(1986) 07 BOM CK 0013

In the Bombay High Court

Case No : Writ Petitions No''s. 337 and 1146 of 1986

Bharat Oxygen and Acetylene Co. and another — APPELLANT

Vs

Union of India and others — RESPONDENT

Date of Decision : 10-07-1986

Acts Referred:

Customs Act, 1962 — Section 111, 112
Imports and Exports (Control) Act, 1947 — Section 2

Citation : (1986) 10 ECC 139 : (1987) 29 ELT 858

Hon'ble Judges : R.A. Jahagirdar, J

Bench : Single Bench

Judgement

1. These two petitions are being heard disposed of by this common judgment and order for the reason that they raise common question of law as well as of fact. For the sake of convenience, however, the facts relating to Writ Petition No. 1146 of 1986 are being mentioned to begin with. The petitioners in this writ petition are engaged in the business of importing rough diamonds and exporting cut and polished diamonds. It has been mentioned by the petitioners that under the Import Policy of 1978-79 they were entitled to the grant of an Export House Certificate and consequential benefits against the exports made by them of diamonds. The concept of Export House forms a part of the Import Policy of the year 1978-79. Under this Policy certain registered exporters were registered as Export houses depending upon their performance in the export field. As Export Houses they were granted special facilities to strengthen their negotiating capacity in foreign trade and to build up a more enduring relationship between them and their supporting manufacturers. This aspect of the recognition of certain exporters as Export Houses has been pointed out by the Supreme Court in Raj Parkash Chemicals Ltd. and Another Vs. Union of India (UOI) and Others, . Under the Import Policy of 1978-79, Export Houses were entitled to import replenishment licences eligible to them as Registered Exporters, import replenishment licences transferred to them by others, import items placed on Open General Licence and additional licences. In the present case we are

concerned with the additional licences which the petitioners were entitled to get.

2. However, the respondents, who are the Union of India and the Collector and Deputy Collector of Customs having their offices in Bombay refused to grant such certificate to the petitioners and some other similar diamond exporters on the ground that the petitioners have not diversified their exports. The cases relating to the other diamond exporters were the subject-matter of several orders both by this Court and the Delhi High Court and ultimately in certain appeals preferred by the Union of India the Supreme Court passed an order on 18th April, 1985 which itself was the subject-matter of clarification in the judgment of the Supreme Court in Raj Prakash Chemical''s case referred to above. It is not necessary to trace the history of that litigation for the disposal of these petitions.

3. The petitioners, however, challenged the refusal of the respondents to grant them additional licence by filing a writ petition in this Court, being Writ Petition No. 1331 of 1983. Pendse J. who decided that petition by his judgment and order dated 23rd November 1983 made the rule absolute in terms of prayer clause (a) of that petition and the order refusing to give the additional licence was set aside. The respondents were directed to issue to the petitioners Export House Certificate under the Import Policy of April 1978 - March 1979 within a period of one month from the date of that order. Pendse J. further directed that the grant of the Export House Certificate would entitle the petitioners to seek certain facilities as provided by paragraph 174 of the Scheme. Certain consequential directions were also given by Pendse J. while disposing of the said petition.

4. Admittedly the respondents did not prefer any appeal against the judgment of Pendse J. Unfortunately, however, they did not also comply with the said order which compelled the petitioners to take out a notice of motion, being Notice of Motion No. 2402 of 1984, for contempt. This notice of motion was heard by Sawant J. on 12th of February 1985. Sawant J. noticed that despite the fact that the motion was admittedly served on the respondents nearly one month before Sawant J. heard it, no reply had been filed by the respondents. On that day Sawant J. directed the respondents to issue the Export House Certificate to the petitioners on or before 25th of February 1985. The petitioners were thereafter to make an application for additional licence. The respondents were directed to dispose of the said application within 10 days of the date of its receipt.

