(1990) 09 BOM CK 0045

In the Bombay High Court

Case No : Writ Petition No. 2546 of 1983

Singhania Associates APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 06-09-1990

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (1991) ECR 432 : (1991) 52 ELT 183

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

Bench : Single Bench

Advocate : Mr. G.E. Vahanvaty and Mr. S.V.Manohar, instructed by M/s. Gagrat and Co, for the Appellant; Mr. V.R. Rege, for the Respondent

Judgement

1. This petition under Article 226 of the Constitution takes exception to non-clearance of goods imported under Exh. B which is an imprest licence dated 11th May 1981.

2. Petitioner had obtained several licences which were of the same kind as Exh. B. figuring in the instant case. Exh. B. is an Imprest licence per para 149(3) of the Import Policy for the period April 1981 to March 1982, hereinafter referred to as ''AM 81-82''. The holders of such licences were allowed to import certain items free of import duty on condition that the imported articles were used for manufacture of goods which had to be exported within a specific time. After the export obligation had been fulfilled, the licensee could apply for an endorsement enabling him to import goods of the value equal to the value of the licence without there being a debit to the imprest licence. Petitioner fulfilled the obligation annexed to the imprest licence figuring in this case and obtained an endorsement on 18th March 1983 which was worded thus :-

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

Acting upon this, the petitioners imported certain goods which were shipped in the country of export on 22 July 1983. Respondents objected to the importation pointing out that the commodity sought to be imported was on the canalised list under the 1983-84 Import Policy. That occasioned the present petition and at the stage of admission an interim order enabling the petitioner to effect the import was passed. A notice of motion was taken out by the respondents and in support thereof an affidavit dated 24th November 1983 was filed. In that notice of motion various grounds were advanced to question the reliefs claimed in the petition. Two grounds therefrom pressed before me in the case by the learned Counsel representing respondents are : That para 254(3) of the Import Policy 1983 provided that REP licence and additional licence held by the export houses or trading houses though valid for import of any item which could be imported under OGL during 1982-83, ceased to be so if there was a change in the Import-Export Policy of the succeeding year i.e. 1983-84. Therefore, even if it was assumed that the goods were importable as an OGL item as per Import Policy 1982-83, in view of the specific contrary provision contained in the 1983-84 policy, the petitioner could not clear the goods as an OGL item. Next, is the reliance placed upon the supreme Court decision D. Navinchandra and Co. and Others Vs. Union of India (UOI) and Others, , D. Navinchandra and Co. and Others Vs. Union of India (UOI) and Others, .

3. Learned Counsel appearing for the petitioner relies upon the judgment of this Court in a case almost identical to the one figuring in this case in Writ Petition No. 1465 of 1984. Pendse J. dealing with plea similar to that raised by Mr. Rege observed :-

"The third ground is that there is no provision for the OGL endorsement in the AM 85 Policy Book. Shri Vahavanti 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 export obligations 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. The action of the respondents in these circumstances cannot be sustained."

This decision was question in an appeal to a Division Bench vide appeal No. 232 of 1985. The said appeal was dismissed. A.S.L.P. preferred against the decision met with no better result vide the Supreme Court''s order on 19th July 1985 in

SLP (Civil) No. 7389 of 1985. Mr. Rege contends that in D. Navinchandra''s case (supra), the Supreme Court has taken a different view and the portion relied upon by the learned Counsel is to be found at the head note, which reads thus :-

"Diamond exporters could import the items which they were entitled to import under the Import Policy 1978-79 provided they were importable also under the import policy ruling at the time of import. These are items which were open to import by Export House 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 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. If the Government decided an economic policy that import or export should be by a selected channel or thorough selected agencies the court would proceed the assumption that the decision was in the interest of the general public unless the contrary was shown. The policy of canalisation which is a matter of policy of the Government was not given a go-bye by the observations of the Supreme Court referred to in the order of 18th April 1985. When the Court observed that the fact whether items were sought to be imported by diamonds 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. The need for canalisation stands on public policy and that need cannot be lightly or inferentially given a go-bye. It should not be presumed that collaterally the court had done away with the system of canalisation based on sound public policy."

Mr. Vahanvati for the petitioner distinguishes the portion relied upon by Mr. Rege, by pointing out the special conditions under which the above observations came to be made. The special condition required to endorsed on the licence was in these words :-

"Save and except items which are specifically banned under the prevalent Import Policy, at the time of import, the holder shall be entitled to import all other items whether canalised or otherwise in accordance with the relevant rule."

That I think explains the exposition of the legal position in D. Navinchandra''s case (supra). That special feature is not to be found in the imprest licence which figures in the instant case. Here the endorsement made on 18th March 1983 is clear that an importation permitted under AM 82-83 could be negotiated and the imports made thereunder would be valid. That changes in Import Policy are prospective has been held in a number of cases which point has also been considered by a Single Judge of this Court in Writ Petition No. 1809 of 1984 decided on January 9, 1986. Mr. Rege submits that the judgment should not be railed upon as it is under an appeal. I do not see how the binding nature of the judgment is affected merely because an appeal is pending. The result of the foregoing discussion is that the refusal to allow clearance impugned in this petition has to be declared as illegal. The importations has already been effected and what remains to be done is to grant approval to the interim relief and discharge the bank guarantee furnished by the petitioners. Rule in the terms made absolute with parties being left to bear their own costs.

