(1988) 01 DEL CK 0028

In the Delhi High Court

Umrao Industries APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 01-01-1988

Acts Referred:

Citation : (1988) 35 ELT 469

Hon'ble Judges : Yogeshwar Dayal, J

Bench : Single Bench

Judgement

Yogeshwar Dayal, J.—M/s. Umrao Industries, Petitioner herein carried on business of manufacturing various items and has a factory in village KIM, Surat District, the State of Gujarat and is registered as a Small Scale Industry.

2. Respondent No. 2 herein is the Chief Controller of Imports & Exports (CCI & E). Respondents No. 3 is Monitoring Committee of Respondent No. 2 and Respondent No, 4 is the Steel Authority of India (SAIL). The Petitioners, inter alia, are challenging the action of the respondent in not granting to the Petitioners the registered quota of two canalised items viz. M. S. Steel Sheets (Defective) and tin plate waste/waste in terms of the provisions of the Import-Export Policy for the year April 1984 to March 1985. These two particular items were canalised in the aforesaid import policy and the canalising agency was Respondent No. 4.

3. In the past before this item was canalised, petitioners used to obtain their quota of basic ingredients of the aforesaid two basis material by directly importing the same in terms of Import Policy then in force.

4. By the Import-Export Policy as aforestated these two items are canalised and are covered by Appendix 5, para 4 of the said policy. As a result of such canalising, the Petitioners are registered to import their requirements of the aforesaid two items through the aforesaid canalising agency.

5. On 12th October, 1984, the Petitioners sent to the aforesaid Canalising agency two separate applications for respective import of the aforesaid two items. The

said applications were sent along with the prescribed D. D. of Rs. 50,000/- being the earnest money. The Petitioners are required to furnish in the terms of para 68 of the aforesaid policy earnest money being paid as mentioned in Ex. `B'' in the enclosure to the application. The Petitioners also mentioned the requirement for the whole year approx. 800 M. Tonnes and gave general description of the quantity as "Tin-plate w/w Bright General Soft, pinhole free assorted to size and thickness, original Mill Export packing". The thickness required was also mentioned. The monthly requirement in relation to two specification was separately given as 45 M. T. and 25 M. T. approx. total being 70 M. T. and according to the Petitioners C. I. F. value was about Rs. 37,60,000/-. Similar requirements were given for M. S. Defective as well.

6. I will deal with the correspondence of tin plate w/w only as the correspondence in relation to M. S. Steel Sheets (Defective) is practically identical. In relation to the communication dated 12-10- 1984 petitioner received communication from R/4, dated 18-10-1984 seeking certain documentary information. The petitioners by their letter dated 19-10-1984 sent the necessary documentary information. The petitioners sent various reminder regarding the aforesaid demand and ultimately the petitioners received a communication dated 21-12- 1984 which was posted on 27-12-1984 and received by the Petitioner on 1-1-1985. In this communication, the petitioners were informed for the first time that R/4 shall offer to the petitioners 106 M. T. of the said tin plate w/w instead of requirement of 800 M. T. R/4 also sought to offer to the petitioners Matt-finished tin plate waste/waste whereas the Petitioner have specifically requested for original mill packing of the aforesaid goods but what was sought to be offered was in warehouse packing. Case of the petitioners is that warehoused packaged material is largely inferior to the mill pack and is moreover not accepted in the trade and by actual users. Petitioners also noticed that size and specification demanded were not adhered to by the respondents. I need not say about the specifications at this stage because this petition is being decided by me on the basis of violation of Clause 69 of the policy contained in Chapter 10. In this very communication, the petitioners were required to open an L/C for balance of 106 M. T. tin-plate w/w (L/C for 116 M. T.) and it was requested that petitioners should open L/C for Rs. 5.7 lakhs and rush copy of L/C within 21 days after which the offer shall stand lapsed and the demand of the petitioners shall be deemed to be serviced. As soon as this communication was received by the petitioner, the petitioners vide their letter dated 1st January, 1985 pointed out to R/4 that they were not using Matt. furnished material for their product and they require all bright material and that too in original mill packing and they again requested R/4 to assure them that the material shall be bright and it should be original mill packing. The petitioner asked for the confirmation. It was also pointed out but the Petitioner that as per Import Policy Book, Canalizing agency shall take prompt action and have to allot specified material within 60 days from the date of payment of Earnest money and again informed R/4 that they were badly in need of the raw material and Therefore prompt action action would be

appreciated. No reply was received to their communication and on 10-1-1985 the petitioner sent a telegram to R/4 and called upon him to issue a `No Objection Certificate'' in terms of para 155 of the Hand Book of Import Export Policy 1984-85. Since it was apparent that it was not possible for R/4 to release the goods as required by the petitioners.

