

(1994) 03 BOM CK 0011

In the Bombay High Court

Case No : Writ Petition No. 1301 of 1983

Union Industries

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 09-03-1994

Acts Referred:

Citation : (1994) 55 ECR 231

Hon'ble Judges : P.S. Patankar, J;M.L. Pendse, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

M.L. Pendse, J.—The petitioners are a firm carrying on business of importing diverse commodities. The petitioners hold letters of authority in respect of two R.E.P. licences issued to M/s. Industrial Cables (India) Ltd. and who are registered as export firm. The two licences were issued in connection with two registered contracts registered on July 25,1980 and October 27,1980. On April 1, 1980 the import policy for year 1980-81 was announced. The registered exporters in accordance with Clause 8 of Appendix 20 were entitled to claim the import replenishment as were permissible to registered exporters. The petitioners arranged for import of 1,000 M.T. of Animal Tallow and entered into contract with M/s. M.W. Harvey Ltd., a company at London on February 21, 1983. The imported items arrived at Bombay Port on April 27, 1983 and the petitioners filed four bills of entry for clearance of the goods for home consumption. The petitioners were called upon by show cause notice dated March 24,1983 to explain why the imported goods should not be confiscated on the ground that the import licence was not valid to cover the goods imported. The petitioners filed their reply on April 27,1983 and the Collector of Customs by order dated April 30,1983 confiscated the goods covered by each of the four bills of entry. The petitioners were given an option to pay a fine of Rs. 2,70,000/-in respect of each bill of entry in lieu of confiscation. The petitioners preferred an appeal in May 1983 but realising that the Appeal Bench was not available, preferred Writ

Petition No. 1301 of 1983 under Article 226 of the Constitution in this Court. The petition was admitted and the petitioners were permitted to clear the goods on furnishing bank guarantee. The petitioners furnished the bank guarantee and cleared the goods.

2. The petitioners imported another quantity of 1,744.798 M.T. of Animal Tallow and seven bills of entry were presented for clearance of the goods. The petitioners requested the Collector of Customs to release the goods on their furnishing bank guarantee in view of the order passed in respect of the earlier consignment. On May 25, 1983 the Collector of Customs confiscated the goods but gave an option to the petitioners to pay fine aggregating to Rs. 24,25,000/- in lieu of confiscation. The petitioners then applied for amendment of this writ petition which was still pending and secured an order for clearance of the goods. The orders passed by the Collector of Customs dated April 30, 1983 and May 25, 1983 are under challenge in this petition filed under Article 226 of the Constitution.

On Wednesday, March 9.1994;-

3. Shri Nankani, learned Counsel appearing on behalf of the petitioners, submitted that the Assistant Collector had sought to draw a distinction between items permissible for import on R.E.P. licence as replenishment items in terms of the policy for registered exporters contained in Chapter 17 and Appendix 17 of the import policy April 1980 - March 1981 on one hand and the additional facility for import to export houses in terms of para 174(v) of Chapter 18. The learned Counsel urged that the Collector of Customs denied the benefits under Clause 8 of Appendix 20 to the petitioners on the strength of the distinction but the distinction is without any difference. It was urged that the Collector of Customs overruled the objective of the scheme for registered export houses and special facilities given to them and eligibility of import under the provisions of para 176 of 1980-81 policy. There is considerable merit in the contention urged by the learned Counsel but the order for confiscation passed by the Collector of Customs is not required to be disturbed for another reason.

It is not in dispute that the item Animal Tallow was canalised with effect from June 5, 1981 and that factor is specifically referred to by the Collector of Customs in the impugned orders. It is equally not in dispute that the licences on the strength of which the import of Animal Tallow is sustained by the petitioners were issued on February 5, 1982 i.e. after the date of order of canalisation of the item. Shri Desai, learned Counsel appearing on behalf of the Department submitted that once the item was canalised, it was not open for the petitioners to import the item by reference to the licences granted. In our judgment, in view of the item being canalised with effect from June 5, 1981, the short question which requires determination is whether the import by the petitioners without intervention of the canalising agency i.e. State Trading Corporation, was permissible.

4. The effect of order of canalisation came up for consideration before the Supreme Court in two decisions reported in Union of India (UOI) Vs. Godrej Soaps Pvt. Ltd. and Another, and D. Navinchandra and Co. and Others Vs. Union of India (UOI) and Others, . In the first case, a firm carrying on business of importing rough diamonds and exporting cut and polished diamonds were issued Export House Certificate under the import policy for the period 1978-79 and certain additional licences in or about the month of July 1986 covered by the licensing period April 1978 -March 1979. The advantage of import was denied and that gave rise to the filing of Writ Petition in this Court. The action of the Government in refusing Export House Certificates was struck down and the Government was directed to issue necessary Export House Certificates. The matter was carried right up to the Supreme Court and the order passed by the High Court was confirmed with direction as follows:

Save and except items which are not specifically banned under the prevalent import policy at the time of import, the respondents shall be entitled to import all other items whether canalised or otherwise in accordance with the relevant rules. Appeals are disposed of accordingly with no order as to costs." (Emphasis supplied in view of the contentions now sought to be raised in these proceedings).

