
(1990) 09 BOM CK 0055

In the Bombay High Court

Case No : Writ Petition No's. 2372 and 2546 of 1983

R.P. Trading and Co.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 20-09-1990

Acts Referred:

Citation : (1991) 52 ELT 178

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

Bench : Single Bench

Advocate : Shri D.H. Mehta, Mr. N.M. Shah, Mr. G.E. Vahanvati, Mr. D.H. Mehta and K.R. Bulchandani, instructed by M/s. Gagrati and Co, for the Appellant; Shri V.G. Rege, for the Respondent

Judgement

1. This judgment will dispose of common questions arising in the two petitions above.

2. The factual position upon which the resolution of the controversy depends is taken from Writ Petition No. 2546 of 1983 and may be summarised thus :-

Petitioners, a firm registered under the Partnership Act, were importers of diverse materials and goods. Several licences were issued by the Licensing Authority in favour of licensees named therein. The kind of licences figuring in the present petitions are what is known as "imprest licences". The Import Policy for April 1981-March 1982 at paragraph 129 deals with advance licences/imprest licences. It had this to say on the subject :-

"(1) An Advance Licence or an Imprest Licence includes a Customs Clearance permit and Release Order, issued before exports are effected.

(2) The term "Advance Licence" refers to cases where the import is allowed under the Duty Exemption Scheme, whereas the term "Imprest Licence" will be used where import is allowed outside the Duty Exemption scheme.

(3) Both Advance and Imprest Licences are intended to supply imported inputs

for export production and will bear a suitable export obligation. The value of such licences will be debited to the REP entitlement, if any, admissible to exports made in fulfilment of such obligation."

Para 183 of the same policy had this to say in respect of Import facilities available to Export Houses. The Export Houses were to be granted facilities of six types referred to in the said paragraph and shortly stated these were :-

- "(i) Import replenishment (REP) licences eligible to them as Registered Exporters;
- (ii) Import replenishment (REP) licences transferred to them by others;
- (iii) Import of items placed on Open General Licence;
- (iv) Additional licences as provided;
- (v) REP licences issued to Export Houses on their own exports to be valid for import of raw materials, components, consumables and spares (excluding items covered by Appendix 5) as were open to Actual Users under Open General Licence, without debit to the value of such REP Licences. . . .
- (vi) Imprest licence to the extent of 100% of the value of REP licences earned against the exports made during the previous year."

Paragraph 185(2) spoke of an endorsement to be made on an import replenishment licence. The export houses wishing to take advantage had to get the licences concerned endorsed by the Licensing Authority in this manner :-

"This licence will also be valid for import of OGL items under para 185 of Import Policy, 1981-82 subject to the conditions laid down and shall be non-transferable."

In the above import policy aluminium alloy-coated steel sheets inclusive of coils and strips were in OGL items. So was the position in the Import Policy April 1982-March 1983. The petitioner being the holder of a letter of authority of an imprest licence which is at Ex. B applied for and obtained an endorsement on the said imprest licence on 18-8-1983, which endorsement reads as follows :-

"This Replenishment Licence will also be valid for import of OGL items under Para 185 of Import Policy 1982-83 subject to the conditions laid down and shall be non-transferable."

The license figuring in the first petition is of the same character bearing the same endorsement. Both the imprest licence were utilised by the petitioners concerned for import of the same article viz. aluminium alloy-coated steel sheets. The arrangements for this were made in the period 1983-84 governed by a different policy. Under that policy, hereinafter referred to as the "1983-84 Policy", aforementioned goods ceased to be an OGL item and became a canalised item. In the 1983-84 policy paragraph 255(3) was worded thus :-

"REP licences and Additional licences held by Export Houses/Trading Houses will

cease to be valid for import of an item which could be imported under Open General Licence during 1982-83 but is no longer so in this Import Export policy."

