P. Ripalkumar and Co. Vs. Union of India

P. Ripalkumar and Co. Vs. Union of India

SooperKanoon Citation : sooperkanoon.com/355249

Court : Mumbai

Decided On : Jan-24-1991

Reported in : 1991LC318(Bombay); 1991(54)ELT67(Bom)

Judge : M.L. Pendse and ;S.M. Jhunjhunwala, JJ.

Acts : Customs Act, 1962 - Sections 111 and 112

Appeal No. : Appeal No. 1105 of 1987 in W.P. 1457 of 1987, Appeal No. 1047 of 1987 in W.P. No. 1725 of 1987, W.P.

Appellant : P. Ripalkumar and Co.

Respondent : Union of India

Advocate for Def. : Shri M.S. Sanklecha, ;Shri V. G. Rege, ;Shri M.O. Chinoy and ;Miss A.M. Chandurkar, Advs.

Advocate for Pet/Ap. : Shri D.H. Mehta and ;Shri N.M. Shah, Advs.

Judgement :

Pendse, J.

1. These four proceedings, that is two appeals and two writ petitions, can be conveniently disposed of by common judgment as the dispute involved in these four proceedings is identical. The appeals are directed against the judgment dated

August 19, 1987 passed by the learned Single Judge dismissing the writ petitions filed under Article 226 of the Constitution of India. The two writ petitions were referred to Division Bench and that is how the two appeals and the two writ petitions are placed before us for final disposal. For the purpose of appreciation issues involved in the proceedings we have referred to the facts involved in Appeal No. 1105 of 1987 which arise out of the judgment delivered by Single Judge in Writ Petition in Writ Petition No. 1457 of 1987.

2. The appellants are a partnership firm carrying on business of exporting cut and polished diamonds after importing rough diamonds. The appellants are recognised export house within the meaning of the relevant import policy issued each year by the Government of India and are holders of an export house certificate issued by the Chief Controller of Imports and Exports, New Delhi. The petitioners for the purpose of carrying on its business of import and export avail of various facilities under the import policies issued by the Government from time to time. The import policies broadly classify the importers into two categories, that is Actual Users and Registered Exporters. Registered Exporters are of three types, Manufacturer Exporters, Merchant Exporters and Export/Trading Houses. The Registered Export Houses are entitled to avail of different types of licences to meet their requirements and the licences issued are Replenishment Licence, Advance Licence and Imprest Licence.

During the Import Policy for the period 1982-83 an Export House was entitled to facilities as per Paragraph 183 of the policy. Paragraph 185(4) of the Policy inter alia provided that the facilities for import of OGL items available in sub-para (3) may also be allowed on merits to Export Houses against their advance/imprest licences on account of which they are eligible to obtain REP licence. In such cases, however, the value upto which the OGL import can be allowed shall not exceed the value to which the Export House should have been eligible to the REP licence, had he not obtained the advance/imprest licence in question. The facility was available to the export house only after discharge of the export obligation imposed on the advance/imprest licence. If by the time the Export House becomes eligible to the facility and the imprest licence has expired, or if the original validity left unused by that time is less than six months, then the licensing authority was required to revalidate the licence allotting a further time of six months for the purpose of importing OGL items.

3. Relying on the representation contained in the Policy for 1982-83, the petitioners applied and were granted an imprest licence dated April 29, 1982 for a value of Rs. 28,17,821/- for the import of uncut and sunset diamonds and against which the petitioners had to effect exports of Rs. 43,34,340 F.O.B. value. It is not in dispute that the petitioners carried out the export obligation and were issued redemption certificate on November 16, 1983 by the licensing authorities accepting the fact of fulfillment of the export obligation. In accordance with the provision of Paragraph 185(4) of the Import Policy, the petitioners sought revalidation of the imprest licence with the requisite endorsement for the purpose of importing OGL items. The request made by the petitioners was rejected by the authorities on March 15, 1984. The request was rejected on an extraneous ground that there is no provision to endorse the imprest licence for OGL items in the Policy Book of 1984-85.

H. Patel & Co., a partnership firm whose application for revalidation and endorsement was also rejected by the authorities in similar circumstances filed Writ Petition No. 1465 of 1984 on the Original Side of this Court under Article 226 of the Constitution of India. The petition was allowed by Single Judge by judgment dated September 18, 1984 and the authorities were directed to revalidate the imprest licence and make the requisite endorsement. The Import and Excise authorities carried the matter right upto the Supreme Court, but without any success. The Petitioners also filed Writ Petition No. 2477 of 1984 and the Petition was allowed by Mr. Justice Pratap by judgment delivered on August 20, 1985. The learned Judge directed the authorities to :

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

(b) endorse the licence to be valid for import of OGL items under Paragraph 185 (excluding sub-para 7 thereof) of the April-March 1983-84 Policy except any items the import of which has been specifically banned under the current policy.

The authorities carried appeal against the order of Mr. Justice Pratap before the Division Bench, but the appeal ended in dismissal. The authorities then approached the Supreme Court by filing Special Leave Petition, but that also ended in dismissal.

4. After dismissal of the proceedings in the Supreme Court, the authorities revalidated the imprest licence and made endorsement in the following terms :-

'Items as per OGL of 1982-83 excluding items not permitted to Export Houses under the Import Policy for 1985-88 i.e. excluding items appearing in lists of restricted items, limited permissible items and canalised items. The endorsement has been made in terms of Para 185 of Import and Export Policy 1982-83 subject to the conditions laid down in Para 185(6) and the licence shall not be transferable.'

