(1989) 04 BOM CK 0016

In the Bombay High Court

Case No : Writ Petition No. 3114 of 1987

Dimexion APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 26-04-1989

Acts Referred:

Citation : (1989) 44 ELT 226

Hon'ble Judges : Ashok Agarwal, J

Bench : Single Bench

Judgement

1. The claim of the petitioners for grant of a certificate of Export House under the 1978-79 Import-Export Policy have been rejected, it filed writ Petition No. 1501 of 1981 in the Delhi High Court. Several other petitions on behalf of traders whose similar claim had been rejected had been rejected had filed different petitions in different High Courts. One such petition viz., Writ Petition No. 1458 of 1979 was filed in this Court by N. Mehta & Co. This latter position was allowed on the 26th November 1982 and it was held that the view taken by the Department that the petitioners were not entitled to the certificates of export house on the ground that they had exported only diamonds and the exports were diversified and hence were not entitled to the certificate of Export House, was erroneous. Following the decision in Writ Petition No. 1458 of 1979, the petitioners'' Writ Petition No. 1501 of 1981 in the Delhi High Court and various similar petitions were allowed. The Department carried the matter to the Supreme Court by filing Civil Appeal No. 1423 of 1984, wherein the judgment and order dated 18th April, 1985 the appeal was dismissed and the view expressed in the various writ petitions was affirmed. Consequently, the petitioners were issued a certificate of Export House. Pursuant of the same, on the 20th August, 1985 the petitioners were issued an additional licence.

2. On the 18th October, 1985, the Supreme Court passed an interim order in the case of Raj Prakash chemicals whereunder importers were prohibited from clearing Butayl Acrylate falling under Appendix 3 Part A of the 1985-88 policy. On

the 5th March 1986 the aforesaid Raj Prakash Chemicals case was decided by the Supreme Court, wherein it was directed that wherever the goods were banned under the 1985-88 Policy, the same could not be imported. "Specifically banned" included the goods covered under Appendix 3 Part A i.e. list of limited permissible items. Acting on the aforesaid judgment, the Chief Controller of Imports & Exports addressed his letter dated the 17th March, 1986 on one M/s. Vijay Kumar & Co. indicating that the goods covered under the canalised items will be permitted to be imported. Similarly, on the 14th May 1986 the Principal Collector of Customs & Central Excise addressed his letter to the Federation of Imports & Exports that canalised items against additional licence was permissible and would be allowed to be cleared to the diamond exporters. Thus, the traders as also the Department proceeded on the basis that under the aforesaid decision of the Supreme Court in the case of Raj Prakash Chemicals import of canalised items under the 1985-88 Policy was permissible.

3. Then came the case of M/s. Indo-Afghan Chambers of Commerce which was decided by the Supreme Court on the 14th May 1986, wherein it was held that the goods covered under Appendix 2 Part B of the Import Export Policy 1985-88 were restricted items which were covered under the expression "specifically banned" and hence the same were not importable.

4. Then came the case of M/s. Godrej Soaps Pvt. Ltd. which was filed in this Court and this Court in Appeal No. 565 of 1986, by placing reliance on the Raj Prakash Chemicals'' case as also Indo-Afghan Chambers of Commerce''s case, held that the additional licence-holders were entitled to import canalised items and canalised items could not be considered as banned items. The petitioners having been issued the additional licence on the 20th August 1985 and relying upon the view expressed by this Court in M/s. Godrej Soaps Pvt. Ltd., on the 24th July 1986, entered into a contract with its foreign supplier for import of 775 kgs. of Vitamin AD-3 Food Grade for Rs. 1,97,879. The petitioners, on the 31st July 1986, opened an irrevocable Letter of Credit through the foreign supplier with the Hong Kong Bank for import of the said goods. In the meanwhile, the Department carried Court of M/s. Godrej Soaps Pvt. Ltd. to the Supreme Court held that the diamond exporters holding additional licence are not entitled to import the canalised items, as according to it they form part of the goods "specifically banned." In October 1986, the goods which the petitioners had ordered arrived in Bombay.

5. Then came yet another case of D. Navinchandra wherein the Supreme Court by its judgment dated the 15th April 1987 held that the diamond exporters holding additional licence could import only goods covered under Appendix 6 List 8 Part II of AM 1985-88 Policy. Hence, the view that held the field was that the goods which were specifically banned as also goods and which were canalised should not be imported and it was only those goods which were specifically permitted to be imported under the 1985-88 Policy could be imported under the additional licences. Following the aforesaid view, the Department, on the 10th

June 1987 passed the impugned order of confiscating the goods imported by the petitioners and imposing a personal penalty of Rs. 10,000/-. Being aggrieved, the petitioners on the 21st September 1987 filed the present petition.

6. On the 8th October 1987, rule was issued and an interim order was passed directing the respondents to clear the goods on the petitioners paying all the duties and 50% of the CIF value of the goods. The petitioners on paying an amount of Rs. 98,939.50 Ps. cleared the goods.

