(1990) 03 BOM CK 0095

In the Bombay High Court

Case No : Writ Petition No. 3315 of 1986

Premchand Somchand Shah APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 15-03-1990

Acts Referred:

Citation : (1991) 52 ELT 231

Hon'ble Judges : V.S. Kotwal, J

Bench : Single Bench

Advocate : Mr. G.R. Vahanvati, Mr. Vikram Nankani and Ms. Fardana Madan, instructed by M/s. Wadia Chandy and Co, for the Appellant; Mr. Martand A. Shringarpure, instructed by Mr. K. C. Sidhwa, for the Respondent

Judgement

V.S. Kotwal, J.—If at all there was any field of controversy, it has been reduced drastically on account of admitted position that all the questions involved in this proceeding are practically decided by various pronouncements of this Court as also of the Supreme Court and really speaking nothing much survives in this petition. Net result is that the petition would obviously succeed. Since most of the points are already decided by various ratios of this court in identical matter, it would be an unnecessary exercise to re-consider and re-state all those facts again so that the controversy can be put in concise form and which is more so since only a short point is reflected through an order which has been impugned in this case. Consequently, therefore, a detailed discussion on the factual structure may not be necessary, though only a few landmarks can be stated.

2. The petitioners herein are a partnership firm registered under the Indian Partnership Act and having their field of operation in this metropolis. They are engaged in the business of importing un-cut and un-set diamonds, having the same processed and then exporting out the polished diamonds. In pursuance to the import policy for the period between April, 1982 and March, 1983 in tune with para 185 thereof, the petitioners applied and were granted an Imprest Licence for CIF value of Rs. 1,33,26,900/- for the import of un-cut and un-set

diamonds against which the petitioners were obliged and had undertaken to make export of cut and polished diamonds for the value of Rs. 2,05,02,922/-. The export obligation in the Imprest Licence was calculated at 65% of the average value added on 1,33,26,900/-. There are various types of licences such as replenishment licence, Advance Licence and Imprest Licence. Such an Imprest Licence is issued when import is allowed outside the Duty Exemption Scheme. Under the relevant policy applicable to the Export House they have been given facility from time to time of importing Open General Item (OGL) against the Replenishment Licence. In respect of Imprest Licence for Export House a special provision has been enacted in Para 185(4) of the said policy under which facility for import of OGL items available in sub-para 3 of that para may be allowed on merits to Export House against their Imprest Licence on account of which they are rendered in eligible to obtain REP licence. In such case however the value upto which OGL import may be allowed will not exceed the value to which Export House would have been eligible to the REP licence, had he not obtained the Imprest Licence. Such facility would be available to the Export House after he has discharged the export obligation imposed on the Imprest Licence. Therefore, if by the time Export House becomes eligible to this facility, the Imprest licence has expired, or, if the original validity un-used by that time, is less than six months, then licensing authority will revalidate the licence simultaneously so as to give to the licence holder a time of six months for the purpose of importing OGL items under this facility. Sub-para (5) deals with the necessity of getting the Imprest Licence endorsed by licensing authority in order to get this facility and will be treated as non-transferable.

3. Continuing the thread of narration, pursuant to the Imprest Licence, having been granted to the petitioners, they imported un-cut and un-set diamonds for the total CIF value of Rs. 1,33,26,900/- whereafter they got the said diamonds manufactured and subsequently exported cut and polished diamonds for aggregate valued of Rs. 1,75,02,920.18. Since in respect of the polished diamonds so exported average value worked out at more than 65% and, therefore, the petitioners were required to export cut and polished diamonds for the aggregate value of Rs. 1,75.02,920.18 instead of Rs. 2,05,02,922/-. It thus appears that the petitioners could not fulfil or discharge their export obligations within stipulated time but had asked for extension from time to time which was ultimately extended upto 16-5-1984 and by which time admittedly they fulfilled their export obligation. Thereafter they applied for redemption certificate which however came to be granted merely two years thereafter and admittedly such redemption certificate was un-conditional. This followed further action on the part of the petitioners who then forwarded the Imprest Licence, Redemption certificate and other required documents to the authority with a request to re-validate the said Imprest Licence and endorse the same for OGL endorsement in terms of Para 185(4) of 1982-83 Policy.