5. Additional licence bearing No. P/W/3065855 for the C.I.F. value of Rs. 96,20,880 was issued to the petitioners on 12th of March 1985. In that licence it was stated that it was issued as per the order of the High Court dated 12th February 1985 in Notice of Motion No. 2402 of 1984. This was a somewhat unusual method of making an endorsement on the import licences. The order dated 12th of February 1985 was in fact a step in the direction of the implementation of the order dated 23rd November 1983 which the respondents did not obey. If the Court directs that a party is entitled to a particular licence or a certificate for that matter in the light of law, I do not sea the relevance of the authorities making an endorsement on the licence that the said licence is issued

pursuant to the order of the Court. Courts pass orders because the authorities refuse to act in accordance with law. It must therefore be presumed that whenever such a licence is given pursuant to a direction of a Court, which direction is given because the authorities are not acting in accordance with law, the said licence is given as per the requirements of law. The Court''s order is only an intervening factor which becomes necessary because of the refusal of the authorities to act in accordance with law. The practice of making such endorsements on the licences must therefore be deprecated.

6. The licence further stated that it was valid for import of items under additional licence category as per paragraph 176 of the Import Policy of 1978-79 excluding those items which were banned for the period 1984-85. There was no mention, as stated by the petitioners in this petition, that there was any restriction to the grant of letters of authority which was permissible under the Import Policy of 1978-79.

7. The Hand Book of Import-Export Procedures for the year 1978-79 has to be read along with the Import Policy for the said year. Imports and exports are controlled and regulated under the Imports and Exports (Control) Act, 1947 and the Imports (Control) Order, 1955 issued under the Act of 1947. The Hand Book of Import-Export Procedures for 1978-79, as the foreword to the said Hand book itself says, is a supplement to the import and export policies of the Government and contains the relevant procedures and other details. Paragraph 7 of Chapter I of the said Hand Book states that in the Import Policy of 1978-79, no special provision has been made for the licensing authorities to issue a Letter of Authority as defined in Section 2(h) of the Imports and Exports (Control) Act, 1947. However, so far as the replenishment licences are concerned if they were issued under the import Policy of 1978-79, they were freely transferable as mentioned in paragraph 126 of the Import Policy of 1978-79. In the case of other licences, however, the licence-holder was given the authority to appoint any person as his agent for arranging the imports permitted by the licences. This was, however, subject to the condition that the licence would continue to be in the name of the licence-holder at all times and the relevant provisions of the Imports and Exports (Control) Act, 1947 and the Imports Control Order of 1955 in regard to the duties and obligations of the licence-holder or Letter of Authority-Holder will continue to apply respectively to the persons concerned. Subject to these conditions and legal requirements, it was open to the licence-holder to decide upon his own form of Letter of Authority.

8. The petitioners, after receiving the additional licence as mentioned above for the C.I.F. value of Rs. 96,20,880/-, gave letters of authority to different persons. Among them are the petitioners in Writ Petition No. 337 of 1986. For the sake of convenience the petitioners in Writ Petition No. 337 of 1986, who are a partnership firm, namely Bharat Oxygen and Acetylene Company, will be referred to as "Bharat Oxygen." The Bharat Oxygen obtained a letter of authority from the petitioners to the extent of Rs. 10 lakhs. Pursuant to this letter of authority

they imported certain goods, namely Palm Kernel Oil. A notice dated 11th of December, 1985 was issued by the Assistant Collector of Customs, Group ''A'', to Bharat Oxygen wherein it was stated that Bharat Oxygen had imported 75 sound second-hand drums of Crude Palm Kernel Oil of the C.I.F. value of Rs. 72,910.82. According to the said notice, the facility of issuing letter of authority granted to the holder of additional licence had been discontinued after 1st of April 1982 and in particular under the Import Policy of 1985-88. Therefore the import made by Bharat Oxygen pursuant to the letter of authority given by the petitioners was illegal. By the said notice Bharat Oxygen was called upon to show cause as to why action should not be taken against them u/s 112 of the Customs Act, 1962 and why the goods imported should be confiscated u/s 111(d) of the said Act.

9. Bharat Oxygen submitted a reply to this show cause notice pointing out, among other things, that the facility of issuing letter of authority enjoyed by the Export Houses under the Import Policy of 1978-79 had not been withdrawn and under law they were entitled to utilise such letter of authority given to them. It has also been mentioned in the said reply that in the case of holders of additional licences the licensing authority issued separate advice not to issue letters of authority whereas on the licence issued to the petitioners no such advice had been issued. Bharat Oxygen therefore was entitled to proceed on the basis that there was no restriction on the right of the holder of the additional licence under the Import Policy of 1978-79 to issued letters of authority.

