 8. Clause 8-D empowers, the aforesaid authorities to keep in abeyance an application for licence or allotment of imported goods during the pendency of the investigation into any of the allegations mentioned in Clause 8. Under Cl.8-C publicity can be

given to the action taken under Clause 8-A. Clause 9 empowers the Central Government or CCIE or any other officer authorised in that behalf to cancel any licence or otherwise render it ineffective on the grounds mentioned in Cls. (a) to (d). No other action in respect of the licence to validly granted is contemplated by the Import Control Order. No power to adjust the value of the validly granted licence against any subsequent licence is conferred on any of the authorities entrusted with the duty to implement the import policy. No such adjustment can be made even if the licensee committed breach of any of the conditions of the licence. For any breach of the conditions of the licence, licence itself can be cancelled under Cl.9. Without specifically cancelling the licence, the value of the licence cannot be adjusted against any future entitlement. Such action cannot be taken even if the party fails to produce any document or information that is called for by the CCIE or any other licensing authority, even though for this failure the licensee can be debarred for specific period from getting a licence or allotment of imported goods as contemplated by Clause 8 of Import Control Order.

11. It is also not possible to contend that to the extent of the adjustment the application for licence should be deemed to have been refused within the meaning of Cl.6 because grant of licence can be refused under Clause 6 only on the grounds mentioned in items (a) to (f) of sub-clause (1) of Cl.6. The impugned action, therefore, was clearly without jurisdiction.

12. As mentioned above, no reasons were given in the impugned order Dt. 27-2-1974 for adjustment of the value of the three licences viz. Rs. 1,75,271/- against the petitioner's entitlement to import goods of the value of Rs. 2,82,937/-. The only thing that was mentioned was that previous excess licence was adjusted against the licence issued vide the said order.

13. It was mentioned in the Order passed by JCCIE while rejecting the appeal preferred by the petitioner that the excess licensing was adjusted in pursuance of the undertaking given by the petitioner in the nomination form. According to the respondents, this undertaking conferred jurisdiction on the JCCIE to make the adjustment. This undertaking was Part B of Form H (particular of nomination) prescribed for application for import of goods as contemplated by para 48 of Part E of Section I of the Import Trade Control Policy for the year 1972-73. The petitioner has submitted its particulars in part B of form H while applying for the three licences in question. The undertaking which was signed by one of the Directors of the Company was in the following words:-

"I/We hereby undertake that if as a result of a scrutiny by the licensing authority at any time of the application of the Registered Exporter any excess licensing is found to have been done to me/us as nominee, the same shall be liable for being adjusted against future licenses due to me/us under any category, without prejudice to any other action that may be taken in this behalf."

14. It is the case of the respondents that in the enforcement of this undertaking

that the adjustment in question was made.

15. The words "excess licensing" are not defined either in the Import Export Control Act or in the Import Control Order. It is also not defined in the policy statement for the relevant year announced by the Government of India, Ministry of Foreign Trade in the Gazette of India-Extraordinary Dt. 3-4-1973. It is also not defined in the policy statement for the subsequent years.

16. It is sought to be contended that on account of the failure of the petitioner to produce DGTD's certificate about the actual user of nitro cellulose cotton for manufacture of lacquers, the petitioner was directed by the JCCIE vide his letter Dt. 24-4-1973 not to utilise the licences in question and as the petitioner utilised those licences in spite of those directions, the entire value of the three licences amounts to excess licensing and the JCCIE was competent to adjust the amount of the three licences against future entitlement of the petitioner in view of the under taking given by the petitioner while obtaining the licences in question. It is difficult to accept this submission because as contemplated by the undertaking itself the excess licensing is to be ascertained on the basis of the scrutiny of the application of the registered exporter and not on the basis of anything done or purported to be done by the nominee. Therefore, simply because the petitioner failed to produce DGTD's certificate or utilised the licences in spite of the directions to the contrary, it cannot be said that to the extent of the entire value of the three licences there was excess licensing.

17. Paras 26 and 27 of Part B of Section I of Vol. II of the Import Trade Control Policy for the year 1972-73 contain the provision for nomination. Para 26 provides:-

"Nominations may be made in favour of a manufacturer/manufacturers of any product in the same "category" or "product group" where there is no category (as explained in the "notes" at the beginning of Sec.II) to which the exported product belongs. Nominations may also be made in favour of a manufacturer of a part, component or material used in the manufacture of the exported product provided that (a) such part, component or material, if exported, would have qualified for import replenishment under the policy and (b) unless specifically provided otherwise, it falls within the same "product group" to which the exported product belongs."

Sub-clause (ii) of Cl.27 further provides:-

"For the purpose of determining eligibility of a nominee, in accordance with the provisions contained in paragraphs 26 and 27(i) above, the nominee manufacturer should possess an import license/release order issued to him under Actual Users Policy for the period 1971-72 or 1972-73 for the import allotment of raw materials and components required in the manufacture of the same end product on the basis of which he is claiming nomination."

18. It is, therefore, clear that the nominee must be actual user of the raw

material. If, therefore, the import licence relates to several items, some of which are not required by the nominee for his manufacturing activities, to the extent of the value of those items not required, it can be said that there is excess licensing in his favour. The JCCIE, therefore, was perfectly justified in calling upon the petitioner to tender evidence by way of DGTD's certificate showing that the company actually manufactured lacquers for which nitro cellulose cotton was required. Admittedly, the petitioner company did not require nitro cellulose cotton during the relevant period and did not import that item under the three licences and that the import was restricted to other 34 items. It could, therefore, have been said that to the extent of value of nitro cellulose cotton there was excess licensing in favour of the petitioner and JCCIE would have been justified in adjusting the excess licensing to the extent of the value of nitro cellulose cotton against the future entitlement of the petitioner. But in the present case there was absolutely no basis for ascertainment of the excess licensing in respect of nitro cellulose cotton because in none of the three licenses item wise value was mentioned and that the three licences were issued in general terms allowing the petitioner to import the items mentioned in the list to the extent of total value mentioned in the three licences. As neither the quantity of any particular item nor its value was specifically mentioned in any of the licences it was not incumbent on the petitioner company to import all the items, and that it was open to the petitioner to import any of the 35 items, the only limitation being that the value of the items actually imported should not have exceeded the value of the licence. As the licences were vague to far as quantity and value of each of the items to be imported it cannot be said that there was any excess licensing in respect of a particular item. It would be preposterous to say that in such a case there was excess licensing to the extent of entire value of the licence. The JCCIE, therefore, proceeded on a wrong assumption that there was excess licensing in this case and wrongly assumed jurisdiction to make adjustment on the basis of the undertaking given by the petitioner company. Moreover, as observed above, the order was passed without giving any opportunity to the petitioner of being heard. The petition, therefore, must succeed.

19. The petition is allowed with cost. Rule made absolute in terms of prayers (a), (b) and (c). Petition allowed.