
(1985) 02 BOM CK 0010

In the Bombay High Court

Case No : Appeal No. 1158 of 1985 in Writ Petition No. 2477 of 1984

Union of India and others

APPELLANT

Vs

P. Ripalkumar and Co., Bombay

RESPONDENT

Date of Decision : 19-02-1985

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1988) 19 ECR 200 : (1988) 37 ELT 517

Hon'ble Judges : V.S. Kotwal, J;P.B. Sawant, J

Bench : Division Bench

Judgement

Sawant, J.—The controversy in the present case falls within a narrow compass viz. whether the respondent-Exporters (hereinafter referred to as the respondents) are entitled to import non-debit open general licence items and if so, whether the said items should be as per the policy of 1982-83 to which the imprest licence related to as per the current policy.

2. The petitioners are registered exporters and at the relevant time held an export house certificate. On the basis of the Import-Export policy of 1982-83, they applied for an imprest licence and it was issued to them for the C.I.F. value of Rs. 28,17,321/- for the import of unset and uncut diamonds against which they had to effect exports of total F.O.B. value of Rs. 43,34,340/- Under the imprest licence which they obtained the respondent imported unset and uncut diamonds and also fulfilled their export obligations but not during the original stipulated period which was six months from the date of import of their first consignment 19-5-1982. They did so only during the period which was extended by one year. In recognition of their fulfilling their required export obligations they were given a redemption certificate.

3. In terms of paragraph 185(4) of the Import-Export Policy for 1982-83, they thereafter applied the facility of importing OGL items under sub-para (1) of the same paragraph. Their application was rejected on three grounds viz. (1) that the imprest licence was not valid, (b) that there was no balance available in the

customs copy of the licence and (c) that there was no provision in the 1983-84 Import-Export Policy entitling the endorsement of the imprest licence. Hence the present petition was filed by the respondents under Article 226 of the Constitution.

4. It appears that a similar petition being Writ Petition No. 1465 of 1984 challenging the rejection of a similar application on the same three grounds was allowed by a learned single Judge of this Court. The appeal filed against the said decision was dismissed by the Division Bench. The SLP against the said decision was however dismissed by the Supreme Court on 19-7-1985 with the following observation :-

"The main point urged by Shri Gopal Subramaniam in support of the petition is that under paragraph 185(7) of the Import-Export Policy, April, 1982 and March, 1983 prescribed that the import of O.G.L. items by the Export Houses under the policy was subject to the condition inter alia that the shipments of goods should take place within the validity of the O.G.L. i.e. March 31, 1983 or within the validity period of the Import Licence itself (without any grace period) whichever date was earlier. The Division Bench of the High Court declined to consider the said contention of the Union of India based on the above paragraph on the ground that this had not been raised by the Union of India before the learned Single Judge. We do not consider in the circumstances of this case the reasons given by the Division Bench of High Court for not considering the above contention are incorrect. We do not, therefore, permit the Union of India to raise this contention in this Special Leave Petition. There is no other point of substance which is required to be considered in this case. The petition is accordingly dismissed. We, however, make it very clear that we express our opinion on the validity of the above said contention based on paragraph 185(7) referred to above. The true effect of the said provision is left open to be considered in an appropriate case when an occasion arises to do so."

5. In view of the liberty reserved for the appellants i.e. the Union of India to agitate their contention based on sub-paragraph (7) of paragraph 185 of the Import-Export Policy of 1982-83, a contention was advanced in the present petition on behalf of the appellants before the learned single Judge that if the benefits to which the respondents were entitled under paragraph 185(4) were not availed of by 31-3-1983 (the last date of the Import-Export Policy of 1982-83) the same could not be availed of thereafter in view of paragraph 185(7).

It is not disputed in the present case that the imprest licence was granted to the respondents on 29-4-1982 and was therefore valid for 12 months i.e. upto 30-4-1983. The first consignment was imported and cleared by the respondents on 19-5-1982. They had therefore to perform their export obligation within six months of the said date and therefore by 19-11-1982. The respondents did not comply with their obligation by that date and hence they had applied for extending the said period and it was extended till 19-5-1983. During this period

also they did not fulfil their obligation and the period was further extended at their request till 19-11-1983. It is only after the respondents complied with their export obligation obligation during the second extended period that they were granted the redemption certificate on 16-11-1983. Certifying that they had fulfilled their export obligation.