4. This request was turned down by Assistant Chief Controller of Exports & Imports on 23-12-1986 mainly on the ground that there had been delay on the

part of the petitioners in fulfilling their export obligation. It is on account of its rejection of the prayer refusing revalidation as also refusing to endorse Imprest licence which has obliged the petitioners to move this Court under Article 226 of the Constitution registering the protests and challenge against that order.

5. Shri Vahanvatti learned counsel for the petitioners mainly contended that this issue has been practically concluded by various judgments of this Court which have also been endorsed and confirmed by the Supreme Court and as such it is not open for the department of refuse the certificates as also to refuse to endorse the licence. He submitted that only ground of delay that is reflected in the impugned order is really not in existence because in fact there has been no delay as such. He further submitted that once extension was granted by the department from time to time, it would be presumed that the Department was satisfied with the justification and necessity for extension and once such extension is granted then normally the further consequential benefits must follow or otherwise granting of such extension would be a futile exercise. He submitted that the conduct of the petitioners is above board all throughout. He ultimately contended that if at all any apprehension is entertained by the department, it would obviously be met and satisfied on the touch-stone of the ratio of the Supreme Court so as to exclude any possibility of the petitioners taking any undue advantage of such an extended time. Shri Shringarpure learned counsel for the department while countering these contentions and supporting the impugned order mainly submitted that there is enormous delay on the part of the petitioners; first to discharge the export obligation and secondly to apply to the authority thereafter for certificate and endorsement. He further submitted that even assuming that extension was justified still grant of extension at the most may justify further any grant of the revalidating certificate. But this does not ipso facto mean that the endorsement on the Imprest Licence for OGL item must follow as a course and according to him lethargic or defaulting party cannot be allowed to be encouraged so as to cause un-healthy competition with the traders in the field. He also expressed an apprehension that if such endorsement is being created at such a belated stage, then the petitioners may benefit unjustifiably by getting the advantage of importing such OGL items which now are banned under the current policy but were available in 1982-83 policy.

6. A few events would be sufficient to highlight the thrust of the controversy and formulate justification for the submissions canvassed on behalf of the petitioners by Shri Vahanvatti. The import-export policy from 1982-83 was announced in April, 1982. The Imprest licence was issued to the petitioners on 4-3-1983. The petitioners carried the first import on 22-3-83. They applied for extension of export obligation duly on 31-10-83 which was granted to them upto 16-3-84 by respondents'' letter dated 29-11-83. The petitioners could not perform or fulfil their obligation even within this extended period and, therefore, they asked for further extension upto 31-9-84. It is now admitted position which is not disputed by the department that the petitioners had discharged export obligation by 9-5-84. It so happened that even though the extension was asked for beyond the

period of 16-3-82 atleast till 9-5-84 when obligation was completely discharged, still it is only on 7-7-86 that the department extended the said period upto 9-5-84. On this ground also there is no dispute. It may be highlighted at this juncture itself that it is not as if there is any delay on the part of the petitioners to ask for extension atleast after 16-3-84 since they fulfilled the obligation by 9-5-84 and yet it is rather surprising that the department granted the said extension by their letter which was communicated nearly two years after it. The consequence has some impact on the controversy because unless and until the extension is granted and thereby the discharge of export obligation has been extended, petitioners could do nothing further and that would be a point in their favour when the question of delay would be considered. It is now further accepted position that events swiftly moved after July 1986 inasmuch as redemption certificate was issued to the petitioners on August 20, 1986. Hardly within eight days thereafter i.e. on 28-8-1986 that the petitioners applied to the authority for re-validation and endorsement of the Imprest licence under Para 185(4) of the said import policy. It is on 10-11-1986 that the petitioners through their solicitors sent a reminder to the authorities for granting revalidation certificate and endorsing the Imprest licence. Since nothing was heard for quite some time, petitioners filed this petition on 4-12-86 in order to meet leveling any delay charge of/or atleast get it condoned and thereby ward off any charge of lethargy. It is on 23-12-1986 that impugned order was passed by the authority which was obviously after filing of the petition on account of which amendment became necessary and under the amendment, the said impugned order was put under challenge. This completes the catalogue of events alongwith the dates which speak for themselves.

