
(1969) 02 BOM CK 0018

In the Bombay High Court

Case No : O.C.J. Miscellaneous Petition No. 1 of 1968

Raymond Woollen Mills Ltd.

APPELLANT

Vs

The Joint Chief Controller of Imports

RESPONDENT

Date of Decision : 28-02-1969

Acts Referred:

Constitution of India, 1950 — Article 13, 226

Citation : (1974) 76 BOMLR 26

Hon'ble Judges : Nathwani, J

Bench : Single Bench

Judgement

Nathwani, J.—[His Lordship after dealing with points not material to this report, proceeded.] Against the background of woollen industry and the relevant rules which governed the grant of actual users' licences before the impugned new policy came into force in November 1967, I may now deal with the various contentions raised on behalf of the petitioners. Their first contention is that they are entitled to a licence for import of raw materials under the Import and Export (Control) Act and the Import (Control) Order, 1955, read together with the rules of the Import Trade Policy for the financial year 1967-68 contained in the Red Book and the Hand Book for the said year. It is urged by the petitioners that the provisions contained in the Red Book and the Hand Book are law or have the force of law, and that as actual users of raw wool/wool tops the right to import licences accrued to them upon the publication of the said import trade policy in the Gazette of India (Extraordinary) dated May 1, 1967 and as the impugned policy of canalisation and distribution is not valid, refusal of respondent No. 3 as licensing authority to grant actual users' licence to them is wrong. They contend that whereas the said public notice dated November 25, 1967, exh. E to the petition, was duly gazetted the rules for distribution of imported raw material contained in the said letter dated November 22, 1967, exh. H to the petition, were not notified in the Gazette of India as required by Section 3 of the Import and Export (Control) Act, and therefore the canalisation of imports simpliciter and the impugned policy of distribution are not valid. Respondents Nos. 1 to 4,

No. 5 and Nos. 7 and 8 deny petitioners" above contentions and submit that the provisions of Red Book and the Hand Book are not law nor have they the force of law.

2. The first question, therefore, is whether the provisions of the Red Book and the rules and regulations in the Hand Book for the year 1967-68 are law or have the force of law. In support of this contention Mr. Parpia relied upon two unreported decisions of this Court, first by the Division Bench in Bhojraj D. Gurnani v. N. Swami (1961) Miscellaneous Application No. 76 of 1960, decided by V.S. Desai and Abhyankar JJ., on April 18, 1961 (Unrep.) and the other in Lalchand Daulatram Mehra v. N. Swami. (1964) Miscellaneous Petition No. 340 of 1960, decided by Mody J., on December 16/17, 1964 (Unrep.). On the other hand, respondents Nos. 1 to 4, 5, and 7 and 8 in support of their contention relied upon the following decisions of the Supreme Court, viz., East India Commercial Co. Ltd., Calcutta and Another Vs. The Collector of Customs, Calcutta, , Ramchand Jagadish Chand Vs. Union of India (UOI) and Others, , Joint Chief Controller of Imports and Exports, Madras Vs. Aminchand Mutha Etc., , and Union of India v. Angle Afghan Agencies. A.I.R.[1968] S.C. 718 Further, in course of reply Mr. Porus Mehta, learned Counsel on behalf of the petitioners, also urged that Mr. Justice Mody had considered in Lalchand Daulatram"s case the effect of the Supreme Court case in East India Commercial Co. on the said Division Bench case and the learned Judge took the view that the decision in the said Supreme Court case, namely, that the public notice published in the Gazette of India dated July 29, 1948, containing principles governing issue of Import licences for the period July-December 1948 had no statutory force, could not. be read to mean that the Supreme Court had held that the said notice Was not law or had not the force of law, and, therefore, the said decision had not rendered the Division Bench case as not good law. He, therefore, submitted that East India, Commercial Co."s case had not even impliedly overruled the said Division Bench case and that even if I were of the opinion that the said Supreme Court case was plainly inconsistent with and had impliedly overruled the Division Bench case of the Court, still I was bound by the view Mr. Justice Mody had taken of East India Commercial Co."s case in Lalchand Daulatram"s case. Messers Advani, Buch and Zaiwalla on behalf of the contesting respondents, however, submitted that in any event the Division Bench case of Bhojraj Dhanrajmal was inconsistent with the later decisions of the Supreme Court in Aminchand Mutha"s case and Afghan Agencies" case and I was not bound to follow the said Division Bench case or Lalchand Daulatram"s case.