On these admitted facts the contention of the appellants was that in the first instance the respondents were not entitled to import items under paragraph 185(4) and secondly, even if they were so entitled, they could not import items available as per the OGL Policy of 1982-83 but only those items which could be validly imported under the current OGL policy. It was argued in this connection that to make available the benefits of paragraph 185(4) to such persons as the respondents who had delayed the performance of their export obligations was to place a premium on such delays and also to grant them an undue advantage as against those who fulfilled their export obligations in time. In support of the second argument it was pointed out that as has happened in the present case, certain items which were available for import under the O.G.L. policy for 1982-83 have been removed from the OGL of subsequent years for various reasons including the need for protection of the indigenous production of the said items. If persons like the exporters are now allowed to import the said items, in the first instance it would lead of unhealthy competition between the imported and the indigenous products leading to the closure of the local establishments producing the said products resulting in a wide-spread unemployment. Secondly, it would also lead to the import of items which are not needed by this country and an unnecessary depletion of previous resources of foreign exchange. Lastly, such an import would also give the defaulting persons like the respondents an undue monetary gains since they can now sell those products at a high premium as their import is banned after 31-3-1983. It was therefore contended that looked at it from any angle the provisions of paragraph 185(4) and 185(7) should be read harmoniously to promote the import policy and not to defeat it particularly at the hands of the defaulting exporters like the respondents. It is for this reason, according to the appellants, that a provision was made in paragraph 185(7) that the shipment of goods of the O.G.L. items has to be made before 31-3-1983 or within the period of validity of the import licence itself (which was in the present case till 30-4-1983) whichever date was earlier. It was also submitted that the benefit of paragraph 185(4) extends only to such export houses which have taken due steps to discharge their export obligations either before 31-3-1983 or before the expiry of the validity of the import licence whichever date is earlier. The export house becomes eligible to the facility under paragraph 185(4) only after it performs its export obligations under the imprest licence. That obligation has to be performed within six months of the import of the first consignment of the items for which the imprest licence was issued (in this case the uncut and unset diamonds). It is therefore for those who want to obtain the benefits of paragraph 185(4) to apply for the imprest licence and perform their export obligations in time so as to arrange the shipment of the O.G.L. goods before

31-3-1983. Either they avail of the said facility according to the terms of the scheme or they do not. They cannot however by their own conduct postpone the date of the import of the OGL goods and defeat the purpose of the import policy itself and also gain an undue monetary advantage. It was further contended on behalf of the appellants that what paragraph 185(7) contains is nothing but the provisions of OGL Order No. 1/82, dated 5-4-1982 which has a statutory force and prevails over the statement of Import-Export policy. If there is a conflict between the said Order and paragraph 185(4) obviously the benefits given under paragraph 185(4) are certainly not meant for defeating the import policy but to promote the exports. There is no other way of reconciling paragraphs 185(4) and 185(7) unless interpretation ignores the import and export policy of 1982-83 as laid down in Order No. 1/82.

6. In reply to these contentions, the respondents submitted that the licence which was granted to them on 29-4-1982 for the licensing period A.M. 83 i.e. from April, 1982 to March, 1983 was valid for 12 months i.e. upto 29-4-1983. Hence they could import rough diamonds for which they were granted the licence upto the end of April, 1983. If this is so, then they could re-export cut and polished diamonds within six months of April, 1983 and would become eligible to import O.G.L. items thereafter. This would necessarily entitle them to import OGL items under paragraph 185(4) long after 31-3-1983 i.e. the last date of the OGL policy of 1982-83. It was further contended that paragraph 185(4) envisages such a situation and therefore makes a specific provision for revalidating the advance/imprest licence for a period of six months after the expiry of the original period for importing OGL items under the facility given as per the said paragraph. According to this contention, further, paragraph 185(7) is confined only to REP licences and does not extend to advance/imprest licences for which a special provision is made in paragraph 185(4). The next argument advanced on behalf of the respondents was that there is a distinction between the imports of OGL items under REP licence and the Impress advance licence. Under the REP licence, exports are already made before the issue of the said licence and they can be used to import OGL items forthwith. Under the Impress advance licence, several steps are to be taken before the licensee becomes entitled to import OGL items. Hence the time-lag between the issuance of the advance/imprest licence and the eligibility to import OGL items is inevitable and it will be difficult to avail to the facility to import OGL items if the provisions of paragraph 185(7) are made applicable to the holders of Impress advance licences for the import of the OGL items. The last contention was that the import of OGL items would necessarily mean the OGL items permissible as per the import policy of 1982-83 and not items permissible under the OGL policy of the period when licence holders become eligible to import the said items.

7. We have given hereinabove the gist of the contentions advanced on both sides. The learned Judge negated the contentions of the appellants adopting the same reasoning which is advanced on behalf of the respondents. Hence the present appeal.

