

(1991) 01 BOM CK 0063

In the Bombay High Court

Case No : Appeal No. 31 of 1986 in Writ Petition No. 416 of 1985

Union of India

APPELLANT

Vs

Gem International

RESPONDENT

Date of Decision : 17-01-1991

Acts Referred:

Citation : (1991) 34 ECC 12 : (1991) ECR 24 : (1991) 54 ELT 73

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

Bench : Division Bench

Advocate : Shri K.H. Bhabha, Mr. M.S. Sanklecha and Mr. V.G. Rege, for the Appellant; Shri S.U. Kamdar and Shri N.M. Shah, for the Respondent

Judgement

Pendse, J.—This appeal and seven other appeals filed by the Union of India and Chief Controller of Imports and Exports from group and the dispute involved in all these appeals is identical, and the issues raised by the appellants are decided by this judgment and in respect of remaining seven appeals only consequential orders will be passed. This appeal is directed against the judgment dated Sept. 5, 1985 recorded by the learned Single Judge granting relief of the respondents on certain terms and conditions. The facts giving rise to the passing of this judgment are not in dispute and are required to be briefly stated to appreciate the grievance made in the appeal.

2. The respondents are the sole proprietary concern and carry on business of exporting diamonds. The respondents are recognised export house within the meaning of Import Policy from April to March 1982-83 issued by the Government of India. Under the Import Policy various kinds of licences known as replenishment licence, advance licence and imprest licence are issued to the exporters. The replenishment licences are issued for the purpose of replenishment of imported items against exports already made. An advance licence is issued where the import is allowed under the duty exemption scheme, while the imprest licence is issued when the import is allowed outside the duty exemption scheme. Under the relevant policy the export houses were given

facility of importing OGL items against replenishment licences without debit to the value of the licence. As far as the advance and imprest licences are concerned, the same were issued for the import of certain items meant for export. Paragraph 185(4) of the Import-Export Policy April 1982 to March 1983, inter alia, provided that the facility for import of OGL items available in sub-para (3) may also be allowed to Export Houses against their advance/imprest licence to the extent to which they are rendered ineligible to obtain REP licence. It further provides that in such cases the value upto which the OGL import would be allowed was not to exceed the value to which the Export House would have been eligible to obtain the REP licence, had it not obtained advance/imprest licence in question. The facility was allowed to the export house only after he discharges the export obligations imposed on the advance/imprest licence. The Policy further provided that if by the time the export house becomes eligible to avail of the facility, the advance/imprest licence had expired or if the original validity left unused by that time is less than six months, then the licensing authority would revalidate the licence simultaneously so as to give the licence holder a time of six months for the purpose of importing OGL items under this facility. Paragraph 185(5) provides that export houses who wish to take advantage of the facility of import of OGL items should get the licences concerned endorsed by the licensing authority as under :

"The 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."

3. The respondents applied for and granted imprest licence dated February 7, 1983 for c.i.f. value of Rs. 35,67,000/- for the import of uncut and unset diamonds against which the respondents had to effect exports of the total FOB value of Rs. 54,88,769/-. Pursuant to the grant of imprest licence the respondents imported uncut and unset diamonds and then fulfilled their export obligations on August 14, 1983. There respondents then sought redemption certificate from the Joint Chief Controller of Imports and Exports, Bombay and the certificate was issued on October 20, 1983. The respondents were required to apply for revalidation of the licence and the requisite endorsement for the import of OGL items in accordance with provisions of Paragraph 185(4) of the Import-Export Policy. The respondents made the requisite application on November 30, 1984 but the Joint Chief Controller turned down the application by order dated December 14, 1984 on the ground that there is no provision for making OGL endorsement on advance/imprest licence during the policy period of April to March 1984-85. The respondents thereupon addressed letter dated January 9, 1985 to the authority pointing out that the endorsement is permissible under the Import-Export Policy of 1982-83 and the ground given was not correct. The authorities sent a reply on January 21, 1985 reiterating the rejection of the endorsement. The two grounds on which the authority placed reliance for refusing the application were :

(a) the provision for OGL endorsement was available in 1981-82 and 1982-83 Policy period and that the same should have been availed of during these policy periods; and

(b) that there is no provision for OGL endorsement in 1983-84 or 1984-85 Policy period.

