**(1962) 03 BOM CK 0012**

**In the Bombay High Court**

**Case No :** Misc. Petition No. 375 of 1961

Pioneer Scrap Traders and Exporters APPELLANT

Vs

O.G. Eapen and Another RESPONDENT

**Date of Decision :** 24-03-1962

**Acts Referred:**

Constitution of India, 1950 — Article 19, 19(1), 226
Imports and Exports (Control) Act, 1947 — Section 3, 5, 6

**Citation :** AIR 1963 Bom 50 : (1962) 64 BOMLR 534

**Hon'ble Judges :** K.K. Desai, J

**Bench :** Single Bench

**Advocate :** Porus Mehta and M.N. Kothari, for the Appellant; M.P. Laud and Ranganekar, for the Respondent

## Judgement

K.K. Desai, J.—This is a petition under Article 226 of the Constitution challenging the legality of the conditions imposed in a licence dated September 4, 1961, and an allotment order also dated September 4, 1961, as also directions in a letter dated October 20, 1961, copies of which licence, order and letter are annexed to the petition. The relevant facts are as follows:

2. The petitioners are a partnership firm carrying on business, inter alia, of export of ferrous scrap from India to foreign countries. The Petitioners had in fact in connection with export of ferrous scrap prior to the date of the above stated licence obtained several licences for export of ferrous'' scrap. By an application for licence dated August 29, 1961, (copy whereof is annexed as Ex. 9 to the affidavit of M.M. Solanki in reply dated January 15, 1962), the Petitioners applied. for exporting 300 tons of cast iron borings and turnings (scrap). As a result of this application, the 1st Respondent issued to the Petitioners the licence in question dated September 4, 1961, to export Ferrous scrap : 300 tons of cast iron borings and turnings (scrap). In the licence conditions are mentioned subject to which the licence was issued. The main condition which is challenged as illegal in this petition is Condition No. 1 and runs as follows:

To entitle the exporter to ship material under this licence he shall have to supply 10 tons of heavy melting scrap for export of every 100 tons of turnings and borings (both steel and cast iron) to the furnace owner nominated by Iron and Steel Controller or by such authority as he may appoint fa this behalf.

Conditions 2, 3, 4 and 5 run as follows:

2. xxxxx

Heavy melting scrap to be supplied by the exporter to the furnace owner as per condition (r) above shall be subject to inspection by the Iron and Steel Controller or his representative(s). If as a result of inspection at the exporter''s godown of yard, it is considered by the Iron and Steel Controller or his representative that the exporter does not possess heavy melting scrap in the required quantity, or this material is not heavy melting scrap and if a certificate from the furnace owned confirming receipt of heavy melting scrap is not produced as evidence, export of turnings and borings (both steel and cast iron) under this licence shall not be permitted.

3. If it is found as a result of this inspection that the scrap in question can be utilised in India the exporter will have to remove the materials from the Docks at his own expense and sell it to consumers in India nominated by the Iron and "Steel Controller at the statutory price. Exports will be permitted only if the material cannot be used in India and if the Iron and Steel Controller is satisfied that the scrap sought to be exported falls within the categories licensed.

4. The Iron and Steel Controller''s decisions in this respect shall be final. Government will not be responsible for any claim for loss due to demurrage, frustration of contract or any other reasons whatsoever.

5.. The licence is liable to cancellation without notice at any time and without any reason being assigned therefor.

3. By the allotment order dated September 4, 1961, the 1st Respondent, referred to the above export licence and the shipment to be made by the Petitioners of the 300 tons of goods mentioned in the licence and instructed the Petitioners to deliver in that connection the materials as mentioned in that order to the furnace owners mentioned therein. The allottees (the furnace owners), the quantities of the goods deliverable to them and the price receivable by the Petitioners are mentioned in the order as follows:

Allottee''s name & address Description of scrap Quantity Price in Rs.

1. M/s-MysoreIron and Steel Works, Lakshrni Bldg., Sir P. M. Rd , Bombay 1.

Heavy Melting of scrap. 25 M/T 1I3/- per M/T

2. M/s. Mukund Iron & Steel Works, Bombay Agra Rd., Kurla,Bombay.

do 5 M/T 113/- per M/T

 

It is further mentioned in the order as follows:

In case satisfactory financial arrangements are not completed by the above allottee(s) within 7 days of the date of establishing your contact with the allottee(s) the matter should be brought to the notice of this office immediately so that necessary re-allotment can be made immediately.

Shipment will be permitted only after the allottee has certified that he has taken physical delivery of the above quantity of materials.....