8. There is no doubt that a mere redemption certificate which only signifies that the licence holder has performed his export obligation will not entitle him to an endorsement on the licence for the import of O.G.L. items. For, the certificate has to be issued whether the export obligation is performed within or without time. Once the time to perform the export obligation is extended, the certificate must follow after the obligation is discharged. The authorities cannot refuse to extend the time for performing the export obligations since it will be a self-defeating exercise. The original imports are permitted for performing the corresponding obligation to export. To refuse to extend time to export will obviously harm the Revenue. Hence there is no duty incurred by the authorities to endorse the licence for the import of OGL items and thus to give the licence-holder the benefit of paragraph 185(4) by a mere issuance of the redemption certificate. We also see enough substance in the Appellants' contention that the importers such as the Respondents who perform their export obligations beyond the stipulated time will derive undue benefits as against those who perform them within time since the late performers will be benefits entitled to import items permitted under OGL policy of 1982-83 but banned or restricted under the current policy, thereby making a huge unjust profit. There is also a good deal of merit in the Appellants' contention that if the items banned or restricted under the current OGL policy are allowed to be imported, it will affect the indigenous industries and may force them to wind up. However, as per the order of the Supreme Court the only question that we have to consider in this appeal is whether the provisions of paragraph 185(7) are applicable to the import of OGL items under the facility given by paragraph 185(4).

9. In the first instance the language of paragraph 185(4) is very clear on the point. It says -

"The facility for import of OGL items available in sub-para (3) above, may also be allowed, on merits, to Export Houses against their advance/imprest licences on account of which they are rendered ineligible to obtain REP licence. In such cases, however, the value upto which the OGL import may be allowed, will not exceed the value to which the Export House would have been eligible to the REP licence, had he not obtained advance/imprest licence in question. This facility will be available to the Export House after he has discharged the export obligation imposed on the advance/imprest licence. Therefore, if by the time, the Export House becomes eligible to this facility, the advance/imprest licence has expired, or, if the original validity left unused by that time is less than six months, the licensing authority will revalidate the licence simultaneously so as to give to the license-holder a time of six months for the purpose of importing OGL items under this facility."

Paragraph 185(5) then stated that :

"Export Houses who wish to take advantage of this facility of import of OGL items should get the licences concerned endorsed by the licensing authority as under :-

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

10. What is of importance to note is that the period of advance/imprest licence issued under paragraph 185(4) would almost always go beyond 31st March, 1983 since it could be applied for and granted any time till 31st March, 1983 and the licence once issued is valid for 12 months from the date of the issue. As has been rightly pointed out by the learned Single Judge, thereafter the licence holder has to take several steps before he applies for endorsement on the licence under paragraph 185(5), for the import of OGL items. Hence the application for the import of OGL items and their consequent import would in most cases be after the 31st March, 1983. That is why specifically it is stated in paragraph 185(4) as follows. We are reproducing the relevant portion of the paragraph at the cost of repetition to emphasise the point. -

"This facility will be available to the Export House after he has discharged the export obligation imposed on the advance/imprest licence. Therefore, if by the time, the Export House becomes eligible to this facility, the advance/imprest licence has expired, or, if the original validity left unused by that time is less than six months, the licensing authority will revalidate the licence simultaneously so as to give to the licence holder a time of six months for the purpose of importing OGL items under this facility.

What is further of importance to note from the aforesaid provisions of paragraph 185(4) is that the facility given there is for importing OGL items not on OGL licence but on advance/imprest licence itself which is to be revalidated for the purpose. The advance/imprest licence is not to be revalidated for import of original items viz. rough and uncut diamonds. It is to be revalidated for enabling the import of OGL items. We are emphasising this to bring home the point that there is a difference in the import of OGL items under OGL licence and the import of OGL items under a facility given to the imprest licence holders. It is the confusion between the two which according to us is mainly responsible for the contentions advanced on behalf of the appellants.

11. It is against this background that we have to reconcile the provisions of paragraph 185(4) with the provisions of (i) paragraph 185(7); (ii) of Clause 21 of OGL Order No. 1/82 and (iii) of paragraph 35 of Appendix 10 of the Import and Export Policy, 1982-83.

12. First coming to Clause 21 of OGL Order No. 1/82, dated 5-4-1982, as the preamble of the Order shows it applies to import by Actual User (Industrial) of OGL items. The expressions "Actual User" and "Actual User (Industrial)" have been defined in Clauses (1) and (3) of paragraph 5 of the Import-Export Policy, 1982-83. The definitions run as follows :-

"5. For the purposes of this policy, the following words shall have the meanings attached to them :-

(1) "Actual User" means a person who applies for/secures a licence for the import of any item or an allotment of an imported item required for his own use, and not for business or trade in it. Thus, in the case of an industrial undertaking, the item concerned shall be utilised for the manufacturing processes or operations conducted within its authorised premises (or made available to jobbing units or other units outside for intermediate processing only as part of such production effort). In the non-industrial category, such as hospitals, research and development units or any other institutions, commercial establishments and individuals, the concerned item shall be utilised for its/his own use i.e. for the purpose for which the item was sought for import.