3. It is, therefore, necessary to examine the above cases in order of date and see whether the ratio of the Division Bench case is over-ruled by any of the said Supreme Court cases. Now, in the Division Bench case, the petitioner had filed an application under Article 226 of the Constitution for a writ of mandamus or any appropriate order requiring the Jt. Chief Controller of Imports and Exports, Bombay to grant petitioner"s four applications for Import Licence. The petitioners who carried on business as importers and exporters had, from time to time,

during the licensing period from April to September 1959 exported art silk goods of the total value of Rs. 1,21,236 under the Export Promotion Scheme declared in the public notice announcing the import trade policy for the said licensing period. After the end of the licensing period the petitioners had from time to time obtained payment in respect of the said exports and had thereafter during the next six months applied for licences for importing art silk fabrics on the basis of the said exports. Those applications were refused by the Jt. Chief Controller of Imports and Exports on the ground that in the import policy for the next six months, i. e. October 1959 to March 1960, the item of art silk fabrics was omitted from the list of importable items. The petitioner, therefore, filed Petition No. 76 of 1960 in this Court for the above relief. It was contended on behalf of the petitioners that the public notice was issued in exercise of the powers vested in the Government under the Import and Export (Control) Act, 1947, and Import (Control) Order, 1955 and therefore the public notice had the force of law or at any rate was law within the meaning of Article 13 of the Constitution and that the Licensing authorities were bound to act in conformity with the conditions and regulations laid down in the said public notice and the refusal of licence to which the petitioner was entitled deprived him of his valuable right to property and also put unreasonable restriction on the petitioner to carry on his business. On the other hand, it was contended on behalf of the respondents that the said import trade policy was framed not in exercise of any powers or authority conferred upon the Government under the Imports and Exports (Control) Act, or Import (Control) Order, but was framed in exercise of the executive powers of the Government for the guidance of the licensing authorities for regulating the grant of import licenses, and it did not confer a legal right on any person to obtain an import licence or oblige the authorities to grant licence to him and as such the trade notices, public notice, directions, conditions and regulations laid down was not law nor had they the force of law. In the context of these rival contentions Mr. Justice V.S. Desai who delivered the judgment of the Court held as follows:

...In our opinion, therefore, there can be no doubt whatsoever that the Hand Book of Rules and Procedure 1956 as also the Policy Book which is issued by the Central Government from time to time, contains rules, procedure, conditions and regulations which are referable to the powers of the Government under the Import and Export Act and the Import Control Order, 1955 or at any rate must be deemed to be referable to the said Act and the said Order. They, therefore, have the force of law or at any rate are laws within the meaning of Article 13 of the Constitution.

4. Article 13(3) defines "law" as including ordinance, order, bye-law, rule, regulation, notification, custom or usage having the force of law. This definition of law is wider than the ordinary construction of law, i.e. enacted law or legislation, and includes subordinate legislation made in exercise of powers conferred by statute. Now, it is apparent from the passage quoted above that the Division Bench, took the view that the rules, procedures, conditions and

regulations in. the Hand Book and the Red Book were referable to the powers conferred on the Central Government by the Imports and Exports (Control) Act, 1947 and the Import (Control) Order, 1955, and as such were laws within the meaning of Article 13 and on this basis the Court granted relief to the petitioners.

