(1982) 11 BOM CK 0003

In the Bombay High Court

Case No : Miscellaneous Petition No. 1458 of 1979

Narendra Mafatlal Mehta APPELLANT

Vs

Union of India and another RESPONDENT

Date of Decision : 26-11-1982

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (1984) 17 ELT 106 : (1981) 129 ITR 609

Hon'ble Judges : M.L. Pendse, J

Bench : Single Bench

Judgement

1. The petitioner is the sole proprietor of a concern carrying on business in the name and style of M\\s N. Mehta and Company. The petitioner is a Diamond Merchant and is engaged in cutting and polishing of rough Diamonds and the export and import of Diamonds. The petitioner''s concern is registered as a Merchant Exporter and is also registered with the Gem and Jewellery Export Promotion Council. The concern imports rough diamonds from abroad and after processed and polished in India by small manufacturers, exports the diamonds to buyers in various countries such as Belgium, United States of America, Hongkong etc.

2. Respondent No. 1 - Union of India declared its Import Policy April 1978 - March 1979 and under the said Policy framed a scheme for registration of Export Houses as per the contents of Chapter 19 of the Policy. The object of the scheme was to grant special facilities to export houses to strengthen their negotiating capacity in foreign trade and to build a more enduring relationship between them and their supporting manufacturers. Export Houses, which are able to export certain average f.o.b. value of exports in a prescribed aggregate value were eligible for the grant of Export House Certificate on application made to respondent No. 1 On grant of the certificate, the Export Houses are entitled to the facility of obtaining replenishment (REP Licences) to enable them to import certain goods which after process could be exported. The Export Houses are also

entitled to the facility of an additional licence as provided under the scheme. The notice containing the Import Policy provided for registration of Export Houses published on April 3, 1978.

3. The petitioner, in accordance with the scheme published by respondent No. 1, made an application dated June 21, 1978 for grant of Export House Certificate. The petitioner satisfied all the requirements for grant of the certificate and the requisite documents and reports were submitted along with the application. The petitioner received the letter from the Controller of Imports & Exports on August 30, 1978 informing that the application for grant of export house certificate could not be considered since the petitioner had failed export house certificate could not be considered since the petitioner had failed to diversify his exports of "other products" during the year 1977-78. A copy of this letter is annexed as Exhibit ''D'' to the petition. Certain correspondence took place between the petitioner on one hand and the respondents on the other, wherein the petitioner was claiming that he was entitled to the grant of certificate as all the required conditions were satisfied and the reason furnished by letter dated August 30, 1978 was totally foreign to the policy announced by the Government. The petitioner did not receive a favourable reply and ultimately preferred the present petition on June 28, 1979 under Article 226 of the Constitution of India. The petitioner claims that the order dated August 30, 1978 declining to grant certificate should be quashed and a writ of mandamus should be issued against respondent No. 2 to issue to the petitioner the Export House Certificate under the Import Policy of April 1978 - March 1979.

4. In answer to the petition, on behalf of the respondents, Shri V. S. Rawat, Deputy Chief Controller of Imports & Exports, has filed a return duly sworn on March 8, 1982. By this return it is claimed that the scheme was published widely on April 3, 1982 and the application of the petitioner made in pursuance of the scheme was duly considered and it was rejected as the petitioner had failed to diversify the export during the year 1977-78 as per the existing provisions of the Policy. In paragraph 21 of the return it is claimed that the import facility given to the eligible Export Houses is that an Export House is granted an additional licence to be calculated at 33.1/3% of the f.o.b. value of export of select products made in the pervious year and manufactured by the small scale and cottage industries. This additional licence is in addition to the normal replenishment licence allowed against such exports. The Affidavit further recites that the replenishment percentage in respect of cut and polished diamonds varied from 65% to 80% during the year 1978-79 and taking the average of 72.5% the Export Houses will get a Replenishment Licence for 103.1/3%. This figure, according to the affidavit, is arrived at by adding the average replenishment of 72.5% to the additional licence at the value of 33.1/3% of the f.o.b. value. The Deputy Chief Controller, therefore, claims that against the export of Rs. 100 the Export House will get a replenishment licence for 103.1/3% resulting into a net outgo of foreign exchange of 3.1/3% against an export of cut and polished diamonds of Rs. 100. It is further claimed that if the 81 firms, who

had requested for grant of Export Houses Certificates in the year 1978-79 have been granted certificates, it would have caused loss of a substantial amount to the Government and that could not be the intention of the Government policy to give facility to the export houses, and therefore the certificate of Export House was denied to the 80 exporters who desired to export cut and polished diamonds. The petitioner has filed an affidavit-in-rejoinder sworn on April 14, 1982 denying the claim made by the respondents and pointing out that there are at least four parties to whom Export House Certificates were granted without diversification of export in the year 1977-78.