In October 1961 the Petitioners received from the 2nd Respondent the letter dated October 20, 1061 directing the Petitioners to give credit facility up to 14 days to the allottee Messrs. Mysore Iron and Steel Works in connection with the delivery of the goods mentioned in the above allotment order to that allottee. These directions were given without giving a hearing to the Petitioners.

4. Thereafter the Petitioners received a circular from the 2nd Respondent on or about October 28, 1961, whereby all exporters were required to give credit facilities to the extent of 2 days to the above allottee Messrs. Mysore Iron and Steel Works. The Petitioners challenged by correspondence the legality of the above conditions and also the allotment order and the directions given in connection with credit facilities to be given to the allottee Messrs. Mysore Iron and Steel Works.

5. The main contention of the Petitioners, relates to Condition No. 1 in the licence. The Petitioners rely upon the mandatory direction contained in Condition No. 1 to the effect that the Petitioners shall have to supply to tons of heavy melting scrap for export of every 100 tons of turnings and borings to the furnace owner nominated by the Iron and Steel Controller or by such authority as he may appoint in this behalf. The substance of the contention is that the above mandatory direction has no relevance and is entirely foreign to the purpose of the legislation providing for control of exports, licence for export and jurisdiction to impose conditions in the licence in connection with export. In that connection, there is no dispute between the parties that the legislative provisions are contained in the Imports and Exports (Control) Act, 1947, and the Exports (Control) Order, 1958. The provisions which must be referred to are the preamble to the Act which throws great light on the purpose and object of the Act as also Sections 3, 5 and 6 of the Act, Clauses 3 and 5 o? the Order and items B-3 and C-9 (x) in Schedule I to the Order. The preamble to the Act runs as follows:

Whereas it is expedient to continue for a limited period, powers to prohibit, restrict or otherwise control imports and exports.

Section 3 provides:

Powers to prohibit or restrict imports and fexports. : (i) The Central Government may, by Order make provision for prohibiting, restricting or otherwise controlling, in all cases or in specified classes of cases, and subject to such exceptions, if any, as may be made by or under the order:

(a) the import, export, carriage coastwise or shipment as ships stores of goods of any specified description.

(b) the bringing into any port or place in India of goods of any specified description intended to be taken out of India***.

(2) xxxxx

(3) xxxxx.

By section 5 the contravention of the provisions of the Act and the Order made thereunder is made penal.

6. By Clause 2 (d) of the Order the "licensing authority" is defined to mean "an authority competent to grant a licence under the Order", Clauses 3 and g of the Order provide as follows:

3. Restriction on export of certain goods.--Save as otherwise provided in this Order, no person shall export any goods of the description specified "in Schedule I, except under and in accordance with a licence granted by the Central Government or by any officer specified in Schedule II." The Respondents in this case are mentioned as officers competent to grant a licence in items 8 and g of Schedule II. In item 7 the Iron and Steel Controller is mentioned as such officer.

5. Conditions of licence : (i) A licence granted under this Order may contain such conditions, not inconsistent with the Act or this Order, as the Licensing authority may deem fit.

(2) It shall be deemed to be a condition of every licence-

(a) xxx

(b) xxx

(3) The licensee shall comply with all conditions imposed or deemed to be imposed under this clause.

Clause 6 of the Order specifically enumerates grounds on which a licence can he refused. Clause 7 provides for amendment of licence and, inter alia, provides that "no action shall be taken under this clause unless the licensee has been given a reasonable opportunity of being heard." Clause 9 relates to cancellation of licences and, inter alia, provides that

No action shall be taken under this clause unless the licensee/exporter has been given a reasonable opportunity of being heard.

7. Before discussing the object and purpose of the Act and of the Order it is necessary to notice that the provisions in Clauses 6, 7, 8 and 9 of the Order which relate to refusal, amendment, suspension and cancellation of licence are enacted because it is known to the enacting authorities that the Constitution

 

