(1990) 09 BOM CK 0015

In the Bombay High Court

Case No : Writ Petition No. 2470 of 1982

Climax Chemicals APPELLANT

Vs

R. Gopalnathan, Addl. Collector of Customs RESPONDENT

Date of Decision : 21-09-1990

Acts Referred:

Citation : (1991) 1 BomCR 16 : (1991) ECR 375 : (1991) 52 ELT 186

Hon'ble Judges : S.M. Daud, J

Bench : Single Bench

Advocate : Shri J.C. Patel and Mr. C.R. Patel, for the Appellant; Shri V.N. Lokur, for the Respondent

Judgement

1. Having regard to the clearance of the consignment figuring in this petition pursuant to the grant of interim relief, what remains is to rule upon the validity or otherwise of the import inclusive of certain incidental directions.

2. The Import and Export Policy, April 82 - March 1983 period, at paragraph 231(4) recited thus :-

"Additional licences issued to Export Houses/Trading Houses during 1981-82 will also be valid within their over-all value, for import of raw materials, components, consumables and spares (excluding the items covered by Appendix 5) which can imported under Open General Licence by Actual Users (Industrial) under the Import-Export Policy, 1982-83. This facility will also be available to Export Houses and Trading Houses holding REP licences which were endorsed during 1981-82 for import of OGL items."

Appendix IV contained item 43 which was worded thus :-

"Oxytetracycline."

There are certain other entries in Appendix IV which have to be set out to established the contrast between them and entry 43. These were :-

"6. Aniline/Aniline oil and salts thereof.

18. Cyclamic acid and its salts.

32. Hydrazine Hydrate/sulphate.

36. Methapyrilene and its salt.

54. Propranolol hydrochloride."

The Central Government, in exercise of the powers conferred by section 3 of the Imports and Exports (Control) Act, 1947 (Act), gave a general permission to import into India from any country, except Union of South Africa and South West Africa, raw materials etc., by Actual Users (Industrial) subject to certain conditions. The first conditions was that the items to be imported were not covered by Appendices 3 to 9 and 15 of the Import-Export Policy 1982-83 (supra). By Public Notice No. 21-ITC(PN)/82 dated 19th April, 1982, the Chief Controller of Imports and exports purported to effect certain changes in the Import Policy for April 82 - March 83. One of the charges effected was thus" -

"Chapter 21 In the second line Para 213 (4) : after"3", insert "4".

Old sub-para 4 to para 218 reads as follows :-

"In the case of drugs appearing in Appendices 3, 5 and 9, the names mentioned :-

(i). . . . .

(ii). . . . . .

Each entry includes the salts and esters of same drug, if any."

After the change pursuant to the Public Notice, it read as follows :-

"In the case of drug appearing in Appendices 3, 4, 5 and 9, the names mentioned :-

(i). . . . . .

(ii). . . . .

Each entry includes the salts and esters of the same drug, if any."

On or about 1st October 1981, the Joint Chief Controller of Imports and Exports, issued Import Licence No. P/K/0458/277 to Manish diamonds who were an Export House under the Import Policy 1982-83. The said Manish diamonds on or about 25th February 1982 executed a letter of authority in favour of the petitioners as permitted by para 38 of the Hand Book of Import and Export Procedure for the year 1981-82. The holder of the letter of authority thus become an agent of the licence holder for the purpose of placement of orders for goods to be imported and to do all acts incidental thereto. The Petitioner is a firm registered under the Partnership Act and purporting to exercise its rights under the L/A aforementioned, placed an order with a concern of Yugoslavia for purchase of 2000 kgs. of Oxytetracycline Hydrochloride BP/USP/IP. The order was placed through the agents of the Yugoslavian concern and the said agents are said to have accepted the order on the very day on which it was placed. Petitioner claims that on 11th April 1982 it applied to the State Bank of Indore to establish an irrevocable L/C for 60,000 U.S. Dollars in favour of their sellers. The Indian equivalent of the Dollars was a sum of Rs. 6,00,000/- and the petitioner claims that some additional formalities were to be gone through which were completed for which reason the enhancement was sanctioned on 20th May 1982. In the meantime on 23rd April 1982, the Public Notice (PN) dated 19th April 1982 was published. The change brought about by the said PN could not affect the validity of the import licence on the basis whereof the petitioner had placed an order for the import of Oxytetracycline Hydrochloride. The said licence had been issued under an Import Trade Control Order promulgated in pursuance of a statutory power. The rights conferred thereby so it is contended could not be eroded or taken away by a PN. Purporting to act on the basis of the PN, respondent had tried to bar the entry of the consignment when it came to Bombay. That led to the filing of the instant petition and in pursuance of the interim order the importations was allowed on the petitioner furnishing a Bank guarantee of a nationalised Bank in the sum of Rs. 3,00,000/- plus a bond to pay the amount payable as a fine in the event of the goods being found to be liable to confiscation etc. Petitioner undertook that in the event of their losing petition they would pay interest calculated at 12% per annum on the amount of fine which could be found payable in lieu of the confiscation from the date of the order imposing such a fine. Having regard to the clearance already having taken place, all that remains to be decided is to rule upon the validity of the importation and the entitlement of the petitioner to a detention certificate as claimed in prayer (b) of the petition.