4. The respondents feeling aggrieved by the rejection of the application by the authorities, filed Writ Petition No. 416 of 1985 on the original side of this Court on February 18, 1985. The respondents pointed out that in Writ Petition No. 1465 of 1984 decided by the Single Judge on September 18, 1984 the rejection of the application on identical grounds was set aside and the authorities were directed to make the requisite endorsement. The petition was resisted by the authorities inter alia, claiming that though the decision of the Single Judge of this Court in W.P. No. 1465 of 1984 was upheld by the Division Bench in appeal on March 19, 1985 the authorities had moved the Supreme Court by filing a SLP and the Supreme Court had granted leave. The authorities also claimed that the provisions of the policy makes it mandatory that the facility for import of OGL items could only be availed within the validity period of the policy, that is till March 31, 1983. It was further claimed that the respondents had failed and neglected to fulfill the export obligations before March 31, 1983 and consequently the facility available under Paragraph 185(4) cannot be claimed. The authorities further claimed that the respondents submitted the application for validation of the licence at very late stage when the facility provided by Paragraph 185 was no longer available.

At the hearing of the petition it was conceded on behalf of the authorities that in view of the several decisions of the Supreme Court the relief sought by the respondents cannot be denied on merits. The sole contention urged before the learned Judge was that there was considerable delay between the date of grant of redemption certificate and the date of application for revalidation and endorsement of OGL on the imprest licence, and therefore, the relief sought under Article 226 of the Constitution of India, being discretionary one, should be declined. The learned Single Judge felt that though it is not open for the authority to support the impugned order on the ground which was not referred to by the authority while rejecting the application, still to balance the interest of the respondents and the authority, a reduction or cut of 25% in the accrued benefit to the respondents should be imposed. The learned Judge also felt that the respondents can get the reduced benefit on condition of payment of costs of Rs. 2500/-. On the strength of this finding the operative order reads as under :-

(a) The impugned order dated December 14, 1984 and the impugned order dated January 21, 1985 (Exhibits "D" and "F" respectively) are set aside and quashed.

(b) On the petitioners paying to the respondents Rs. 2500/- as costs quantified of the proceedings, the respondents are directed to -

(i) revalidate for the period of six months from the date of revalidation the petitioners' imprest licence, and

(ii) endorse the said licence to be valid for import of OGL items under Paragraph 185 (excluding sub-para 7 thereof) of the April-March 1983 Policy except any item, the import of which has been specifically banned under the current policy but with a cut to the extent of 25% of the c.i.f. value mentioned in Column 6 of the said licence.

(c) This licence will be non-transferable.

The respondents paid the costs as directed by the learned Judge and sought the endorsement but the appellants preferred the appeal and secured interim relief of stay of the operation of the order of the learned Judge.

5. Shri Bhabha, learned counsel appearing on behalf of Government of India, very fairly stated at the outset that the respondents are entitled to the relief on merits as sought in the petition, in view of catena of decisions of the Supreme Court. The learned counsel also very fairly stated that it was not accurate to reduce the accrued benefits to the respondents, but urged that the learned Single Judge should have dismissed the petition on the ground of delay. Shri Bhabha submitted that the ground of delay should be examined from two different angles, first there was a delay on the part of the respondents in applying for revalidation of the imprest licence and requisite endorsement on OGL. Secondly, the respondents were guilty in approaching this court in writ jurisdiction by filing petition under Article 226 of the Constitution of India after considerable delay and therefore the relief should have been declined on the ground of laches. Shri Bhabha also submitted that the operative part of the order passed by the learned Single Judge and which is quoted hereinabove requires modification in view of the decision of the Supreme Court.

6. The first contention urged by the learned counsel is that the respondents are not entitled to the relief in writ jurisdiction because the respondents were guilty of filing application after considerable delay for revalidation of imprest licence and for an endorsement of OGL on the licence. To appreciate the submission of the learned counsel, it is necessary to restate some of the undisputed facts. The imprest licence was issued to the respondents on February 7, 1983 and the export obligation was completed on August 14, 1983. Shri Bhabha is unable to furnish us the date of application for issuance of the redemption certificate or the date on which the authority issued such redemption certificate. It is required to be stated that the learned counsel filed a chart setting out various dates in respect of eight proceedings which are before us and we have taken the chart on record and marked "X". However, Shri Bhabha very fairly stated that the appellants are not in a position to state when the respondents applied for issuance of redemption certificate. It is not in dispute that the respondents could not have applied for revalidation of imprest licence and OGL endorsement before issuance of the revalidation certificate. The revalidation certificate was issued on

October 20, 1983 and Shri Bhabha complains that the application for revalidation and OGL endorsement was filed one year thereafter, that is only on November 30, 1984. The application was turned down by the appellants on December 14, 1984. Shri Bhabha submits that the delay in applying for revalidation of the imprest licence and OGL endorsement is fatal to the grant of relief sought by the respondents and on this count and count alone the learned Judge should have turned down the petition. Shri Bhabha urged that the respondents were not serious about seeking revalidation or securing endorsement on OGL till the items covered under the OGL list in the Policy of 1982-83 were taken out in the subsequent policy from the OGL list, leading to advantage of securing premium on import of those items during the subsequent policy. It was urged by the learned counsel that the exchange position of the country and the policy of the Government regarding International Trade varies from year to year and it would not be proper for the Court to direct revalidation of imprest licence and OGL endorsement when the respondents had deliberately delayed making application for revalidation with an ulterior purpose. It is not possible to accede to the submission of the learned counsel for more than one reason.