(2) ** ** *

(3) "Actual User (Industrial)" shall mean an industrial undertaking, be it in the large scale, small scale or cottage industries sector, engaged in the manufacture of any goods for which it holds a licence or Registration Certificate from the appropriate Government authority, wherever applicable."

The respondents who are admittedly the Export House will not fall within the said definition of Actual User (Industrial) for they are neither an industrial undertaking nor do they need OGL items for any manufacturing processes or operations of their own. On the other hand, paragraph 185(6) permits them to sell the same to Actual Users (Industrial). Hence no part of the OGL Order No. 1/82 including Clause 21 thereof will apply to the respondents.

The contention advanced on behalf of the appellants that the licence issued to the respondents is an Actual Users (Industrial) licence is according to us misconceived. For what is issued to them is an imprest licence for importing unset and uncut diamonds. It is this licence which is the Actual Users (Industrial) licence and it is under this licence that they had imported unset and uncut diamonds which were for processing them into refined diamonds. This licence is not the Actual Users Open General Licence. As stated earlier, the OGL Order No. 1/82 applies to Actual Users Open General Licence and not to Actual Users imprest or advance licence.

13. Similarly, paragraph 35 of Appendix 10 which is *pari materia* with Clause 21 of OGL Order will also not be applicable to the respondents for Appendix 10 deals with "Import of items under Open General Licence". As has been pointed out earlier, the import of OGL items sought by the respondents is not under Open General Licence but under a facility given to them as holders of the imprest licence. The respondents do not hold nor is it necessary for them to hold an Open General Licence. Therefore, there is no conflict between paragraph 35 of Appendix 10 and the provisions of paragraph 185(4).

14. We may now deal with the apparent conflict between paragraphs 185(4) and 185(7). There is no doubt that as the two paragraphs are worded, the conflict is writ large and that is why it has given rise to a long debate on the point. There is nothing in paragraph 185(7) to suggest that the restrictions placed therein viz.

that "the shipment of OGL items should take place within the validity of the OGL i.e. 31st March, 1983 or within the validity period of the import licence itself (without any grace period), whichever date is earlier," is confined only to import of OGL items on Open General Licences. In fact, the said language shows that it applies to all imports of OGL items whether under OGL or under the facility given to the holders of REP or advance/imprest licences by paragraphs 185(3) and 185(4). The whole of paragraph 185 deals with imports of OGL items on licences other than Open General Licence. However, the different provisions of paragraph 185 have to be read harmoniously. In particular, when special provision is made in paragraph 185(4) extending a facility to the holders of advance/imprest licences, it cannot be frustrated or rendered nugatory by the provisions of paragraph 185(7) which are obviously general in nature in as much as they apply to all licences, whether advance/imprest or REP licences. In the teeth of the specific provisions made in paragraph 185(4) to advance a special facility to the holders of advance/imprest licences, the only way to reconcile the two provisions is to hold that in the case of the holders of the advance/imprest licences, the provisions of paragraph 185(7) will not be applicable.

15. We are fortified in this view by the provisions of paragraph 255(3) of the Import-Export Policy of 1983-84 for that paragraph states that REP licences and Additional licences held by Export Houses/Trading Houses will cease to be valid for import of any item which could be imported under Open General Licence during 1982-83 but is no longer so in this Import-Export policy meaning thereby the import Export Policy of 1983-84. The paragraph however does not refer to advance/imprest licences and is confined only to REP and additional licences. This shows that the facility given by paragraph 185(4) of 1982-83 Policy to advance/imprest licence holders was very much present in the mind of the policy makers while laying down the Import Policy for 1983-84. Where it not so, there is no reason why the prohibition contained in paragraph 255(3) should not have been extended also to import of OGL items under advance/imprest licences. This only means that the policy makers did not want to take away the facility given earlier to the advance/imprest license-holders to import OGL items even after 1982-83 OGL Policy expired.

16. We also further find that the learned single Judge has under his impugned order not allowed the import of OGL items which are specifically banned under the current import policy. Hence the fear expressed by the appellants with regard to the effect of the imports on the market for the indigenous products and the possibility of the Respondents making huge profits by the imports may not come true.

17. As has been stated earlier, we have not gone into the question as to whether the Export Houses like the respondents who have delayed their performance of export obligations should be given the facility of importing OGL items under the 1982-83 Import Policy or not. This is because that question has not been kept open by the Supreme Court, and as far as this Court is concerned, it will be

deemed to have been concluded.

18. In the circumstances, we find no reason to interfere with the impugned order of the learned single Judge and dismiss the appeal. There will however be no order as to costs.