10. Against the aforesaid show cause notice Bharat Oxygen has preferred this petition. However, no rule was granted on this petition and in the meantime the Deputy Collector of Customs, Bombay by his order dated 28th February 1986 heard the show cause notice and held that the import made by Bharat Oxygen was in contravention of the Import Policy of 1985-88 since the said Policy did not permit the facility of giving letter of authority. The goods were held to be liable for confiscation u/s 111(d) of the Customs Act. However option was given to Bharat Oxygen to redeem the goods on payment of a fine of Rs. 73,000 which, I am told, has been done by Bharat Oxygen. The petition was thereafter amended to include a prayer for setting aside the order passed by the Deputy Collector of Customs on 25th of February 1986 which is now annexed as Exhibit ''G'' to the petition.

11. The petitioners in Writ Petition No. 1146 of 1986 have prayed that the notice dated 8th of April 1986 issued to them should be quashed. This notice mentions that the petitioners have imported certain goods mentioned in the said notice by issuing letters of authority in contravention of the Import Policy of 1985-88. Therefore the goods were liable to be confiscated u/s 111(d) of the Customs Act.

12. The short question that is to be decided in these petitions is whether the facility to which the petitioners were entitled under the Import Policy of 1978-79 read with the Hand Book of Import-Export Procedures of the same year to give letters of authority for importing goods under the additional licence granted to them as an Export House can be said to have been withdrawn by the subsequent

Import Policy of 1985-88. The question whether the petitioners are entitled to import goods under the additional licence obtainable by them by virtue of holding an Export House Certificate under the Import Policy of 1978-79 has been decided in the affirmative by several orders passed by this Court and subsequently confirmed by the Supreme Court. The only restriction is that under such an additional licence obtained by the Export House, the Export House would not be entitled to import any commodity the import of which is banned in the year of import. That therefore the petitioners are entitled to import good to the extent of the value of additional licence given to them cannot be said to be in dispute.

13. But it has been contended on behalf of the respondents that the imports which the petitioners are entitled to make under the authority of the additional licence granted to them as an Export House can be made only by the petitioners themselves and not by any other persons to whom letters of authority are given by them. It is the case of the respondents that the facility of importing through persons to whom letters of authority are given, which was available as per paragraph 7 of the Hand Book of Import-Export Procedures of 1978-79, has been abolished by the Import Policy of 1985-88. This facility was at best a facility and not a right vested in the holders of additional licences. A facility given in a particular year could be withdrawn in another year, subject however to the fact that, as has been held by the decisions of this Court and the Supreme Court, under the additional licences which were claimable by the Export Houses they could import goods covered by the additional licences. The Deputy Collector has taken the view, which view has been supported before me by Mr. Rege appearing for the respondents, that the other facilities which were available under the Import Policy of 1978-79 were no longer available under the current Import Policy. Therefore, in the year of import the Policy relating to the facilities for that year alone will decide the question whether letters of authority could have been given by the petitioners. The Deputy Collector of Customs also read into the order of the Supreme Court a meaning that only import of items other then the banned items is permitted, provided such items were importable in terms of the 1978-79 Policy. The Deputy Collector of Customs also though that there was nothing in the order of the Supreme Court which could show that the other provisions of the Import Policy of 1978-79 should be applied.

14. It is not necessary to fully notice all the provisions of the Import Policy of the year 1978-79 and the Hand Book of Import-Export Procedures of the same year. A brief reference, which is sufficient for the disposal of these petitions, has already been made to the relevant provisions. They show that an exporter who becomes entitled to the issuance of a certificate of an Export House becomes as such entitled to the grant of an additional import licence. If such an additional import licence is available to him, then naturally the procedure which he has to follow for importing goods under the said licence is the one that is prescribed in the Hand Book of Import-Export Procedures for the relevant year. It has also been mentioned above that paragraph 7 of the Hand Book of Import-Export Procedures for 1978-79 permitted such a licence-holder to issue letters of

authority to persons through whom imports could be made subject, however, to the conditions mentioned in the said paragraph. The right to import certain goods pursuant to the import licence given must necessarily be read in the light of the manner in which it could be imported as provided by the Import Policy of the same year. One cannot see how a person who acted upon a policy announced by the Government in a particular year and became entitled to a certificate as an Export House and consequently to the issuance of an additional licence could be denied the facility of using such a licence in the manner provided in the Import Policy of that year. The right to import, as far as I can see, necessarily when hand in hand with the manner of importing the goods under the import licence as mentioned in the Import Policy of the relevant year. If, admittedly, therefore, in the Import Policy of 1978-79 a licence-holder could issue a letter of authority in respect of the import licence held by him by way of right, there is no reason as to why the said facility, which accompanied the right to import, should be denied to him subsequently. In my opinion, therefore, the holders of additional import licences under the Import Policy of 1978-79 are entitled to import the goods in the manner in which such import was permissible under the Hand Book of Import-Export Procedures of the same year. That facility necessarily formed a part of the right which they had acquired under the relevant Import Policy.