7. I may mention that a communication was also sent by R/4 to the Petitioners on the same terms as the telegram was sent on 21-12-1984. This communication was by way of letter of 26th December, 1984, but the contents were the same. Again no reply was received to this telegram on 10-1-1985 either. The petitioners wrote a letter dated 21st January, 1985, to R/4 setting out the aforesaid various grievance in detail and called upon R/4 to furnish them with full details of the material sought to be imported on their behalf. Petitioners also called upon respondent No. 4 to specify the delivery schedule in respect of the said material and informed the respondent No. 4 that only after receipt of all the clarification, the petitioners, would open L/C. It is not pointed out by the Petitioners, that it is apparent from the conduct of R/4, that it was not in a position to release the said goods to the petitioners and again called upon R/4 to issue "No Objection Certificate" again no reply was received.

8. The Petitioners, thereafter, sent the comments dated 18-2-1985 of R/2 & 3, 4 - and in this letter it was pointed out specifically that R/4 is not capable of meeting requirement and requested R/2 & 3 to do the needful in the matter in terms of para (1) of 155 and requested R/2 of his own accord to direct import of said item. Also sent necessary license application along with the treasury challan for direct import of 116 M. Tonnes of the said items but there was no response. There was similarly no response to identical communication in relation to M. S. Steel Sheets (Defective) Only thing 1 may say that for M. S. Steel Sheets (Defective) demand was registered for 114 M. T.

9. The case of the petitioner herein is that for the year 1984-85 for the first time import of the aforesaid 2 items was canalised through R/4 and the policy was that the actual user would get the demand registered with R/4. and R/4 would within 60 days of the payment of the earnest money scrutinize his registration and in the case the arrangement which it will be able to make for effecting supplies. In case the canalising Agency does not --

(a) give any such indication for the period of delivery atleast 60 days ahead from the date of registration, or

(b) effect deliveries as registered with it and for which it has or would have taken financial cover as laid down in the Import Export Policy, 1984-85, the actual user may approach the CCI&E (Monitoring Committee), New Delhi for appropriate relief by way of direct imports. Submission further is that imports may also be allowed to actual users with the permission of CCI&E, New Delhi, on the basis of `No Objection Certificate'' issued by the Canalising Agency if the agency has not been or may not be able to supply the material for no fault of the actual user.

This submission is based in the light of para 69 and para 73 (2) occurring in Chapter 10 of the aforesaid Policy, Para 69 reads as under :--

"69. The Canalising Agency may take such financial cover as it considers necessary before arranging import not exceeding sale value of the quantity registered for 3 months at a time".

Para 73 (2) reads as under :--

"73 (2) - in the case of items canalised for import in this Policy which were not canalised in the earlier policy, the eligible Actual User may be allowed to make direct import to the extent of 25% of the c. i. f. value of the actual consumption of that item (imported material only) during the year 1983-84. Actual users should show the availability of this facility and make their import application to the Licensing Authority concerned along with the required statement of consumption duly certified by the Chartered Accountant or Cost Accountant or Company Secretary or sponsored authority . Such application should be made so as to reach the Licensing Authority concerned not later than 15th May, 1984. Such actual user should register their balance requirements with the Canalising Agency concerned.

10. Other relevant paragraphs are paras 153, 154 and 155 (1) & (2) which are reproduced below for facility of understanding :--

"153 - Each Canalising Agency may from time to time, decide upon items and for which he would seek additional information or clarification in terms of Import-Export Policy, 1984-85".

"154. Under the Import-Export Policy of 1984-85 Canalising Agency is expected to take into account the availability of indigenously produced material before imports are arranged. No person registering his requirement with Canalising Agency will also have the right to have a particular Brand of Make.

"155 (1) -- The Actual user, while registering his 6 months or 12 months'' requirement in his description of allotment of a canalised item and indicate to the Canalising Agency the phased programme of delivery on bimonthly basis - or monthly basis, if so laid down by the Canalising Agency. The Canalising Agency will scrutinize such registration and indicate within a period of 60 days the arrangements it would be able to make for effecting supplies. In case the Canalising Agency does not-

(a) give any such indication for the period of delivery atleast 60 days from the date of registration;

(b) or effect deliveries as registered with it and for which it has or could have taken financial power as laid down in the Import-Export Policy, 1984-85, the Actual User may approach CCI&E (Monitoring committee), New Delhi for appropriate relief by way of direct imports. Direct imports may also be allowed to actual users with the permission of C. C. I. & E. New Delhi on the basis of "No

Objection Certificate" issued by the Canalising Agency (C/A) or where CCI&E is satisfied that C/A has not been or may not be able to supply material for no default on the part of actual user".

2. If the Actual User has registered his demand with the C/A concerned, the C/A does not supply the material within 60 days from the date of actual user paid the earnest money may apply for direct import license of the original Licensing Authority concerned to the extent of 25% and quantity of the same material allocated to him by the C/A in the previously financial year ad within the quantity due for allotment under the prescribed scheme in respect of which supply has not been made by the C/A as aforesaid without having to obtain "No Objection Certificate" from the C/A. Such application for direct import license should be accompanied by a declaration of a senior executive of the applicant firm/ company giving the date of payment of earnest money thro'' C/A, the description of the material registered and its quantity and stating in clear terms that the C/A has not supplied material within 60 days of the payment of earnest money. Declaration should also mention the description and quantity of the same material allocated to the applicant firm/company by the C. A. in the previous financial year and quantity of the material due for allotment in respect of which supply has been delayed. This facility, however, will not be available for items listed in Paras 150, 151 above and for items in Appx. 5 Part II of Import- Export Policy, 1984- 85".

