
(1980) 01 BOM CK 0003

In the Bombay High Court

Case No : Appeal No. 521 of 1979 in Miscellaneous Petition No. 1938 of 1979

Union of India

APPELLANT

Vs

Loksons Pvt. Ltd.

RESPONDENT

Date of Decision : 28-01-1980

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1989) 43 ELT 226

Hon'ble Judges : Sujata V. Manohar, J; R.A. Jahagirdar, J

Bench : Division Bench

Judgement

Mrs. Sujata Manohar, J.—This is an appeal from an interim order passed by our learned Brother Judge Shah J. on 11th of December 1979 in the present petition whereby the petitioners have been allowed to export silver wires of half the value of the contract quantity.

2. On or about 14th July 1979, the petitioners entered into two contracts with one Messrs Globe Trading Agency Ltd., Dubai, under which the petitioners agreed to sell to Messrs Globe Trading Agency Ltd. Assorted Silver Wires containing 47 per cent silver and 53 per cent copper or any other non-ferrous metal, at a price of Rs. 950/- per kg. The shipment was for August-September 1979. This period has been subsequently extended to 16th of October 1979. One contract was for the supply of about 6350 kgs. of Silver Wires while the second contract was for the supply of about 650 kgs. of silver wires of the above description. In respect of these contracts the petitioners have received remittances of the total value of Rs. 67,50,000/-, from Dubai. Out of these, a remittance of Rs. 7,50,000/- was received on 27th of June 1979. Another remittance of Rs. 1,10,00,000/- was received on 19th of July 1979 and yet another remittance of Rs. 50,00,000/- was received on 28th of July 1979. Originally, the remittances were for larger amounts, but out of these remittances a total amount of Rs. 66,10,000/- is available as against the two contracts which are the subject-matter of the petition. At the time when these contracts were entered into, there were no

restrictions on the export of goods which contained less than 50 per cent silver. Before these goods could be shipped, however, on 13th of August 1979, the Exports (Control) Order was amended. As a result of this amendment, in item 77 of Part "B" of Schedule I to the Exports (Control) Order, 1977, sub-item (iv) was added. Under this sub-item, manufactures and products having 50 per cent or less silver content were permitted to be exported "on merits". It may be noted that Part "B" of Schedule I to the Exports (Control) Order of 1977 gives a list of items the export of which is allowed on merits or subject to a ceiling or other conditions to be specified from time to time. The export policy in respect of this item which was inserted for the first time in Part "B" of Schedule I was also published by a public notice dated 13th of August 1979 which was, in fact, published on 22nd of August 1979. Under the policy so published, it was stated that the provisions of paragraph 295 of the Hand Book of Import-Export Procedures, 1979-80, will not be applicable to any pre-control commitments consequent to the public notice. All cases for pre-control commitments will be decided on merits only where certain conditions have been satisfied. The condition which is relevant for our present purpose is condition (i) which stipulates that advance payment must be received through an authorised dealer in foreign exchange covering the full f.o.b. value of the consignment before the date of this public notice. The notice further provides that the exporters concerned should send their claims in pursuance of the public notice to the original licensing authorities concerned along with documentary evidence relied upon in support of such commitments/contracts having been made as provided therein. Pursuant to this public notice, by their letter dated 29th August 1979, the petitioners applied for permission to export silver wires under the contracts in question. They also stated in the letter that they had received complete advance payment in respect of the said contracts. Two separate letters of the same date were sent to the respondents along with photostat copies of the two contracts. Thereafter, with their letter dated 4th of September 1979, the petitioners enclosed original documents and the certificates of Inward Remittance received. Since the petitioners did not hear from the respondents, they sent a reminder dated 13th of September 1979 asking them to expedite their application and also asking for an appointment in connection with the pending applications. No such appointment was given to the petitioners. By their letter dated 15th of September 1979, addressed to the petitioner, the respondents rejected the applications of the petitioners stating that their applications could not be considered, as they had failed to furnish the documents prescribed in para 3 of Public Notice No. 54-ETC/79, dated 13-8-1979. Thereafter, the petitioners filed the present petition asking, inter alia, for an order or direction directing the respondents to permit the petitioners to export the said goods as per the said contracts. The petitioners took out a Notice of Motion for interim relief in this petition which came up for hearing before our learned Brother, Sawant J. After certain discussions, on 26th of September 1979, our learned Brother Judge directed the respondents to make a report furnishing the reasons why the applications were rejected. Pursuant to this direction, the respondents have