7. In the first instance it is not open for the appellants to raise the contention that the relief sought in the petition should be refused on the ground that application for revalidation of imprest licence and endorsement of OGL items was made after a considerable delay. As mentioned hereinabove the redemption certificate was issued on October 20, 1983 and the application for revalidation and OGL endorsement was filed by the respondents on November 30, 1984. The complaint that the respondents did not file the application almost for a year and therefore should be deprived of the advantage because of delaying process of applying, the respondents are trying to gain advantage cannot be permitted to be raised in the writ petition. The respondents had filed the application for revalidation and endorsement before the Joint Chief Controller of Imports and Exports and the Controller was exercising quasi-judicial powers while determining the relief sought in the application. The Joint Chief Controller turned down the application on the ground that there is no provision of making endorsement in the Import-Export Policy of 1983-84 and 1984-85 and therefore endorsement cannot be granted. The second reason was that the endorsement should have been secured by the respondents during the operation of the Import-Export Policy of the year 1981-82. The Joint Chief Controller while rejecting the application did not even refer to the delay in applying for revalidation and endorsement of OGL items on imprest licence. It is not therefore permissible for the authority to take the additional ground of delay in making application at the hearing of the writ petition. It is now well-settled that when the statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. The Supreme Court laid down the principle in the decision reported in *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, and Mr. Justice Krishna Iyer speaking for

the Bench observed that permitting the authority to supplement fresh reasons in the return filed in the Court may lead to bad order in the beginning to get validated by additional grounds later brought out. The Supreme Court approved the observations made by Justice Bose in the decision reported in *Commissioner of Police, Bombay Vs. Gordhandas Bhanji*, , where the learned Judge observed :

"Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

It is therefore obvious that it is not permissible for the appellants to supply fresh grounds in the return filed in answer to the petition filed by the respondents and claim that the order can be sustained also on the ground that the respondents did not apply forthwith for revalidation of imprest licence and OGL endorsement thereon.

The second reason for not acceding to the submission of Shri Bhabha is that the appellants have not brought on record any material to indicate as to how the respondents secured advantage by delaying in making application for revalidation and OGL endorsement on the imprest licence. We repeatedly inquired from the learned counsel as to how the respondents would gain any benefit by delaying the process of making application and we were unable to get any positive answer. It is undoubtedly true that the Courts would be slow in granting relief in respect of grant of import licence when problems of conflicting policy considerations arise. The delay in making application may lead in a given case to an undue advantage to the licensee, but it cannot be assumed in every case that mere failure to apply forthwith for revalidation and the endorsement should automatically deprive the licensee from entitlement which was earned by export of goods bringing valuable foreign exchange to the country. As the appellants were unable to bring any facts on record, either before the learned Single Judge or even in appeal Court to indicate that the respondents have secured undue advantage by delaying in making the application for revalidation and OGL endorsement, we are unable to accede to the submission of Shri Bhabha that the delay of one year in making an application should be considered as fatal and relief should be refused on that count.

Shri Bhabha invited our attention to the decision of the Supreme Court reported in *Rup Diamonds and Others Vs. Union of India and Others*, , where the Supreme Court declined to grant relief to the exporters for revalidation and endorsement in a petition filed under Article 32 of the Constitution. The learned counsel urged that the Supreme Court declined the relief because the applicant in that case had not pursued the claim for several years. On careful perusal of the judgment we find that the applications for revalidation and endorsement was rejected by the

authority on two counts, first pertains to the inordinate delay in seeking revalidation and endorsement, and the second on merits. The authority held that the request for revalidation and endorsement was made after four years and seven months from the discharge of the export obligation and it was therefore obvious that the applicant had not cared to apply immediately after discharge of export obligation and as such the request is grossly time-barred. The Supreme Court on the set of these facts held that the applicants are not entitled for the relief for not pursuing the remedy for several years. The facts of the present case are totally different. In the present case the authority has not declined to grant relief to the respondents on the ground that application was made long after the discharge of the export obligation. As the authority has not turned down the application on that count, it is not appropriate to raise such contention in the writ proceedings and thereby depriving an opportunity to the respondents to meet that submission. It also cannot be overlooked that the appellants were unable to point out what prejudice was caused to the Government of India by the respondents making the application for revalidation and endorsement after a period of one year from the date of grant of redemption certificate. For these reasons we are unable to accede to the submission of Shri Bhabha that the learned Single Judge should have dismissed the petition refusing to grant any relief to the respondents on the ground that the respondents are guilty of laches in making application for revalidation and OGL endorsement on the imprest licence.