7. As regards the impugned order, it becomes manifest that the authorities had rejected the petitioners'' claim for revalidation and for endorsement on the Imprest Licence exclusively and solely on the ground of delay. It is observed in the order that extension was granted upto 16-3-1984. However, the petitioners failed to fulfil the export obligation even during this extended period and finally discharged the obligation by completing the export on 9-5-1984. The authority in that very letter indicated that exercising powers vested under the Act, the competent authority granted the extensions from time to time and ultimately last extension was granted in July 1986. The order expressed that redemption certificate was also granted on 20-8-1986. On the basis of these facts, the authorities concluded that there has been delay in fulfilling the export obligation within initial valid period and even within extended period of first extension. The letter, however, itself mentions that the petitioners were given extensions at their owns request to complete the export obligation. It is only on this basis that ultimately it was concluded that request for re-validation and OGL endorsement under Para 184(4) of the policy cannot be considered, and, therefore, it was rejected.

8. Shri Shringarpure, learned counsel no doubt endeavoured to submit that there is a purpose casting the obligation on Export House and party as situated like the

petitioners to fulfil the export obligation within the prescribed period as stipulated under the relevant para of that policy itself and grant of extension is merely by way of grace. However, according to him, such a grant of extension does not by itself condone the lapse but at the most it may entitle the petitioners to get Redemption Certificate. However, endorsement on the Imprest Licence has nothing to do with such grant of extension. This was initially based on the apprehension that if such endorsement is granted, nearly two years after fulfillment of export obligation then it would create un-healthy competition among the traders whereby the bona fide traders would be affected and learned counsel apprehends in that behalf that this would be mainly because the petitioners may be getting benefit of the policy that was prevalent in 1982-83 regarding OGL items which were not banned in that year though in the current year policy some of these items may have been banned. For obvious reasons even an obstansible apprehension that could be generated in the mind of the department must be wiped out on account of specific dictum of Supreme Court in M/s. D. Navinchandra & Co., Bombay and another etc. v. Union of India and others AIR 1987 SC 1974 where in it was observed as :

"After taking recourse to various decisions in that behalf and examining all the considerations, it was opined and concluded that even though the endorsement is to be made specifically still it would cover within its fold not only the policy that was prevalent at the time when licence was granted and export obligation was discharged but also it has got to be in tune and in consonance with the current policy when endorsement was made."

It is thus specifically observed that items had to pass two tests, firstly they should have been importable under import policy of 1978-79 and secondly they should also have been importable under the Import Policy of 1985-88 in terms of the order dated 18th April, 1985, and if one may add in such terms, in accordance with the import rules whether canalised or not canalised. In that case policy pertained to the year 1978-79 while endorsement was made in the year 1985. These are to be substituted on the facts of the instant case by years 1982-83 for the policy and endorsement that was sought to be made in 1986 which may be made in the current year. Nonetheless the Supreme Court ultimately set at rest the entired controversy in that field concluding that item which could be importable under OGL policy after the endorsement on the Imprest Licence must undergo the twin test. In other words, even if the endorsement is made at late stage, still the Export house would be entitled to import under OGL policy after endorsement only those items which were not only permissible items under the policy when the licence was granted but also those items which are permissible at the time of endorsement meaning thereby as counter-part that items which are banned in the current policy would also be treated as having been banned in so far as import of OGL items under Imprest Licence is concerned. This would, therefore, be expressly equated to mean that the petitioners even if they get the endorsement now or had obtained the endorsement in 1986 they would not have been permitted to import such OGL items which could have been banned at the time of endorsement but permissible in 1982-83 policy. The said twin test, therefore, completely wipes out the alleged apprehension entertained by the department about the undue advantage that would be bestowed on the petitioners.

9. All these features are squarely covered by catena of decisions of this Court as also Supreme Court and which have been rightly relied upon by Shri Vahanvatti, learned counsel. Thus for instance in M/s. R. Ripalkumar & Co. v. Union of India, writ petition No. 2477 of 1984 dealt with the same aspect though there were some additional features as reflected in the order impugned apart from the delay which items are not available in the instant case because the impugned order is restricted only to the ground of delay. The order directing the endorsement on Imprest Licence was recorded in that writ petition and that came to be affirmed by Division Bench of this Court in appeal No. 1158 of 1985 to which I am a party. That decision came to be endorsed by the Supreme Court. In yet another matter of similar nature in writ petition No. 1465 of 1984, the learned single Judges took more or less similar view in all respects and that decision came to be affirmed by the Division Bench in appeal No. 232 of 1985 which one again came to be affirmed by Supreme Court in Special Leave Petition. Significantly the Division Bench has also taken a note of the very argument that is being canvassed by Shri Shringarpure about unjustified benefit that would be bestowed on the petitioners if endorsement is allowed at belated stage but in any way the controversy is now set at rest on account of the decision of the Supreme Court cited supra.