15. Mr. Rege, however, has relied upon certain observations in the judgment of the Supreme Court in the Raj Prakash Chemical''s case. In my opinion, the question which arose before the Supreme Court in that case was totally different. The question whether the facilities which went with the right to import under the Import Policy of a particular year was not the subject-matter of the arguments and therefore was not dealt with by the judgment of the Supreme Court. The observations to which Mr. Rege has invited my attention are to be found in paragraph 18 of the judgment (page 1031 of the report). The are as follows :-

"They (the Bombay and Delhi High Courts) directed the issue of such Certificates as well as the consequent Additional Licences, but while defining the right of the diamond exporters to import items under the Additional Licences they also took into account the Import Policy prevailing at the item of import in regard to the items which could not be imported. The pendency of the litigation had inevitably occupied time, and meanwhile events had not remained stationary. The contextual framework determining the import structure had altered. Considerations pertaining to current economic and fiscal needs had led to the periodic reorientation of the country''s Import Policy. Indigenous industry had put in appearance over the years, and it was necessary to protect its growth and encourage its development. Many items which could formerly be imported with comparative freedom under Open General Licence were no longer so permissible."

16. Mr. Rege says that at the time of importing the goods under a licence issued pursuant to the policy of a previous year, the contextual framework determining the import structure at the time of the import must be taken into consideration. The submission is that the Import-Export Procedures for 1985-88 do not provide

for the issuance of letters of authority and this must be taken into consideration at the time of the actual import. In my opinion, this reading of the observations of the Supreme Court is incorrect. These observations were made in the context of the question whether in the year of import goods which were banned could be imported pursuant to a licence granted for a previous year and it was held that it could not be done. In other words, if the import licence pertains to a particular year and in the year of the actual import a particular commodity is banned, then that commodity cannot be imported under that licence. The language of the observations on which Mr. Rege has relied clearly point out that the Supreme Court was necessarily dealing with the question as to which goods should be imported and not the manner in which they could be imported.

17. If anything, certain other observations contained in paragraph 11 of the same judgment seem to go counter to the submissions of Mr. Rege. In the said paragraph it is stated as follows :-

"There is no dispute that the diamonds exporters enjoying the benefit of the order are entitled to the issue of Export House Certificate under Import Policy 1978-79 and to the facilities flowing from such grant."

The facilities which flew from such grant, in my opinion, included entitlement to an additional import licence and the facility of importing goods under such additional licence in the manner provided for the relevant year. I am not unaware of the fact that the Supreme Court has mentioned that there was no dispute on that point. However, on an examination of the provisions made by me I have come to the same conclusion. The view taken by the respondents, therefore, in my opinion, is incorrect and the action taken by them is liable to be quashed.

18. In the result, Writ Petition No. 337 of 1986 is allowed. Order No. S/10-344/85A dated 27th February 1986 passed by the Deputy Collector of Customs, Bombay is set aside. The petitioners are entitled to the refund of the amount of fine paid by them pursuant to the order which is set aside. The respondents are also directed to issued to the petitioners in this petition a Detention Certificate covering the period of detention, namely from the date the goods were available for clearance till the date of clearance.

There will be no order as to costs.

19. Rule in Writ Petition No. 1146 of 1986 is made absolute in terms of prayer clauses (a) and (b). The respondents are directed to cancel the Bank guarantee given pursuant to the order dated 2nd May 1986 and return the same to the petitioners.

20. Though it is not specifically prayed in this petition that detention certificate should be issued, I do not see any reason why the respondents should not be directed to give a detention certificate to the petitioners in this petition similar to the one which I have directed them to issue in Writ Petition No. 337 of 1986. Respondents accordingly are directed to issue a Detention Certificate to the

petitioners in this petition also.

21. There will be no order as to costs in this petition also.

