

(1987) 02 BOM CK 0001

In the Bombay High Court

Case No : Writ Petition No. 1660 of 1986

Mehta Gems and Another

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 27-02-1987

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1987) 13 ECC 109

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

Bench : Single Bench

Final Decision : Allowed

Judgement

S.M. Daud, J.—This petition under Article 226 of the Constitution is to obtain a mandamus in terms of prayer (b).

2. The points arising for determination are to be considered in the following background:--

Pursuant to the order of this Court in Writ Petition No. 1048 of 1983, petitioner No. 1 was issued an Export House Certificate and a REP licence. The said licence was endorsed thus:--

Not-transferable. Endorsed as per Hon"ble High Court order dated 21-6-1985 in Notice of Motion No. 2679 of 1984 in Writ Petition No. 1048 of 1983. The licence is endorsed as per provisions of para. 174 of 1978-79 Policy for import of items covered by valid open general licence.

After the above order was passed, petitioner No. 1 issued a letter of authority in favour of petitioner No. 2 for the import of goods, for and on its behalf, from the foreign suppliers. Petitioner No. 2, in pursuance of the letter of authority, placed an order with the foreign suppliers for the goods to be despatched in consignments under three bills of entry bearing nos. 9127 and 9128 dated September 24, 1985 and 2348 dated October 1, 1985. Respondents refused

clearance of the goods covered by bills of entry bearing Nos. 9127 and 9128. This led to the filing of Writ Petition No. 2239 of 1985, wherein rule was issued and an interim order directing the respondents to permit the clearance of the consignment was issued. Respondents being aggrieved by the interim relief went in appeal to a Division Bench--that appeal being one bearing No. 1146 of 1985. The appeal was dismissed with costs. Respondents went to the Supreme Court by way of a petition seeking special leave to appeal, but to no avail. Petitioners contend that having regard to the many decisions of this Court as also the Supreme Court, respondents cannot object to the clearance of the goods for and on behalf of petitioner No. 1 by petitioner No. 2 which is the holder of a letter of authority. In spite of this being the clear position, a show cause notice was issued to petitioners. To the extent relevant, this show cause notice which is at Ex. I, recites thus:--

M/s. Pacific Exports (petitioner No. 2) imported...and sought clearance against R.E.P. licence...issued in the name of M/s. Mehta Gems (petitioner No.1) under a letter of authority in the name of importer dt. 27-7-1985.

As per para. 118(2) of Hand Book of A.M. 85-88 letter of authority cannot be issued by Export House against the licence marked non-transferable.

As per the additional endorsement attached to the said licence, the licence is made non-transferable and also with the benefit of para. 174...

In view of the above, the licence produced by the importer is not valid to cover the import. The import therefore appears to be unauthorised.

Petitioner No. 1 was called upon to show cause why it should not be proceeded against for the alleged commission of an offence punishable under the Customs Act read with Imports and Exports (Control) Act. A reply was given on behalf of petitioner No. 1 through its advocate. This not having yielded any result, petitioners lodged the instant petition. They complain that the import licence in favour of petitioner No. 1 did not prohibit the issue of a letter of authority in favour of petitioner No. 2 and that in refusing to clear the proposed import, respondents were violating the law. This contention is disputed by the respondents. It is their case that the import licence originally issued in 1978-79, though transferable, became non-transferable by virtue of the Import Policy of 1985-88. In particular para. 118(2) of AM-85-88 made it clear that the facility of getting the goods cleared through a letter of authority holder was not available in case of licences marked "non-transferable". The short question that arises in this petition is whether the reliance placed upon para. 118(2) of AM-85-88 is well founded ? I find in the negative and allow the petition for the reasons given below.

3. An identical question arose before Jahagirdar J. in Writ Petitions Nos. 337 and 1146 of 1986 decided on 10-7-1986 reported as *Bharat Oxygen & Acetylene Co. v. Union of India and Ors.* in [1986] 10 ECC 139 . The contention raised on behalf of the respondents was repelled by the learned Judge and I cannot do

better than reproduce such of the excerpts from the judgment, as are relevant:--

...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... 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.... 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 went 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.... 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.

Counsel for the respondents submits that the view taken by Jahagirdar, J. stands overruled by the Supreme Court's decision in Union of India (UOI) Vs. Godrej Soaps Pvt. Ltd. and Another, . The exact passage relied upon by Mr. Bulchandani is 10 ECC 396 and reads thus:--

This Court reiterated that by the order dated 5th March, 1986, this Court has construed its order dated 18th April, 1985 referred to hereinbefore to mean that

only such items could be imported by diamond exporters under the additional licences granted to them as could have been imported under the Import Policy 1978-79, the period during which the diamond exporters had applied for Export House Certificates and had been wrongfully refused, and were also importable under the Import Policy prevailing at the time of import which in the present case was the Import Policy 1985-88, i.e., it meant to say that those importable at the time when licence was refused and must continue to be importable at the time when] import is sought, i.e., 1985-88. These were the items which were not specifically banned under the prevalent Import Policy. That is the construction. The items had to pass through two tests. These should have been importable under the Import Policy 1978-79. These should have been importable under the Import Policy 1985-88 in terms of the order dated 18th April, 1985. Union of India v. Rajnikant Brothers (Civil Appeal No. 1423 of 1984 decided on 18-4-1985 Supreme Court). Counsel places special emphasis upon the last three sentences of the aforementioned passage. These sentences, so he submits, have to be read as relating not only to the importability of the items, but also the terms. In other words, if a certain item importable in 1978-79 comes to be banned in Import Policy 1985-88, there cannot be restitution to the extent of permitting import of the banned item though the importer is utilising the licence for the earlier period. Next, if there is a change in the terms and conditions governing import, such changed terms and conditions will govern import in the subsequent period, though they may not have been existent in the earlier period. In 1978-79, there was no restriction upon a licence holder importing through the holder of a letter of authority. This limitation came in vide para. 118(2) in the AM-85-88 Policy. On a parity of the reasoning given above, import through the holder of a letter of authority, though permissible in 1978-79, became impermissible when the licence for that year was being availed of in the import period 1985-88. I do not see anything in the passage relied upon by Mr. Bulchandani to support this argument. Counsel argues that it was to clarify an ambiguity resulting from the Supreme Court's judgment in Rajnikant Brothers' case (Civil Appeal No. 1423 of 1984 decided on 18-4-1985) which led to the Supreme Court entertaining the aforementioned application for special leave. The order passed in Rajnikant Brothers' case by the Supreme Court is set out in Raj Parkash Chemicals Ltd. and Another Vs. Union of India (UOI) and Others, . Therefrom, it is clear that it was the use of the words "whether canalised or otherwise", which had created the problem that required resolution in the latter case, viz., Union of India (UOI) Vs. Godrej Soaps Pvt. Ltd. and Another, . The emphasis all along was on the importability of items at the period when the licence was sought to be Utilised though it pertained to an earlier period. The permissibility of using an agent, in the form of the holder of a letter of authority, was not in question. I therefore would not construe the Godrej case as an authority overruling the view taken by Jahagirdar, J. in Writ Petitions Nos. 337 and 1146 of 1986. This apart, I really see no substance in the contention that Jahagirdar, J. has erred in understanding the position and determining the point at issue. The consequence flowing from the forgoing discussion is that petition has to be allowed. Hence the order.

ORDER

Rule made absolute in terms of all the sub-paragraphs of prayer (b) to the petition. Petitioners shall get their costs from the respondents, who shall in addition bear their own.