The goods came in and at that time the respondents raised an objection regarding their importability, pointing out that the goods were a canalised item and could not have been directly imported as had been done by the importers. Petitioners came to Court challenging the obstruction and obtained interim relief whereunder importation was allowed, subject to payment of the prescribed duties, the legality or otherwise thereof being left to the final outcome of the petitions. It was petitioners' contention that the imports being made under imprest licences could not be subject to the Import Policy 1983-84. The restriction relied upon by respondents, resting as it did upon Para 255(3) of the Import Policy 1983-84 could not apply to imports made under imprest licences. The respondents contend the contrary pleading that para 255(3) prevents imports contrary to the policy prevailing at the date of imports irrespective of what the position was in the preceding years or when the endorsement was made. Mr. Rege representing respondents relies upon the Supreme Court's decision in *D. Navinchandra and Co. and Others Vs. Union of India (UOI) and Others*, . The present Chief Justice of India speaking for the Bench referred in *D. Navinchandra's* case to the earlier decisions of the Court and had this to say :-

"It must be emphasised that in the case of *Raj Parkash Chemicals Ltd. and Another Vs. Union of India (UOI) and Others*, this position has been explained by saying 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 of 1978-79, the period during which the diamond exporters had applied for Export House Certificates and had been wrongly refused and were also importable under the import policy prevailing at the time of import which in the present case would be during the Import Policy of 1985-88. These were the items which had not been specifically banned under the prevalent import policy. The items had to pass to two tests, firstly, they should have been imported under the Import Policy 1978-79 and secondly they should also have been importable under the Import Policy 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. It must be emphasised that in this case also, the Court had no occasion to consider the significance of the words "whether canalised or otherwise" mentioned in the Order dated 18th April 1985 because that point did not arise in the case before it. What did the Court then intend by these words used by the Court ? We have seen that diamond exporters could import the items which they were entitled to import under Import Policy 1978-79 provided they were importable also under the Import Policy ruling at the time of Import. These were items which were open to import by Export Houses holding Additional Licences for sale to the Actual Users (Industrial). These are items which were directly imported, for example, items in Part 2, List 8 of Appendix 6 of Import Policy 1985-88. These are items which are not canalised. Canalised items are those items which are ordinarily open to import only through a public

sector agency. Although generally these are importable through public sector agencies, it is permissible for any import policy to provide an exception to the rule and to declare that an importer might import a canalised item directly. It is in that sense and that sense only that the Court could have intended to define the entitlement of diamond exporters. They would be entitled to import items which were canalised or not if the import policy prevailing at the time of import permitted them to import items falling under such category.

It must be emphasised that in the Order dated 18th April, 1985, this Court did not do away with canalisation. That was not the issue before this Court. The expression "whether canalised or not canalised" was to include both. Thus Court did not say that canalised items could be imported directly by the importers ignoring the canalisation process. We are of the opinion that this Court did not say that canalisation could be ignored. That was not the issue. High Public Policy, it must be emphasised, is involved in the scheme of canalisation. This purpose of canalisation was examined by this Court in *Daruka and Co. Vs. The Union of India (UOI) and Others*, If the Government decided an economic policy that import or export should be by a selected channel or through selected agencies the Court would proceed on the assumption that the decision was in the interest of the general public unless the contrary was shown. . . . When this Court observed that the fact whether items were sought to be imported by diamond merchants were canalised, would not be an impediment to the import directly by them, the Court meant to say that this could be imported directly by them through the canalisation organisation."

Mr. Rege submits that these observations apply fully to the licences figuring in the instant cases. Aluminium alloy-coated steel sheets were in the OGL list in the Import Policies for 1981-82 and 1982-83. The endorsements made in the licences of the petitioners will have to be read as subject to the policy prevailing at the date of import. If the import took place in the year 1983-84, the commodity could have been imported only through a canalising agency and not directly. The normal position in regard to the law prevailing has been stated thus by Ajit Kumar Sengupta, J. in *Mangla Brothers Vs. Collector of Customs and Others*,

"A licence issued during a policy period is governed by that Policy as amended upto the date of the licence and any amendment made after the date of issue cannot have any effect on the licence. There may be a time lag between the date of placing of an order and actual importation. Even after an importer has complied with all the necessary formalities for import of the goods under a licence, he may not complete the importations for no fault of his and when goods arrive, the import policy is found to have been amended to prohibit the import of the goods covered by the said licence. In such a case the importer will suffer loss and prejudice if he is not allowed to clear the goods on the basis of the licence. The time-limit can always be prescribed by Import Policy as has been done in para 185(7) of 1982-83 Policy. If within the time prescribed the goods

are imported under a licence covered by import policy of a particular year, the Customs Authorities cannot withhold the release of the goods on the ground that when the goods have arrived at the port, the import policy has been amended making the item in question a canalised item. The Customs Authorities have to ascertain whether the items were allowed to be imported under the import policy governing the licence and whether such goods have been imported within the time prescribed by the import policy."