submitted two reports (one in respect of each contract), both dated 8th of October 1979, communicating the reasons for the order in detail. In the reports, the reasons given for rejecting the applications was that, according to the respondents, the petitioners had not complied with condition (1) which was imposed by the public notice of 13th August 1979 relating to receipt advance payment against the contracts prior to the date of the public notice. According to the respondents, the Remittance Certificates were subsequently amended to cover the item of silver products containing 50 per cent or less silver. By his order dated 18th of October 1979, our learned Brother Sawant J. refused to grant any interim relief to the petitioners. From this order, the petitioners preferred an appeal. In view of the contents of the two reports, the petitioners in their affidavit in appeal relied upon certain documents in order to show that the amendments in the Remittance Certificates were made on 3rd of August 1979 prior to the date of the public notice, viz., 13th of August 1979. In this connection, the petitioners relied upon certain letters from Messrs Globe Trading Agency Ltd. to the British Bank of the Middle East and letters from that bank as also from the State Bank of India to the effect that the amendments in the Remittance Certificates were made on 3rd of August 1979. The respondents did not file any affidavit in reply to this affidavit, just as they have not filed any affidavit in reply to the original Notice of Motion. When the appeal came up for hearing the petitioners withdrew the appeal as they were relying on certain new documents which they had obtained after 18th of October 1979. They, therefore, made an application for a review of the order which was passed on 18th of October 1979. They, therefore, made an application was supported by an affidavit in which these new documents were set out. The respondents have filed two affidavits in this application, one in November 1979 and the other in December 1979, in which once again the respondents have set out the reasons why the petitioners cannot be permitted to export the goods under the two contracts. By his order dated 11th of December 1979, our learned Brother Shah J., after considering the reports and the two affidavits which were filed by the respondents, permitted the petitioners to export the goods limited to half the value at the agreed price for the reasons set out in that order.

3. Mr. Paranjape who appears for the respondents has challenged this order by the present appeal. He has raised a number of preliminary points in this appeal. We need not deal with all the points in detail, since this is merely an appeal from an interlocutory order. But we will set out in brief the reasons why the preliminary points do not, *prima facie*, appeal to us. Mr. Paranjape has strenuously urged that the application for review was barred by principles analogous to the principles of *res judicata* because, according to him, all the facts were before Sawant J. when he rejected the petitioners' application for interim relief. He also pointed out that the appeal from this order was withdrawn by the petitioners and hence a review of the original interlocutory order was barred by principles analogous to the principle of *res judicata*. This argument does not have much substance because certain new material has come to light

after the passing of the original interlocutory order of 18th of October 1979. The petitioners obtained from the two banks concerned documents to show that the alterations in the Remittance Certificates were made by the banks on 3rd of August 1979. This is a very material circumstance in the present case since the ground for rejecting the petitioner's applications was based on the alternations in the Remittance Certificates which the respondents suspected had been carried out subsequently. It is true that these documents were available with the petitioners at the time when they filed the appeal, and they had filed an affidavit in the appeal relying upon these documents. Nevertheless, this was new material which was being produced before the appeal Court for the first time and hence the petitioners rightly decided that the correct procedure in such a situation was to ask for a review of the original order. Under these circumstances, the appeal was withdrawn. This withdrawal of the appeal cannot bar the petitioners from applying for a review of the original order. All these are interlocutory orders and at the interlocutory stage, such orders can always be reconsidered if any fresh material comes to light or if there is any change in the circumstances.

4. Mr. Paranjape has next urged that the petitioners do not have any vested right or any fundamental right to obtain an export licence. Hence it is not open to them to ask for an order or directing the respondents to grant them an export licence. Such an order cannot be granted even at the final hearing of the petition, and much less at the interlocutory stage. In this connection, it should be noted that although the petitioners do not have any vested right, nor do they have any fundamental right, to obtain an export licence, nevertheless, if under the export policy announced by the Government they have complied with all the conditions, they are entitled to the grant of an export licence. If the applications are rejected, their right to obtain an export licence is adversely affected and they are entitled to come before the Court in writ petition under Art. 226 of the Constitution. In this connection, a reference may be made to *Godde Venkateswara Rao Vs. Government of Andhra Pradesh and Others*, in which the Supreme Court has held that any person who has been prejudicially affected by an act or omission of an authority can file a writ even though he has no proprietary or even fiduciary interest in the subject-matter.