5. Shri Desai, learned counsel appearing on behalf of the petitioner, submitted that the reason given in the letter dated August 30, 1978 for rejecting the application for grant of Export House Certificate is entirely misconceived. The submission is correct and deserves acceptance. The letter merely states that the application cannot be considered since the petitioner has failed to diversify his export of other products during the year 1977-78. It is not in dispute between the parties that there is no clause in the scheme which requires the applicant to establish that he had diversified the export of other products during the year 1977-78. In fact Shri Paranjpe, appearing on behalf of the respondents, was unable to state what the Controller of Imports & Exports desired to convey by referring to ''diversification of export of other products''. As the scheme, which was published on April 3, 1978, makes no reference to the diversification of export of other products during the year 1977-78, the Controller of Imports and Exports was clearly in error in importing this foreign consideration while considering the application for grant of Export House certificate. Although there is no other reason assigned in the letter dated August 30, 1978 for rejecting the application and Shri Desai is right in his submission that it is not permissible for the respondents to furnish additional grounds in the return for the first time I considered the submission of Shri Paranjpe that the application was rejected because the result of grant of certificate would have caused substantial loss to the Government in the loss of foreign exchange. The respondents for the first time have stated in their affidavit that grant of export house certificate to the exporters of diamonds would result in granting them replenishment licence for more than 100% and the respondents claimed that as the replenishment licence would be more than 100%, it was felt that the application for export house certificate should be turned down. In the first instance, the return does not state that it was the policy of the Government to turn down all applications for grant of export house certificate in respect of all items where the replenishment licence may exceed 100%. I inquired from Shri Paranjpe as to whether there are any other items in the Import Policy which grants replenishment licence of a value of more than 65% or 70% and Shri Paranjpe very fairly pointed that there are at least three items where the import replenishment percentage is more than 75%. Items like lead semis/extrusion at serial No. A-16 had the import replenishment percentage of 75%, item B-41. 1 Zinc Oxide 80% and item B-41.2 Red lead and Letharge, white lead 80% Shri Paranjpe did not dispute that in respect of these

items additional licence calculating at 33.1/3% of the f.o.b. value was available to the export house certificate holder. Shri Paranjpe was unable to state that it was the policy of the Government to reject the application for grant of export house certificate in all case in respect of all items where the replenishment licence would increase 100%. In absence of any material on record, it is impossible to hold that the claim made by the respondents in the return that the applications of diamond exporters were turned down on the basis that the replenishment licence would be more than 100% of the f.o.b. value. I have considered the submission urged by Shri Paranjpe even though it was neither stated in the scheme framed by the respondent nor was given as a ground in the letter dated August 30, 1978 as a ground for rejecting the application. I find that the claim made by the respondents in paragraph 21 the return is totally unsustainable and belated effort to deny the just claim of the petitioner. The respondents have stated in paragraph 21(f) of the return that it could not be the intention of the Government policy to give facilities to an export house to the extent when there is no net earning of a foreign exchange. It hardly requires to be stated that the policy of the Government must reflect in the scheme and not what in felt by the officer who has filed the return. In my judgments, the rejection of application of the petitioner for grant of export house certificate was without any basis and the petitioner is entitled to the relief in this petition. It is not in dispute that except the ground mentioned by the Controller in the letter dated August 30, 1978 there is not objection on the part of the respondents to refuse the certificate, because other conditions required under the scheme are complied with by the petitioner.

6. Shri Desai invited my attention to the judgment dated July 15, 1980 of a Division Bench of the Delhi High Court in Civil Writ Petition No. 250 of 1979 M/s. Jayantilal Mangalji Mehta v. Union of India & Ors. The ratio of the judgment does support the contention of the petitioner.

7. Accordingly, the petition succeeds and the rule is made absolute and the order dated August 30, 1978 and order dated October 25, 1978, copies of which are annexed as Exhibits ''D'' and ''E'' to the petition, are quashed and set aside. The respondents are directed to issue to the petitioner the Export House Certificate under the ''Import Policy April 1978 - March 1979'' within a period of one month from to-day. The grant of Export House Certificate would entitle the petitioner to seek certain facilities as provided by paragraph 174 of the Scheme.

Shri Desai points out that one of the facilities is the additional licence and the application for the same was required to be filed prior to February 28, 1979 as provided by paragraph 177 of the Scheme.

As the time for making the application has already expired long back, it is directed that in case the petitioner makes an application within a period of three months from the date of grant of Export House Certificate, then the respondents shall consider it on merits and do the needful.

8. In the circumstances of the case, there will be no order as to costs.