3. Respondents in their affidavit-in-reply contend that the order for import was placed not in the month of April 1982 but later. In fact the same was placed after the PN had become known. To escape the application of the PN the petitioner in collusion with certain Bank officers had fabricated documents to give the impression of the order having been placed in the first or second week of April 1982. This alone disentitled the petitioner to any relief under Article 226 of the Constitution. That apart, the PN was a valid exercise of power vested in the Chef controller of Imports and Exports.

4. Insofar as the factual position is concerned, Mr. Patel contends, and rightly, that the date on which the contract was arrived at and the date on which the letter of credits was finalised etc. etc. are extraneous to the importability of the consignment. Petitioner relies upon the licence issued under the Notification issued u/s 3 of the Imports and Exports (Control) Act, 1947. Admittedly, these order did not bar the import of Oxytetracycline Hydrochloride BP/USP/IP. To put it in layman''s language the item sought to be imported by the petitioner is a salt of Oxytetracycline. In Appendix IV where the law makers wanted to include salts,

they have done so and this is well illustrated by the contrast between entry 43 and entries Nos. 6, 18, and 26 etc. It therefore cannot be disputed that Appendix IV as originally issued, did not bar the salts of Oxytretracycline. This omission was sought to be made good by the impugned PN. Mr. Patel submits that a statutory instrument cannot be amended by exercise of a non-statutory power. In support of this submission Counsel relies upon a number of cases, the principal one being Bharat Barrel and Drum Mfg. Co. (P) Ltd. Vs. The Collector of Customs, Bombay and Another, . In that case a change was sought to be effected in the importability of sheets by the Public Notice prescribing that the sheets to be imported must be of "prime quality". It was observed that the change could not apply to sheets imported under licence issued earlier and in exercise of a statutory power. The Supreme Court approved a decision of an Officer who heard the Revision application on behalf of the Central Government in these words :-

"The Officer who heard the revision applications on behalf of the Central Government was of the view, and rightly, that the Public Notice. . . . . dated December 6, 1962, of the Iron and Steel Controller had no retrospective operation and the condition of "prime quality" could not be applied to the sheets imported under the licences issued before that date."

This precedent was followed in a number of other cases relied upon by Mr. Patel and these are reported at 1984 ECR 301 . Mr. Lokur for the respondents counters the submissions made by Mr. Patel with the decision Raj Parkash Chemicals Ltd. and Another Vs. Union of India (UOI) and Others, . But in that case what was in issue was a specific ban upon importability of certain commodities pursuant to an exercise of legislative power and not administrative power as is the position prevailing in the instant case. Therefore, Rajprakash cannot be said to go counter to the authorities relied upon by Mr. Patel. Mr. Lokur contends that a statutory instrument does not cease to be such an instrument merely because the source of power has not been correctly set out therein. It is the words employed which have to be taken into consideration, coupled of course with the right of the authority to exercise the powers, whether the power being exercised is statutory in nature or administrative in character. Attractive as this argument is, the manner in which the power is exercised or expressed to be exercised is an important indicia of what the authority is purporting to do. The Chief Controller of Imports and Exports can on behalf of the Central Government issue statutory instruments flowing from the power conferred by section 3 of the Act though he does so, for, and on behalf, of the Central Government. Similarly the Chief Controller has the authority to issue Trade or public Notice and the Objects of such notices is to make known the policy to the importers and exporters. The publication of notices for the Information of the general public is something in the nature of an exercise in public relations without any statutory consequences flowing therefrom. On the other hand, notifications in exercise of statutory powers have consequences in law affecting the rights and obligations of citizens. Therefore, irrespective of the suspicion said to surround the date of placement of the order by the petitioner and the finalisation of the L/C, the lead right of the petitioner to import the commodity under the Import Licence was not affected. The importations was valid and so it has to be declared. In regard to the petitioner''s claim for a detention certificate, the same will have to be issued by the 1st respondent, for the detention of the goods was on account of any legal fault or lapse on the part of the petitioner. Mr. Lokur contends that in respect of the petitioner''s entitlement to get a detention certificate the International Airport Authority is a necessary party and its non-joinder disentitled the petitioner from getting such a certificate from respondent No. 1. I cannot agree. The detention of goods was at the instance of respondent No. 1 and he alone will have to issue the required detention certificate. Whether the International Airport Authority does or does not respect that certificate, remains to be seen and if the said authority considers that it is not bound by the said certificate, the petitioner has other remedies open to it. The International Airport Authority''s joinder is not required to enable the petitioner to secure relief in terms of prayer (b).

5. The result of the foregoing discussion is that the petition succeeds. It is hereby declared that the importation of the goods figuring in the petition was valid. Further directed that respondent No. 1 do issue a detention certificate specified in prayer (b) of the petition to the Petitioner. The Bank Guarantee and Bond furnished by the petitioner to stand discharged forthwith. Rule in these terms made absolute, with parties being left to bear their own costs.