5. Mr. Paranjape has then pointed out that for the purpose of an interim relief the petitioners are not challenging the public notice of 13th of August 1979. On the contrary, for that purpose they have claimed that they have complied with all the conditions which are laid down under the public notice of 13th of August 1979. Under the policy which is announced by this public notice, it has been stated that all cases of pre-control commitments will be decided on merits only where the conditions stipulated therein are satisfied. Mr. Paranjape has emphasised the words "on merits". He has urged that even after the petitioners comply with the conditions which are laid down in the public notice, still the respondents have an absolute discretion to accept or reject their applications. In our view, this not a correct reading of the public notice, as the Supreme Court has rejected such an exalted claim about the nature of the authority conferred on the respondents to

grant or reject applications for export and import licences at their absolute discretion in the Union of India and Others v. M/s. Anglo Afghan Agencies, AIR 1968 S.C. 718. In any case, this aspect of the matter need not be examined in detail because in the two reports which the respondents have filed in the present case as well as in their affidavits which have been filed in the review application, the respondents have stated that they have rejected the applications of the petitioners entirely on the basis that the petitioners have not complied with the conditions which are laid down in the public notice on 13th of August 1979. In the two reports which were filed on 8th of October 1979 - one in respect of each of the contracts -, the respondents have said that the petitioners have not entered into any pre-control commitment because they have not received advance payment against the contract in question. In the Remittance Certificates which were submitted by the petitioners, the original purpose for the remittance has been scored out and the item "silver products 50 per cent or less silver" has been substituted. On the basis of this alteration, the respondents in the two reports stated that these certificates showed that they had been subsequently amended to incorporate this item, and hence it could not be said that the remittances which were received covered the contracts in question. The second ground which was urged in the report was that the total F.O.B. value for 650 kgs. plus 6350 kgs. of silver wires covered by the contracts in question exceeded the total amount of the three remittances, and hence also it could not be said that the full value of the consignments has been received. These were the only two grounds mentioned in the report. Subsequently, in the two affidavits which have been filed in the review application, the respondents have tried to elaborate on these reasons. The respondents have tried to cast a doubt on the petitioners' case by even going to the extent of suspecting the genuineness of the Bank Certificates which have been obtained by the petitioners. It is somewhat surprising that a responsible officer of the respondents in an affidavit has stated as follows :-

"I submit that sometimes when stakes are very large, businessmen manage to get favourable letters from the Bank staff and the Licensing authorities are not bound to take always letters of Bank on face value and as gospel truth ..."

It is a somewhat startling proposition and it is surprising that such statements are made by responsible officers such as the Deputy Chief Controller of Imports and Exports on an affidavit which is drafted by an Advocate without having any material to doubt the genuineness of the letters. The respondents have merely stated that they wish to probe further in respect of some earlier transactions of the petitioners. In the other affidavit, the respondents have alleged that the prevailing market price of similar products at the material time was higher than the contract price of the petitioners. These are the only reasons by the applications of the petitioners have been rejected.

6. As our learned Brother Shah J. has noted in his order, none of these grounds appears to be substantial. The entire suspicion of the respondents rests on the

alterations in the Remittance Certificates, but this suspicion has been found to be baseless in the light of the documents from the banks which have been produced by the petitioners. In fact, at the hearing of the review application, the learned Advocate for the respondents very fairly conceded that the alterations in the Remittance Certificates were genuine and had been effected prior to the publication of the public notice of 13th of August 1979. This concession has very fairly not been withdrawn before us. Hence there can be no doubt that the alterations made in the Remittance Certificates are of a date prior to the public notice of 13th of August 1979. If this is so, then there can be no doubt that the petitioners have complied with all the conditions which are laid down in the public notice of 13th August 1979. The respondents have merely relied upon these alterations to allege that the contracts themselves are ante-dated. There is no basis for this suspicion either. They have also urged that there is no genuine sale because the contracts do not contain specifications about the commodity which is sold. This again is not correct because the contracts clearly mention that sale is to be effected of assorted silver wires containing 47 per cent silver and 53 per cent copper or any other non-ferrous metal. Our learned Brother Shah J. has also very rightly come to the conclusion that the price of the commodity which is mentioned in the contracts does not appear to be below the market price. It is also not correct to say that full value of the consignment is not received in advance. The shipping documents show that the total value of the consignments comes to Rs. 59,99,250/- since the petitioners are seeking to export only 6315 kgs. of silver wires. The remittances exceed this amount. Under the public notice of 13-8-1979, remittance must cover the full value of the consignment. This condition is complied with in the present case.