provides for freedom of trade and freedom of acquisition and disposal of properties. The provisions are enacted with a view to protect rights of citizens in that connection. The intention of the enacting authorises must be to make legislative provisions which are restrictions for protection of public and/or general interest as required by the provisions in Article 19 of the Constitution. I assume that it is for that reason alone that the grounds on which a licence can be refused are enumerated in Clause 6 and provision is made in Clauses 7, 8 and 9 to give a hearing before any action is taken for amendment, suspension and/or cancellation of the licence. I have no doubt that it is for that reason that it is provided in Clause 5 that the conditions to be included in the licence must not be inconsistent with the Act or the order. The whole of the contention of the Petitioners in this case is that the impugned Condition No. 1 in the licence in question is entirely inconsistent with the Act and the provisions of the Order. The purpose and object of the Act obviously as appears from all the above provisions including the preamble to the Act is to control imports and exports. Control must be necessarily for general and public interest. Control that was intended to be imposed was not to be arbitrary and was not to relate to any purpose other than the control of exports so far as exports are concerned. I assume that the control of exports was deemed necessary for the purpose of protection of economy in this country. It must be that goods which are required for consumption in India may not be allowed to be exported. It may be that the goods by export whereof foreign exchange could be earned may be allowed to be exported in such a way as appropriate foreign exchange can be earned by this country. These and similar objects, I imagine, must be the object and purpose of the export control as provided in the above Act and the Order. It is, however, apparent that whilst dealing with the question of export of goods and/or question of imposing conditions in the licences for exports of goods, the above provisions could never have been intended to confer jurisdiction in the licensing authority to issue mandatory directions against exporters directing them to acquire other goods in the local market for delivery thereof to specified persons locally in India. In spite of best efforts I have not been able to find anything in the above Act and the Order that suggests that the Parliament or the authority enacting the Exports (Control) Order thereby directly or indirectly intended to confer jurisdiction in the licensing authorities to give such mandatory directions. I have no doubt that the true construction & effect of Condition No. 1 is that the Petitioners must somehow or other procure and thereafter supply 10 tons of heavy melting scrap to the nominated furnace owner as a condition precedent to export of every 100 tons of the goods mentioned in the licence. In effect by that direction the Respondent No. 1 has indirectly taken control of the Petitioners'' business and/or trade. The only provisions which are relevant in this connection are contained in Section 3 and Clauses 3 and 5 of the above Act and the Order. The purpose of the; above Act and the Order is not to vest any authority in the licensing officers to do anything more than control exports. These provisions do not, in my view, create any wider jurisdiction in the licensing authorities to impose conditions giving mandatory directions of the above kind in the licences issued under the

 

Act and the Order.

8. In this connection, it is necessary to mention that the Petitioners have alleged in the petition that under the Iron and Steel (Control) Order, 1956, the Iron and Steel Controller has absolute power to control acquisition and disposal of scrap by any person. It is not in dispute that there is no free market for melting scrap and there is price control in respect of melting scrap. The Petitioners have alleged that on account of exercise of control with respect to heavy melting scrap there is extreme shortage of that material in the open market and, therefore, it is practically impossible for the Petitioners to acquire heavy melting scrap in sufficient quantities. The reply to that allegation in the affidavit in reply is significant and runs as follows:

Under the current policy for the period of July-December 1961, export of heavy melting scrap has been totally banned as furnace owners in the country are experiencing great shortage of this scrap. I do not admit that there is scarcity of heavy melting scrap in the country, but it is true that the price of heavy melting scrap being controlled, it is not easily and in sufficient quantity available in the open market.

It must be noticed that it is not alleged in the affidavit in reply that the Petitioners were stockists of and/or found to be in possession of melting scrap directed to be delivered under Condition No. 1. The only method which the Petitioners were bound to adopt to comply with Condition No. 1 was to make purchases of melting scrap in the market, whilst the conditions of the market were as mentioned in the affidavit in reply. 1 have not been able to find any provisions in the above Act and the Order which entitle Respondent No. 1 (and vest jurisdiction in Respondent No. 1) to give mandatory directions as contained in Condition No. 1.

9. It is also apparent that the direction as contained in Condition No. 1 has been given for the reason that "the furnace owners in the country were experiencing great shortage of melting scrap". It may be, therefore, for the protection of economy in India that the Government must find ways and means to make melting scrap available to the furnace owners. I do not see how, to meet that situation, powers conferred on licensing officers under the above Act and the Order can be utilised. The purpose of the Act and the Order is not to procure and make available locally to any person goods from the local market, It is obvious that the power that is given to Respondent No. 1 as licensing authority under the Act and the Order has been utilised by him for a purpose which is entirely irrelevant and extraneous to the purposed of the Act and the Order.

10. Mr. Ranganekar for the Respondents, however, has relied upon the provisions of the Iron and Steel (Control) Order, 1956. He has submitted that the provisions of that Order and the Exports, (Control) Order, 1958, must be read together. He has submitted that upon reading these provisions at the same time it is at once apparent that the directions given in the licence are legal and nail contrary to the

 

legislative enactments as contained in both the Orders. The contention is made as follows:

The purpose of the Iron and Steel (Control) Order, 1956, and Imports and Exports (Control) Act and Exports (Control) Order is prohibition of export of scrap except under and in accordance with the conditions of a licence.

The melting scrap and turnings and borings (scrap) are not disconnected in their intrinsic property and that the condition imposed in the licence for delivery of melting scrap in certain proportions to the quantity of the export goods consisting of turnings and borings which could not have been permissible except under the licence is not extraneous to the purposes of the above two Orders.