5. After the said Division Bench case the Supreme Court decided East India Commercial Co.'s case. In that case the appellant company had applied for licence to import fluorescent tubes and fixtures from abroad. It was mentioned in the application that the goods were required by the Company for use as industrial raw material or accessories. The licence was issued to the Company subject to the condition that the goods were to be utilised only for consumption as raw material or accessories in the licence holder's factory and that no portion thereof was to be sold to any party. On arrival of the goods the Company took delivery and paid customs duty. On information received by the Chief Controller of Imports that the Company was selling the goods to various parties, the matter was investigated and the goods were seized under a search warrant and, ultimately, pending the trial of a criminal case in the Court of the Presidency Magistrate they were with the consent of the parties sold under an order of the Court, and the sale proceeds, i.e. Rs. 4,15,000, were deposited in the Court of the Presidency Magistrate. A criminal prosecution was launched against the Company and its director for disposing of imported goods in violation of the conditions of licence. The said case resulted into acquittal and the Company took proceedings for return of Rs. 4,15,000. While the said proceedings were pending, the Collector of Customs started proceedings u/s 167(8) of the Sea Customs Act, 1878, read with Section 3(2) of the Imports and Exports (Control) Act, and called upon the Company by a notice to show cause why the said sum of Rs. 4,15,000 should not be confiscated and also why penal action should not be taken against it. Thereafter the Company moved the Calcutta High Court under Article 226 of the Constitution for issue of an appropriate writ prohibiting the Collector of Customs from taking any proceedings pursuant to the said notice to show cause. The application was dismissed by Mr. Justice Sinha and the appeal of the Company to the Appellate Bench of the High Court also failed. The Company, therefore, went in appeal to the Supreme Court by special leave. The Supreme Court first considered whether the petition filed by the Company was maintainable in the circumstances of the case. Subba Rao J. (as his Lordship then was) delivering the judgment of the majority of the Court held that Section 167(8) of the Sea Customs Act would be attracted, only if there was a contravention of the order issued u/s 3 of the Imports and Exports (Control) Act. His Lordship then considered whether there was any order issued u/s 3 of the said Act which imposed a condition on the licensee not to sell imported goods to a third party. The Collector of Customs had relied upon a Public Notice dated July 16, 1948, published in the Gazette of India on July 29, 1948 as amounting to an order made in exercise of the powers conferred on the Central Government u/s 3 of the said Act. The said Public Notice contained rules governing the issue of import licences for specified goods for the licensing period July-December 1948.

After considering the contents and form of the said public notice, Subba Rao J. held it was not an order issued u/s 3 of the Imports and Exports (Control) Act and observed (p. 1907) :

...orders made u/s 3 of the Act have statutory force, whereas public notices are policy statements administratively made by the Government for public information.

and allowed the company's appeal and by an order prohibited the customs authorities from proceeding with the enquiry under the said Section 167(8).

6. After East India Commercial Co.'s case the petition in Lalchand Daulatram's case came up for hearing- before Mody J. In this case the petitioners had exported goods under the Export Promotion Scheme, but were refused licence in respect of a part of value of goods so exported by them. In the petition they prayed for a writ or order under Article 226 for granting them an import licence of the said value. This petition was similar to the petition No. 76 of 1960 before the Division Bench in Bhojraj Dhanrajmal's case except that the Red Book in Lalchand Daultaram's case was for a subsequent licensing period i.e. October 1, 1958 to March 31, 1959. Before Mody J. it was contended on behalf of the respondents that the Red Book policy was not law or had not the force of law and that in view of the intervening decision of the Supreme Court in East India Commercial Co.'s case the decision of the Division Bench was not good law. In this context Mody J. cited the passage reproduced above from the judgment in the Division Bench case and considered himself bound by the said decision. Referring to the judgment in East India Commercial Co.'s case the learned Judge observed as follows:

That judgment cannot be read to mean that the Supreme Court has held that the public notice was not law or did not have the force of law. It cannot therefore be read as rendering the said Division Bench judgment in Petition No. 76 of 1960 that the policy statements contained in the Red Book are law or have the force of law not good law. The Supreme Court had occasion to consider the Import Policy contained in the Red Book and particularly the Export Promotion Scheme in two other cases, viz. Ramchand Jagdish Chand v. Union of India and Santram Lashkarimal v. The Joint Chief Controller of Imports and Exports, Bombay. Writ Petition No. 63 of 1962 (Supreme Court-Unrep). In the unreported judgment in its said second case (Santram's case) the Supreme Court has observed:--

First the constitutional validity of the export promotion Scheme and the powers vested in the authorities for determining the quota of export licences to be granted thereunder is no longer open to question, since the same has been upheld by this Court in Ramchand Jagdish Chand v. Union of India.