7. It has also been urged by the respondents that all relevant documents are not submitted by the petitioners within 15 days of the publication of the public notice. Hence their application cannot be considered. Under the public notice, however, the petitioners were required to submit within 15 days only those documents that pertain to the pre-control contract or commitment. The petitioners have complied with this condition. They have subsequently obtained letters from the banks in order to clear the doubts raised by the respondents regarding alterations in the Remittance Certificates. These letters were not required produced within the stipulated time. Hence the petitioners have not committed any breach of the terms of the public notice. In any case, under the Export (Control) Order, 1977, clause, 5, there are 17 grounds specified on which the licensing authority may refuse to grant a licence. Even if, in addition to the conditions which are specified in the export policy, these grounds are taken as grounds for refusal, none of them is applicable to the present case. It is not the case of the respondents that they have rejected the applications of the petitioners on any ground other than non-compliance with the conditions laid down in the public notice of 13th of August 1979. As far as we can see, the petitioners have complied with all the conditions which are laid down in the public notice of 13th August 1979. They have produced all the relevant documents and

there is nothing more which they can produce. Under these circumstances, nothing more remains to be done and, in our view, there is no reason why we should interfere with the order passed by our learned Brother Shah J. on 11th of December 1979.

8. Mr. Paranjape has urged that the contracts contain a force majeure clause under which, if there is a change in the export policy, such a change would be covered. He has, therefore, urged that the petitioners have not suffered any damage and no interim relief should be granted to them. This argument is also fallacious. There is no reason to suppose that if the petitioners are not permitted to carry out their contracts, they will not suffer any loss or damages. The petitioners are likely to suffer a loss by not being allowed to carry out their contracts even though it is possible that they may have a good defence to the other party's claim for damages.

9. Mr. Paranjape has also strenuously urged that we cannot judge the petitioners' applications for export licences on the basis of the policy existing on 13th of August 1979 because the Export Trade Control Order has again been amended on 2nd of November 1979 and a new export policy pertaining to the items in question has come into effect by a public notice dated 5th of November 1979. According to Mr. Paranjape, the applications of the petitioners must be considered in the light of this new export policy of 5th of November 1979. In support of this contention, he has relied upon two decisions of the Supreme Court reported in *The Deputy Assistant Iron and Steel Controller and Another Vs. L. Manickchand, Proprietor, Katrella Metal Corporation, Madras, and Andhra Industrial Works Vs. Chief Controller of Imports and Others*, In the first decision reported in *The Deputy Assistant Iron and Steel Controller and Another Vs. L. Manickchand, Proprietor, Katrella Metal Corporation, Madras, , the Supreme Court*, on the facts of the case, held that in a case where an application was made for an import licence and on account of certain delays on the part of the applicant the application could not be processed till a later date when a new import policy came into existence, the new policy would govern the application for the grant of a licence. The present case is not such a case, where there is a change in the export policy between the time when the application for a licence was made and the order was passed rejecting that application. In the present case, at the time when the final order was passed on the application, the policy which was in operation was the policy as laid down in the public notice of 13th August 1979. Hence, a subsequent change in the policy which has come into existence long after the petition was filed cannot govern an application which was made and rejected prior to the coming into operation of the new policy. As it has been pointed out by the Supreme Court in *Bharat Barrel and Drum Mfg. Co. (P) Ltd. Vs. The Collector of Customs, Bombay and Another*, such public notices and public notifications are prospective and they cannot govern the applications made and decided upon prior to the coming into existence of such public notices or notifications. There is no substance in this contention of Mr. Paranjape.

10. In the premises, the appeal is dismissed with costs.
11. Notice of Motion No. 31 of 1980 taken out in this appeal by the respondents, dated 11th January 1980, is also dismissed with costs for the same reasons.
12. The appellants apply for a continuation of the interim stay which is granted to them earlier. Mr. Gursahani who appears for the respondents states that his clients will not export the goods in question till 4th of February 1980.
13. In view of this statement, no order on the application for stay.