The ban and/or control of exports is always for public and general interest when under such control turning and boring scrap is allowed to be exported. In general and public interest conditions may be imposed so that the other secreted scrap (melting scrap) may be brought into the market for correct use thereof.

11. It is first necessary to notice the relevant provisions of the Iron and Steel (Control) Order, 1956. Under Clause 2 (i), "stockholder" means "a person holding stocks of iron or steel for sale who is registered as a stockholder xxx". Under clause 2 (j), "scrap" is defined. Under clause 2 (k), "scrap merchant" is defined. Clauses 3 to 17 relate to iron and steel of prime quality. Clauses 18 to 27 relate to defectives and scrap. The effect of Clauses 4 and 5 is that no one can acquire iron or steel from a producer or stockholder or a person holding stock except under the authority of and in accordance with the conditions contained in a quota certificate or permit. No one who acquires Iron and steel under Clause 4 and under the quota and permit can dispose of or export or agree to export the acquired iron and steel except in accordance with the conditions contained in a special or general written order of the Controller. Under Clause 10, the Controller is empowered to direct sale Of iron and steel acquired in the aforesaid manner under clause 4. Under clause 11, the Controller is empowered to prohibit removal of iron and steel. Under Clause 15, he is empowered to fix prices for iron and steel. I have referred to these clauses relating to iron and. steel only because Mr. Ranganekar has relied upon them. These clauses have no bearing on the question in this case, because the same relate to scrap in respect whereof provision is made in Clauses 18 to 27 of the Order. Clause 18 provides for acquisition of scrap and runs as follows:

No producer shall acquire or agree to acquire any scrap except under the authority of and in accordance without the conditions contained or incorporated in a written order of the Controller, and no person or authority other than a producer shall acquire or agree to acquire any scrap from a controlled source save under the authority of and in accordance with the conditions contained or incorporated in a written order of the Controller.

Under Clause 19, scrap acquired in accordance with Clause 18 must be used as directed and in accordance with conditions under Clause 22 the Controller is authorised to make a written order requiring any person holding stock of scrap acquired by him otherwise than under Clause 18 to sell the same to such person as may be specified in the Order. Under Clause 23, the Controller is authorised by order to prohibit removal of scrap from controlled source, scrap merchant or other person. Under Clause 27, the Controller is authorised to specify buyers'' and sellers'' prices for sale of scrap.

12. Mr. Ranganekar''s submission appears to be that since there is power vested in the Controller to direct sale of scrap and to fix buyers'' and sellers'' prices under Clauses 22 and 27 of the Iron and Steel (Control) Order, the directions as contained in Condition No.1 are legal. According to him, these directions could be incorporated in an export licence.

13. In the first instance, it is necessary to point out that whilst providing for control of disposal of iron and steel of prime quality in Clause 5 "export and agreement to export" the same is mentioned. In the similar provisions made in Clause 20 relating to control of disposal of scrap "export and agreement to export" the same is not mentioned at all. Again, it is clear that the power to direct sale as enacted by Clause 22 can only be exercised in respect of a party holding stock of scrap and is not power to direct (sale against) any one who is in fact not holding stock of scrap. There is no doubt, that on the facts of this case it is not even alleged in the affidavit in reply that the Petitioners were holding stock of scrap. The Petitioners are merely merchants. The intention of the direction in Condition No.1 was that they must buy melting scrap from the market and comply with the direction for delivery as contained in Condition No.1. Under Clause 22, there is no jurisdiction to give such a direction against a person who is in fact not holding stock of scrap. Apart from the above, it appears to me that the powers vested in the executive authority under the Iron and Steel (control) Order and for the purposes and objects of that Order cannot be resorted to whilst exercising the powers for export control under the Imports and Exports (control) Act and the Exports (control) Order. The purposes and objects of each of these enactments are different and the powers vested in the executive authority under these different legislative enactments must be used for the purposes and objects of each of the enactments and in the manner prescribed by each of the enactments. It is impossible for me to hold that under the Iron and Steel (control) Order there is any provision at all for controlling export of scrap. In my view, it is also impossible to hold that powers vested in the executive authority for the purposes of and objects of the Iron and Steel (Control) Order can be relied upon for imposing conditions in an export licence. Having regard to the above discussion, in my view, it is clear that the mandatory direction as contained in Condition No. 1 of the licence was extraneous and foreign to the purposes of the Imports and Exports (Control) Order and without any jurisdiction at all. That condition must be held to be illegal for the above reasons. The condition was, in other words, contrary to the provision of Clause 5 of the Exports (Control) Order. The condition was not consistent with the Act or the Order.

 