10. To complete the circuit and judgment one aspect cannot be lightly overlooked. Though all along it has been canvassed on behalf of the department that there has been unjustified delay on the part of the petitioners factually that does not appear to be so and, therefore, factual foundation for the argument that is being canvassed on behalf of the department is really non-existent. This would be manifest even by cursory reference to various events and dates which have already been referred. It is no doubt true that extension was asked for atleast on two occasions. One of the extensions was granted upto 16-3-1984 and it is equally true that by that time, the entire obligation for the exported was not fulfilled and there still remained some items. All those were completely fulfilled on 9-5-1984. What is of significance is that immediately they had asked for extension before the time was running out i.e. before May 1984 and yet no reply was given by the department till July 1986 and it is only at that time i.e. nearly more than two years that the department was pleased to grant extension upto 9-5-1984 accepting that export obligation was discharged fully on that day. Shri Vahanvatti, learned counsel can not be said unjustified when he submits that it can be presumed by reason of this extension that the department had applied its mind and was satisfied that there was enough justification for the petitioners to ask for extension and that is precisely why the extension was granted. Shri Shringarpure endeavoured to submit though faintly and without much success that undertaking was given by the petitioners and department would have been

justified in implementing that undertaking. However that really bags the issue inasmuch as once having granted the extension it would be difficult for the department to turn round, go backward and destroy the consequential result of that extension or otherwise it was within the powers of the department to reject such an extension. Any way full discharge of the obligation was complete by 9-5-1984 though it was required to be completed by 16-3-1984 under the extended period. The lapse of these two months can be utilised as point of blame at the doors of the petitioners because they informed the department immediately requesting for extension for further period, which was granted two years after such an application. However, further part is also relevant inasmuch as the redemption certificate was issued on 20-8-1986 and within eight days thereafter the petitioners applied for re-validation and endorsement. Obviously, therefore, if the period of July 1986 has some relevance in the context of this controversy then applying hardly within 1 1/4 months cannot be treated as delay. For obvious reasons the said period of two years cannot be utilised against the petitioners. The petitioners were anxious to get reply and move the authority in November, 1986 by way of reminder and yet silence was observed in that behalf by the department and significantly without waiting any further time the petitioners knocked the doors of this Court by filing the petition on 4-12-1986 though ultimately rejection was made by the department. In the set up of these features and events I cannot persuade myself to accept the submissions of Shri Shringarpure that in fact there has been delay on the part of the petitioners. Shri Shringarpure, learned counsel no doubt sought to place reliance on the ratio in Rup Diamonds and Others Vs. Union of India and Others, , in support of his proposition that a mere unexplained delay on the part of the petitioners would justify the Court to oust the petitioners without granting any relief. However, facts of the said case are entirely different and there has been delay of nearly four years and 7 months and there was obviously no justification in the said delay in the said case. This fact can hardly furnish any analogy because on the factual structure there does not appear to be any delay and if at all it was there it was almost marginal and in any event in contrast to 4 years and 7 months it was nothing. This ratio also therefore cannot be of any avail to the respondents.

11. Shri Shringarpure, learned counsel for the department ultimately requested that if any direction is to be issued in endorsing the Imprest Licence then it should be clarified that the petitioners would be entitled to import such OGL items only those which were not banned or permissible not only those in 1982-83 policy but also under current policy. The request is reasonable though really speaking no such directions are necessary in view of specific dictum of the Supreme Court cited supra. The petitioners have no objection in that behalf.

12. Under the circumstances the petitioners must succeed.

13. The respondent-competent authority is directed to revalidate the Imprest Licence in favour of the petitioners for a period of six months from the date of revalidation. Further the said authority is also directed to endorse the said

licence for import of items as permissible for import under OGL policy of 1982-83 and OGL items of Appendix I Part B and Appendix VI list 8 part I and II of 1989-91 import policy i.e. current policy.

14. Rule made accordingly absolute in these terms. There would, however, be no order as to costs.