These two judgments and the reference to "the powers vested in the authorities for determining the quota of export licences" clearly shows that these two judgments of the Supreme Court deal with the Import Policy as contained in the Red Book as being law or having the force of law. Of course, it may not have

statutory force; but yet it may be law or have the force of law.

7. From the above passage it is evident that Mr. Justice Mody took the view that in East India Commercial Co. 's case the Supreme Court did not decide that the public notice was not law or did not have the force of law. With this view, with utmost respect, I am unable to agree. As already seen, in East India Commercial Co.'s case the Supreme Court held that the relevant public notice setting forth the principles governing the issue of import licences had no statutory force and further observed that public notices were policy statements administratively made by the Government for public information. If the said public notice had no statutory force as not being issued u/s 3 of the Import and Export (Control) Act, it is difficult to see how otherwise it could amount to law or have the force of law. In my judgment as the rules in the Red Book in Lalchand's case were not issued u/s 3 of the Imports and Exports Act or the said Order, 1955, the ratio in East India Commercial Co.'s case was applicable to the said Red Book. Further, the opinion expressed by Mody J. that in two cases of Ramchand Jagdish and Santram Lashkarimal the Supreme Court had dealt with the import policy as contained in the Red Book as being law or having the force of law is inconsistent with the opinion expressed by the Supreme Court in the subsequent case of Anglo Afghan Agencies, namely, that in the three cases before the Supreme Court inclusive of Ramchand Jagdish's case it had assumed that import policy was executive in character. It may also be noticed that Mr. Justice Shah, who delivered the judgment of the Court in Anglo Afghan's case, was a party to the decisions in two out of the said three cases, i.e. Ramchand Jagdish Chand's and Amichand Mutha's cases. It will, therefore, be seen that in Ramchand Jagdish's case the Supreme Court did not deal with the import policy in the Red Book as being law or having the force of law. Again, as explained hereafter the view that the provisions in the Red Book are law or have the force of law is inconsistent with the observations of the Supreme Court in Anglo Afghan Agencies' case. Therefore, with respect, the view expressed by Mody J. as to the effect of the Supreme Court case in East India Commercial Co. on the Division Bench case is not binding upon me.

8. In Anglo Afghan Agencies' case the facts were as follows. The Textile Commissioner published on October 30, 1962, an Export Promotion Scheme providing incentive to wool exports. On January 1, 1963, the Scheme was extended to export of woollen goods to Afghanistan. The scheme provided that the exporters would be entitled to import raw materials of the total amount equal to 100 per cent, of F.O.B. value of the exports. The petitioners exported to Afghanistan woollen goods of the total value of Rs. 5,03,471. The office of the Deputy Director, however, issued to the petitioners import entitlement certificate for Rs. 1,99,459 only. The petitioners, therefore, filed a petition in the High Court of Punjab for a writ or order directing the Union of India, the Textile Commissioner and the Joint Chief Controller of Imports and Exports, Bombay, to issue a licence permitting them import of wool-tops, raw wool etc. of the remaining value of Rs. 3,04,012.73 paise. The High Court allowed the petition

and set aside the order of the Textile Commissioner and the Central Government. Against that order the Union of India, the Textile Commissioner and the Joint Chief Controller of Imports and Exports appealed to the Supreme Court. Before the Supreme Court it was submitted on behalf of the petitioners-respondents that the Export Promotion Scheme published by the Government under para. 52 of the Government Notification dated December 29, 1954, must be deemed to be issued u/s 3 of the Imports and Exports (Control) Act since the schemes had been published in the Gazette of India and contained general provisions relating to the grant of licences and imposed restrictions upon the rights of citizens to carry on business in certain commodities, and that as such they were legislative in character and the obligations imposed or the sanctions prescribed thereby must on that account be deemed to be enforceable by command of the Court.