Though an exposition of the normal practice prevailing the authority stands considerably eroded by the decision of the Supreme Court in D. Navinchandra's case (supra). But D. Navinchandra and the several cases referred to therein including Union of India (UOI) Vs. Godrej Soaps Pvt. Ltd. and Another, Indo Afghan Chambers of Commerce and Another Vs. Union of India (UOI) and Others, and Raj Parkash Chemicals Ltd. and Another Vs. Union of India (UOI) and Others, all related to imports made under Additional Licences. The rule of normal importation as explained by Ajit Kumar Sengupta J. in the Calcutta decision aforementioned applies to all imports except those covered by the exposition in D. Navinchandra's case. The restriction paragraph relied upon by Mr. Rege relates only to REP licence and additional licences. It does not cover the case of imprest licences. Mr. Rege disputes this by pointing to the endorsement which in terms describe the document as being a "replenishment licences". But the replenishment is that accruing through an imprest licence. For that reason when the petition licences use the words "replenishment licences" the same have not to be read literally. They have to be read as "a replenishment licence accruing through an imprest licence". So far as an imprest licence is concerned Mr. Vahanvati and Mr. Mehta for the petitioners rely upon the case of M/s. Hindustan Transmission Pvt. Ltd. decided at an administrative level by the Customs Authorities. Mr. Rege contends that no cognizance can be taken of an administrative order and that they are not binding upon judicial forums. In a general sense learned Counsel is right. But the question here is of an order having persuasive value, and if it has that effect, whether or not passed in a judicial or administrative capacity, it will be taken into consideration. Whether it should be accepted or not, is a different question altogether. Therefore I will now turn to the administrative order relied upon by the petitioners. The importers there had imported the same commodity as that which figures in these two petitions. The licence under which the imports had been made had been revalidated for a period of six months for OGL purposes only. The endorsement in the licence figuring in that case was on the same lines as that made in the licences figuring in the instant petitions. At the lower level the Department Officers were of the view that the importation was illegal having regard to the commodity ceasing to be an OGL item pursuant to its transfer to the list of canalised items. The Collector of Customs considered the matter in great detail, and, with respect to the learned Officer, came to the right conclusion. In the decision recorded by him appear the following words which contain the ratio :-

"I now turn to the transitional arrangement in para 255(3) of the 1983-84 policy.

This sub-para deals only with REP and additional licences. Such licences will cease to be valid for import of only item which could be imported under OGL in 1982-83 but not in 1983-84. This licence is not a REP or Additional Licence. It is an imprest licence which is specifically endorsed for OGL items of a particular policy period. The transitional arrangements do not place any restriction on the import of OGL items permitted on merits in terms of paras 185(4) and (5) of 1982-83 policy. . . . if the above are the only point of objection, there is no force and the licence will have to be read as valid, if otherwise in order."

The matter does not rest at this level. A single Judge of this Court Pendse J. was concerned with a similar case of importation made on the basis of an Imprest licence in Writ Petition No. 1465 of 1984, decided on 18th September 1984. Said the learned Judge -

"Shri. Vahanvati submitted that the licence was issued during the licensing period April-March 1983 and it is expressly provided that the licence will be governed by the conditions imposed at the time of issue thereof. The learned counsel urged that it is entirely irrelevant to take into consideration the subsequent policy and deprive the petitioners of the facility granted in Paragraph 185 of the earlier policy. The submission of the learned counsel is correct and deserves acceptance. The licences were granted to the Petitioners on January 1983 and the new policy was to come into operation within a period of three months. The time required for the import of the goods and the fulfillment of the expert obligation would obviously require the period in excess of three months and therefore, the new policy is bound to be introduced before the obligations are carried out by the petitioners. In my judgment, the reference to the policy for the period AM 85 is totally extraneous and irrelevant for considering the claim of the petitioners.

In the present case the endorsement was made on the last day of prevalence of the Import Policy for 1982-83. Therefore, the observations of the learned single Judge will apply with greater force to the facts of the present petitions.

3. To sum up, the decision in D. Navinchandra's case must be read as restricted to Additional licences and not covering the case of importations made under imprest licences. Therefore the importations made by the petitioners were not illegal and the threatened action of the respondents was unwarranted in law. So declaring, I make the rules absolute to that extent, leaving parties to bear their own costs. Bank guarantees/bonds, if furnished, to be kept alive for a period of eight weeks from today and to stand discharged thereafter.