8. The second limb of the submission of Shri Bhabha on the ground of delay is that the learned Single Judge should not have entertained petition under Article 226 of the Constitution, which confers discretionary jurisdiction on the High Court, when the respondents approached the High Court after a considerable delay. It was urged by the learned counsel that the two decisions of the Supreme Court referred to hereinabove and reported in *Rup Diamonds and Others Vs. Union of India and Others*, and *Union of India (UOI) and Others Vs. Suksha International and Nutan Gems and Another*, clearly support the submission that inordinate delay in filing the writ petition should lead to refusal of the relief. There cannot be any debate on the principle that the writ court should be slow in assisting the party which is guilty of laches in approaching the Court. It is also well-settled that there cannot be any fixed period of limitation applicable to all the cases where the relief is sought under writ jurisdiction, and it is necessary for the court to examine whether the approach to writ court is after considerable delay which remains unexplained. Indeed in the decision of the Supreme Court in the case of *M/s. Suksha International and M/s. Nutan Gems (supra)* the Supreme Court observed that the High Court has to examine whether there is satisfactory explanation for the delay. While examining the submission of Shri Bhabha we cannot overlook that the respondents secured the entitlement in view of fulfilling the export obligation under the import policy. The respondents were granted imprest licence in February 1983 in accordance with the existing import policy of April to March 1982-83 and the import obligation was completed on August 14,

1983. The entitlement accrued in the year 1983 is being postponed for last over several years and we cannot defeat the entitlement on a technical ground that the respondents have approached the Court after some laches. It also cannot be overlooked that the learned Single Judge has imposed a heavy penalty upon the respondents while granting relief. The learned Judge not only imposed heavy costs of Rs. 2500/- but reduced the benefit to the respondents by 25%. The appellants received the amount of costs awarded by the learned Single Judge and thereafter preferred the appeal. It is not fair on the part of the Government of India you argue contentions which are technical in nature with a view to defeat the substantive right of a citizen and more so when the appellant happily received the heavy costs awarded by the learned Single Judge.

As regards the contention of approaching the writ court after considerable laches, the said contention is not available in the case of the present respondents or in case of any of seven companion appeals. The respondents filed the application for revalidation and endorsement on November 30, 1984 and that application was turned down on December 14, 1984. The respondents filed writ petition on February 18, 1985 and Shri Bhabha with his usual fairness conceded that the respondents in the present case could not be denied the relief on the ground of delay in approaching the writ court.

9. The last contention urged by Shri Bhabha is that the operative order passed by the learned Single Judge is not in accordance with the directions given by the Supreme Court in several matters. The grievance of the learned counsel is in respect of the directions given in Clause (b)(ii) of the operative order. The learned Judge directed that the endorsement should be valid for import of OGL licence under Paragraph 185 (excluding sub-para 7 thereof) of the AM 1983 Policy except any item, the import of which has been specifically banned under the current policy. Shri Bhabha submits, and in our judgment with considerable merit, that this direction of the learned Single Judge requires modification and the respondents would be entitled to import items permissible under the OGL list in the import Policy of the year 1982-83 and which items are also permissible for import under the OGL list at the time of actual import. The learned counsel invited our attention to the order passed by the Supreme Court in Civil Appeal No. 5619 of 1990 on November 27, 1990, *Union of India v. Premchand Somchand Shah*, where an identical direction was given. In our judgment, the operative part in Clause (b)(ii) of the learned Single Judge requires modification to that extent. Shri Kamdar, learned counsel appearing on behalf of the respondents, submitted that the operative order should be further modified by directing that the revalidation and endorsement should be carried out within a short period. In our judgment, the submission is correct and the appellants must carry out the endorsement of revalidation and OGL endorsement within a period of three months from today.

10. Accordingly, while the appeal is being dismissed, the operative portion in Clause (b)(ii) of the order passed by the Single Judge is modified in the following

terms :-

"(ii) endorse the said licence to be valid for import of OGL items under Paragraph 185 (excluding sub-para 7 thereof) of the April-March 1982-83 Import-Export Policy and which items are also permissible for import under OGL list in accordance with the policy in operation at the time of the import".

The appellants are directed to revalidate the imprest licence and make requisite endorsement in respect of OGL items in accordance with sub-para 5 of Paragraph 185 of Import-Export Policy for the year 1982-83 within a period of three months from today.

The appellants shall pay the costs of the respondents.