7. Then followed yet another case of the Supreme Court being the case of B. Vijay Kumar & Co. which was decided on the 16th December 1988. In that case, a grievance was made on behalf of traders in regard to the hardship suffered by them in view of the various judgments which had been passed from time to time. The view taken by the Department following the decision in the case of Raj Prakash Chemicals that the canalised items under the 1985-88 Policy were permissible was pointed out and the hardship suffered by the traders who had acted in pursuance of the aforesaid view and had effected imports was submitted for the consideration of the Supreme Court. The Supreme Court, on referring to all the aforesaid cases as also various orders and communications issued by the Customs Authorities, expressed its opinion "that in view of the special facts and circumstances of the case, specially having regard to the findings of the Tribunal that the appellants imported the canalised item of goods bona fide under the additional import licence granted to them in pursuance of the express conditions of the orders of this Court, which finding had not been challenged before us....." It held that, "the Collector and Tribunal were not justified in confiscating the goods or in imposing redemption fine." The Department was directed to refund the amount of redemption which was realised. The Supreme Court emphasises that it had decided the matter in view of the special facts and circumstances available in the cases before it and that order will not be treated as a precedent.

8. Shri Kamdar, the learned Counsel appearing on behalf of the petitioners submitted that the petitioners'' case was identical to the case of the two petitioners before the Supreme Court in the aforesaid case of B. Vijay Kumar & Co. Both the petitioners in the case of B. Vijay Kumar & Co. had opened their Letters of Credit after the 18th April, 1985 and the Supreme Court held that the said two cases were bona fide importers against whom orders of confiscation, and imposition of redemption fine could not be passed. Shri Shringarpure, on the other hand, placed reliance on the case of Raj Prakash Chemicals Ltd., wherein the following observation was made :-

"At the same time we make it clear that diamond exporter who pursuant to the issue of additional licences under the Import Policy 1978-79 have opened and established irrevocable letters of credit on or after October 18, 1985 will not be entitled to the benefit of this order."

Shri Shringarpure also placed reliance on the decision in the case of M/s. Godrej Soaps Ltd., wherein the following observations have been made :-

"In this case no injustice would be done by this order. The goods were purchased by present petitioners only on 27th June 1986 after they were aware of the judgment of this Court in Raj Parkash Chemicals Ltd. and Another Vs. Union of India (UOI) and Others, as well as in the Indo Afghan Chambers of Commerce and Another Vs. Union of India (UOI) and Others, . No question of any restitution of rights arises.

"It was further submitted that in any event under item 1 of Appendix 6 (Import of items under open general licence of the Import Policy 1985-88, raw materials components and consumables (non-iron and steel items) other than those included in the Appendices 2, 3 Part A, 5 and 8 will be permissible by the actual user (Industrial). It was submitted that the respondents herein were actual users (Industrial) because these were used by them for their production. This contention cannot be accepted firstly because it comes within specific prohibition of item 9 of Part B of Appendix 5 being fatty acid and acid oil which were importable only by the State Trading Corporation of India under Open General Licence on the basis of foreign exchange released by the Government in its favour. Secondly the actual importation was not by the petitioners but by somebody else as mentioned herein before being M/s. Dimexion and Co. In the premises, the view of the Bombay High Court cannot be sustained."

Shri Shringarpure finally reiterated the observations of the Supreme Court in the case of B. Vijay Kumar & Co.

"We would like to emphasise that since we have decided the matter in view of the special facts and circumstances available in these cases this order will not be treated as a precedent."

9. Having considered the rival contentions, I am of the view that the facts obtaining in the present petition are identical to the facts which were before the Supreme Court in the case of B. Vijay Kumar & Co. It is true as submitted by Shri Shringarpure that the Supreme Court in this case was not concerned with the cut off date of 18th October 1985 which was considered in the Raj Prakash Chemicals'' case but was concerned only with the hardship sustained by the petitioners before them. That, however, in my view, would make no difference. It is also true that the Supreme Court in the case of Raj Prakash Chemicals did lay down that it was only in cases where the Letters of Credit had been opened prior to October 1985, that the importer would be entitled to import under the additional licences. However, the Supreme Court in the case of B. Vijay Kumar & Co. was considering the case of the importers who had opened their Letters of Credit after the 18th October 1985. After taking into account the earlier decisions rendered by it, it came to the conclusion that the decision of the Department to confiscate and to impose redemption fine in respect of the canalised items of goods which had been imported bona fide was not justified. If the case of the petitioners stands pari materia to the case of B. Vijay Kumar & Co., I fail to see how relief can be denied to the petitioners merely on placing reliance on the observations of the Supreme Court that, that case had been decided in view of

the special facts and circumstances available therein and that case will not be treated as a precedent. If the case of the petitioners cannot be distinguished, on any material grounds, the petitioners cannot be treated differently. Hence, in my view, the petitioners will be entitled to the reliefs claimed in the petition.

10. In the result, the petition succeeds. The impugned order dated 12th June 1987/22nd July 1987 (Exhibit ''C'' to the petition) ordering absolute confiscation and imposing a penalty of Rs. 10,000/- is quashed and set aside. The respondents are directed to refund the petitioners the amount of Rs. 98,939.50 Ps. which has been paid by the petitioners in pursuance to the interim order dated 8th October 1987 passed in the present petition. This amount shall be refunded within a period of four weeks. In the event of there being a default, the said amount will carry interest at the rate of 12% per annum from today.

Rule absolute in the aforesaid terms.

11. There shall be no order as to costs, in the facts and circumstance of the case.