The direction given by the Supreme Court holding that the importer will be entitled to import all other items whether canalised or otherwise, gave rise to further litigation. Ultimately, when the matter reached Supreme Court. Mr. Justice Sabyasachi Mukharji, as he then was, speaking for the Bench observed that canalised items are those items which are ordinarily open to import only through a public sector agency. It was held that although such items are importable through a public sector agency, it is permissible for the import policy to provide an exception to the rule and to declare that an importer may import a canalised item directly. The Supreme Court held that an export house holding an additional licence will be entitled to import items open ordinarily to direct import (non-canalised items) as well as items directly importable although on the canalised list and it is in that sense that the Court could have intended to define the entitlement of diamond exporter. The observation made by the Supreme Court in paragraph 8 of the judgment leaves no manner of doubt that an item once canalised cannot be imported except through the public sector agency. The decision was reiterated in the subsequent judgment where Mr. Justice Sabyasachi Mukharji, as he then was, referred to the earlier decisions and observed that two things are required to be satisfied in respect of imports, firstly whether the items were importable under the import policy prevalent on the date of issuance of licence and secondly, whether the items were importable under the import policy in existence on the date of actual import. Referring to the earlier decision in the case of diamond exporters, the Supreme Court observed that the canalised items cannot be imported unless an exception is made to the rule and the policy declares that the importer can import a canalised item directly. The Supreme Court then observed in paragraph 22 of the judgment as follows:

his 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*, where the Constitution Bench of this Court observed that the policies of imports or exports were fashioned not only with reference to internal or international trade, but also on monetary policy, the development of agriculture and industries and even on the political policies of the country and rival theories and views may be held on such policies. 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. Therefore it could not be collaterally altered in the manner suggested. The policy of canalisation which is a matter of policy of the Government was not given a go-by by the observations referred to in the order of 18th April, 1985. Indeed it is possible to read the order in a manner consistent with canalisation scheme in the way we have indicated. If that is so, then it should be so read. 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. The need for canalisation stands on public policy and that need cannot be lightly or inferentially given a go-by. It should not be presumed that collaterally the Court had done away with the system of canalisation based on sound public policy.

The two decisions of the Supreme Court clearly establish that the petitioners were not entitled to directly import Animal Tallow which was canalised item with effect from June 5, 1981 by reference to the two licences which were issued on February 5, 1982.

5. Shri Nankani, learned Counsel for the petitioners, submitted that the two decisions of the Supreme Court were delivered in respect of the import desired by diamond merchants and the Supreme Court had not examined the issue as to whether the import of canalised item was invalid in spite of the facility provided by the import policy. The learned Counsel urged that the two decisions of the Supreme Court were with reference to the interpretation of the ambit of order dated April 18, 1985 passed by the Supreme Court in Civil Appeal No. 1423 of 1984 and the findings recorded by the Supreme Court should not be considered while examining whether the import of Animal Tallow by the petitioners under the licences was valid or otherwise. The learned Counsel also contended that a Division Bench of this Court in Appeal No. 296 of 1986 by judgment dated August 22, 1991 upheld the import of Animal Tallow subsequent to the two decisions of the Supreme Court. In our judgment, the submission is not correct and cannot be accepted. It is futile to suggest that the two decisions of the Supreme Court do not lay down the principles which must be applied when an

item is canalised. It is incorrect to suggest that the decisions of the Supreme Court should be restricted to the facts relating to the examination of earlier order dated April 18, 1985. In our judgment, the two decisions clearly set out the law which is applicable in respect of import of item which was canalised. The reliance upon an unreported decision of the Division Bench of this Court is also not accurate. The decision proceeds on the basis that principles laid down by the Supreme Court were only in respect of consideration of meaning of the earlier order of the Supreme Court dated April 18, 1985. The Division Bench felt that the decision of the Supreme Court would be attracted when the order to be passed is in the nature of restitution and not otherwise. It is clear from the observations made by the Division Bench that it was not holding that the two decisions of the Supreme Court are not applicable in respect of items imported directly even though the items were canalised. In our judgment, the conclusion recorded by the Collector of Customs, in these circumstances, cannot be faulted with and the petition must fail.

6. Accordingly, rule is discharged with costs. It is open for the respondents to enforce the bank guarantees furnished by the petitioners at the time of passing of the interim orders.