9. Before dealing with these contentions in his judgment, Mr. Justice Shah observed as follows (p. 723) :

The orders which the Central Government may issue in exercise of the power conferred by Section 3 of the Imports and Exports Control Act may be executive or legislative.

His Lordship then referred to the aforesaid contentions of the respondents and proceeded to deal with them as under (p. 723) :

It cannot be assumed merely because the Imports Trade Policy is general in terms and deals with the grant of licences for import of goods and related matters, it is statutory in character. The Imports and Exports (Control) Act, 1947, authorises the Central Government to make provisions prohibiting, restricting or otherwise controlling import, export, carriage, etc. of the goods and by the Imports (Control) Order, 1955, dated December 7, 1955, and by the provisions which were sought to be repealed restrictions already imposed. The order was clearly legislative in character. The Import Trade Policy was evolved to facilitate the mechanism of the Act and the orders issued thereunder. Even granting that the Import Trade Policy notifications were issued in exercise of the power u/s 3 of the Imports and Exports (Control) Act, 1947, the order as already observed authorised the making of executive or administrative instructions as well as legislative directions. It is not the form of the order, the method of its publication or the source of its authority, but its substance, which determines its true character. A large majority of the paragraphs in the Import and Export Schemes are in the form of instructions to departmental officers and advice to persons engaged in the export and import business with, their foreign counterparts. It may be possible to pick out paragraphs from the Scheme which appear in isolation to be addressed generally and have direct impact upon the rights and liberties of the citizens. But a large number of paragraphs of the Scheme refer to matters of procedure of departmental officers and heterogeneous material: it sets out forms of applications, the designations of licensing authorities, amounts of application and licensing fees, last dates for applications, intermixed with definitions of "Established Importers", "Actual

users", "New comers" and others and details of different schemes such as Quota Registration Schemes, Export Promotion Schemes etc. There is no pattern of order or logical sequence in the policy statement: it is a jumble of executive instructions and matters which, impose several restrictions upon the right of citizens. Some of the provisions which impose restrictions upon citizens in the exercise of their right to carry on trade without statutory limits may be open to serious objections, but we do not find it necessary to embark upon an enquiry whether the provision which authorises the issue of import entitlement certificate for the full f. o. b. value of the goods exported is legislative in character. Granting that it is executive in character, this Court has held that the Courts have the power in appropriate cases to compel performance of the obligations imposed by the Schemes upon the departmental authorities.

His Lordship further added (p. 724) :

The question whether the Import Trade Policy is legislative in character has not been expressly dealt with in any decision of this Court. It appears to have been, assumed in certain cases, that it is executive in character, but even so it had been held that when it is declared under an export policy that a citizen exporting goods shall be entitled to certain import facilities, in appropriate cases the Courts have the power to direct the concerned authority to make that facility available to the citizen who has acted to his prejudice acting upon the representation in the policy and has been denied that facility.

In the judgment then there is a discussion of the ratio of three earlier Supreme Court cases, namely, *Ramchand Jagdish Chand v. Union of India*, *Probhudas Morarjee Rajkotia and Others Vs. Union of India (UOI)* and *Others*, , and *Joint Chief Controller of Imports and Exports v. Aminchand Mutha*, and the position is summed up as follows (pp. 725-26) :

In each of the three cases, the Court observed that the Court was competent to grant relief in appropriate cases, if, contrary to the Scheme, the authority declined to grant a licence or import certificate or the authority acted arbitrarily. Therefore even assuming that the provisions relating to the issue of Trade Notice offering inducement to the prospective exporters are in character executive, the Union Government and its officers are, on the authorities of this Court not entitled at their mere whim to ignore the promises made by the Government.

10. His Lordship then proceeded to consider the provisions of the Export Promotion Scheme relying upon which the petitioners, Anglo Afghan Agencies, had exported woollen goods to Afganistan, and expressed the view that even if the said scheme was executive in character, the petitioners who were aggrieved because of the failure on the part of Government to carry out the terms of the said scheme were entitled to seek resort to the Court and claim that the obligation imposed upon the Textile Commissioner by the Scheme be ordered to be carried out and in the result dismissed the appeal filed by the Union of India and others.