11. We are not really concerned with para 155 (2) as goods in dispute were not canalised items in the earlier order, but para 155 (2) is however, relevant from one point of view that it explains that if actual user has registered demand with the Canalising Agency concerned and Canalising agency does not supply the material within 60 days from the date actual user paid the Earnest Money, (earnest money) A/U (Actual User) may apply for direct Import license. It will be noticed that in view of para 73 (2) the petitioner has already effected import of 25% of the amount of goods registered by r/4 i. e. wy under the communication dated 21st December, 1984 R/4 talked about the balance of the goods and not the full quantity which was registered. It will again be noted from the communication of 21st December, 1984 that demand was created against the petitioner for opening L/C for the full price of full quantity registered and not for monthly or bi-monthly or for 3 months.

12. I have already quoted para 69 of the Policy which puts the max. limit to financial cover being not more than sale value for 3 months at a time R/4 could not possibly have created this demand in their communication dated 21st December, 1984 and again repeated in the letter dated 26th December, 1984. By this illegal demand which was contrary to explicit provisions of para 69, R/4 flatly refused to perform the duty as contemplated by aforesaid policy. This letter was sent by R/4 which amounts to refusal by them, or inability to perform their work as Canalising Agency. Under the circumstances, petitioners were right and justified in approaching Respondent No. 2 & 3 by representing that Respondent

No. 4 has failed to supply material registered with them and in the circumstances, Respondent No. 2 and 3 for balance quantity should issue the requisite import license.

13. Clear policy was that for 25% of the Registered Demand, the actual user could import it directly but for the balance of demand, the A/U have to utilise services of the Canalising Agency. It was only if the Canalising Agency refuse or fail in the balance registered demand, A/U could then approach the Monitoring Committee of the Chief controller of Import & Export. It is obvious that R/4 incapacitated itself for performing his duty for making demand contrary to para 69.

14. I may mention the other failure committed by Respondent No. 4 in not confirming to the registered demand. Demand registered was as per the requirement of petitioners. Demand was not registered as per the availability of material with R/4.

15. However, indeed not to go into this case. The fact remains that by demanding opening of Letter of Credit of 100% sale value for the balance goods R/4 really never made the offer within 60 days as contemplated by para 155 (1) of the aforesaid Policy. R/2 and 3 have not filed any counter-affidavit but filed reply of the application which was filed by the petitioner for ad-interim ex-parte relief. This reply position taken by Respondent NO. 2 and 3 is that when they had received the application for direct issuance of import license from the petitioner in relation to both the items, the queries were sent to Respondent No. 4, if they have refused to supply.

16. Respondent No. 4 submitted that Petitioner did not accept the offer. I have already noticed there was really no offer in items of para 155 of Import-Export Policy by R/4. They wrongfully informed the R/2 and 3 to their own face, as if they had made the proper offer. In view of this report of Respondent No. 4, R/2 and 3 had declined to issue the import license. If R/2 and 3 were relying on the report of R/4 which was sent behind the back of the petitioner and was also received behind their back. Petitioners ought to have been told by Respondent No. 2 and 3 and then the petitioner would have the opportunity to explain this position so far as tin-plate waste/waste is concerned. Regarding M. S. Steel Sheets (Defective) no formal refusal has been received from R/2 and 3 on the plea that the matter is pending in the Court. Approaching this court is not the folly of any law that authority concerned should tie up their hand and do nothing and they were duty bound to reply before. R/2 and 3 would have done the same thing, in case M. S. Steels Sheets (Defective) as they have done in the case of tin plate w/w. It is stated in the reply that report from R/4 regarding M. S. Steel Sheet (Defective) received only on 18th March, 1985 and was in the same light as it was given in relation to tin plate w/w but no formal reply had been sent by R/2 and 3 to the petitioner. I am afraid that the bond relating to leading to para 155 (1) and (2) make it clear that if Canalising Agency fail to offer the registered demand within 60 days actual user was entitled to import license for the balance

of registered demand from Respondent No. 2 and 3 it was also the duty of Respondent No. 4 in the circumstances to issue "No Objection Certificate". But that could have disclosed their own fault and failure to supply and they kept mum in spite of repeated requests of the petitioner.

17. Under the circumstances, mandamus is accordingly issued to Respondent No. 2 and 3 to issue necessary import license for the balance quantity of tin plate w/w as well as the M. S. Steel Sheets (Defective) in the circumstances of the case. Because mandamus being issued to Respondent No. 2 and 3, it is not necessary to issue mandamus to Respondent No. 4 for issuance of "NO OBJECTION CERTIFICATE". The petitioner is however, to be entitled to cost which are assessed to be Rs. 2,000/- . It will be payable by Respondent No. 4.

18. Respondent No. 4 is also directed to refund the earnest money of Rs. 50,000/- lying with them within a month.