11. From the said observations from Anglo Afghan Agencies" case it is clear that (i) even assuming that the Import Trade Policy notifications were issued in exercise of the powers u/s 3 of the Imports and Exports (Control) Act, such notifications may be executive or legislative, (ii) that even though a scheme may have been published in the Gazette of India and contained general provisions relating to the grant of licence it cannot therefore be assumed that the scheme is legislative in character, and (iii) that it is not the form of the order, or the method of its publication, or the source of its authority, but its substance which determines its true character.

12. Now, in Anglo Afghan Agencies" case there is no reference to the earlier case of East India Commercial Co. It will have been noticed that in the said earlier case the petitioners had sought relief against the Collector of Customs, Calcutta, in respect of confiscation of petitioners' moneys and taking other penal steps against them as threatened in the show cause whereas in the said three cases referred to by Mr. Justice Shah, the petitioners had sought to enforce compliance with the obligations laid upon Government under the respective schemes promoted by the Government. It was, therefore, suggested by the learned Counsel on behalf of the petitioners that as in East India Commercial Co.'s case the Court was concerned with penal action the decision in that case was distinguishable on that ground. In my opinion, the distinction thus sought to be made is untenable as the decision in the said case directly turned upon the question whether the relevant public notice was a statutory order u/s 3 of the Import and Export Act as contended by the Government, or was merely information given to the public for their guidance as argued for the petitioners and the penal action threatened against the Company had no bearing whatever on the said question.

13. In my opinion, as indicated earlier, the said observation in Afghan Agencies" case i.e. notifications issued in exercise of powers under the said Section 3 may be executive or legislative is inconsistent with the basis of the decision in Bhojraj Dhanrajmal's case. The decision in the said Division Bench case, as discussed above, is based solely on the ground that the provisions in the Hand Book and the Red Book were or must be deemed to be referable to the powers of the Government under the Imports and Exports (Control) Act and the Import (Control) Order, 1955, and, therefore, were laws or had the force of law; in other words, they constituted subordinate legislation within the meaning of Section 13(3) of the Constitution. However, in view of the said observation in Anglo Afghan Agencies" case, such provisions in a Hand Book or a Red Book cannot be said to be legislative in nature solely on the ground that they are referable to the powers of the Government under the said Act or the Import Control Order. In my view, the said observation, therefore, considerably weakens the ratio of the Division Bench case.

14. Besides relying upon the said Division Bench case and Lalchand Duulatram's case it was also urged by the learned Counsel for the petitioners that in any

event the rules, conditions, etc. of the Import Trade Policy contained in the Red Book and the Hand Book for the year 1967-68 were enforceable by a Court at the instance of a party as held by the Supreme Court in *Afghan Agencies*" case and were, therefore, laws or had the force of law. No doubt in that case the Supreme Court relying- on the rule of law and the equity arising in favour of petitioners after they carried out their part of the export policy announced by the Government confirmed the relief granted to the petitioners by the High Court. But this is quite different from saying that the said export policy or other provisions of the Red Book and the Hand Book had the force of law. In fact the Supreme Court gave relief to the petitioners in that case on assumption that the provisions of the Red Book were executive and not legislative in character.

15. Further, though it is true that in *Anglo Afghan Agencies*" case the Supreme Court did not decide the question whether the provisions in the Red Book were legislative or executive, yet, in my opinion, the trend of the said observations in para. 12 of the judgment appears strongly to favour the view that they are executive in character.

16. Apart from relying upon the Division Bench case of *Bhojraj Dhanrajmal and Lalchand Daulatram*"s case and also contending as aforesaid that the provisions of the Red Book and the Hand Book can be enforced against the Government in certain circumstances, the petitioners have not advanced any further argument or cited any authority to show that the said provisions of reasons already discussed, I hold that the provisions of Import Trade Policy contained in the Red Book and the Hand Book for the year 1967-68 were not laws nor have they the force of law.

17. [The rest of the judgment is not material to this report.]