This endorsement was made by the authorities in view of the judgment delivered by the Supreme Court and reported in : 1987(30)ELT45(SC) [Raj Prakash Chemicals Ltd. v. Union of India] and : 1986ECR1(SC) [Union of India v. Godrej Soaps Pvt. Ltd.].

The petitioners thereupon filed contempt proceedings in this Court claiming that the endorsement is not in accordance with the judgment delivered by Mr. Justice Pratap and which was upheld right upto the Supreme Court. After institution of the contempt proceedings, the Import Control Authorities decided to change the endorsement initially made and made a fresh endorsement on November 6, 1986 in accordance with the decision of Mr. Justice Pratap. The endorsement reads as follows :-

'The licence is 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.'

5. After the revalidation of the imprest licence and the endorsement made by the Import Control Authorities the petitioners opened letters of credit and booked an order with the foreign manufacturers for supply of marble slabs. The foreign

manufacturers sent the goods and the same reached Bombay Port on March 25, 1987. 100% C.I.F. value of the marble slabs imported was Rs. 1,04,010/-. The petitioners filed bill of entry dated March 25, 1987 and the petitioners claimed that as the marble slabs do not appear in Appendix 3, 4, 5, 8, 9 and 15 of 1983 Policy and also not appear in Appendix 2 Part A of the current policy, the import of the same is valid under the OGL. During the assessment of the bill of entry the Appraising Officer issued Query Memo dated March 26, 1987 seeking explanation as to how the imprest licence was valid for the import of items appearing in Appendix 2 Part 4 of the current policy. The petitioners gave their reply claiming that the items imported do not fall in the list of specifically banned items. The Customs Authorities withheld the clearance of the marble slabs and the show cause notice dated April 9, 1987 was served on the petitioners to explain why the marble slabs should not be confiscated under Section 111(d) of the Customs Act read with Section 3 of the Import and Exports (Control) Act, 1947 and why penalty under Section 112 of the Customs Act should not imposed on the petitioners. The petitioners gave explanation but the Customs Authorities made the show cause notice absolute and directed confiscation of goods, but permitted redemption on payment of Rs. 28,260/-. The petitioners paid the redemption price and cleared the goods on February 5, 1990.

6. Before the show cause notice was disposed of, the petitioners filed Writ Petition No. 1457 of 1987 in this Court challenging the legality of the show cause notice and seeking clearance of the goods. The petition was resisted on behalf of the respondents, and the learned Single Judge by the impugned judgment dated August 19, 1987 dismissed the petition. It was contended before the learned Judge that by judgments of the Supreme Court in the case of Raj Prakash : 1987(30)ELT45(SC) , M/s. Indo-Afghan Chamber of Commerce [AIR 1986 SC 1557] and Godrej Soaps Pvt. Ltd. : 1986ECR1(SC) and finally in the case of Navinchandra & Co. v. UOI : 1987(29)ELT492(SC) , it is now settled that holders of additional licences were not entitled to import goods enumerated in Appendix 2 Part B of the Import Policy 1985-88. Before the learned Judge it was not disputed that the decisions of the Supreme Court clearly set out which items could not be imported by the holders of additional licences. A contention was raised before the learned Single Judge that the decisions recorded by the Supreme Court were all in

the cases where the licences involved were additional licences and not imprest licences. It was claimed on behalf of the petitioners that there is difference between additional licence and an imprest licence and in view of the difference the principles settled by the Supreme Court in respect of additional licence should not be made applicable in cases of imprest licence. The learned Judge declined to accede to the submission and held that though the decisions of the Supreme Court are in respect of additional licences, the principle laid down therein squarely applies in cases of imprest licences also. On the strength of that finding the petition came to be dismissed.

7. Shri Mehta, learned counsel appearing on behalf of the appellants, initially raised two contentions to challenge the legality of the judgment of the learned Single Judge. The first submission of the learned counsel was that the learned Judge failed to appreciate the difference and distinction between the additional licence and imprest licence and was in error in applying the ration of the decisions of the Supreme Court to the case of the petitioners who are holders of the imprest licence. The second contention urged by the learned counsel is that even assuming that the endorsement made on the imprest licence by the Import Control Authority did not permit import of marble slabs in accordance with the Policy of the year 1985-88, still the Customs Authorities were not justified in confiscating the goods and release of the same only on payment of redemption charges. After some arguments Shri Mehta stated that the petitioners are not pressing the first contention and relief should be considered with reference to the second contention only.

Shri Mehta submitted that in Navinchandra's case : 1987(29)ELT492(SC) Mr. Justice Sabyasachi Mukherjee, as he then was, while considering the prayer that where contracts have been entered into for import of the goods before the controversy as to what should be imported is settled, the importer should not be penalised, observed that the authorities concerned will decide the contention by taking into consideration all the facts and circumstances of the case, including the claim of bona fide import made by the importers. Shri Mehta also invited our attention to the decision of the Supreme Court in Civil Appeal Nos. 4445 and 4446 of 1988 delivered on December 16, 1988, where the order of confiscation and payment of redemption fine was set aside as the import was made bona fide in pursuance of the orders passed by the Court. Shri Mehta submitted that the facts and circumstances of the present case leave no manner of doubt that the import of marble slabs on March 25, 1987 was bona fide and therefore the order of confiscation and imposition of redemption fine in lieu thereof should be set aside. Shri Mehta requested that instead of remitting the matter back to the Customs Authorities for examining the question, it is desirable that the issue should be decided in the present proceedings to avoid multiplicity of litigation and further delay and expenses to both parties. Shri Sanklecha, learned counsel appearing on behalf of the respondents, very fairly stated that the relief claimed by the petitioners should be determined in the present proceedings and the matter need not be sent back to the Customs Authorities for determining the issue.

8. On the specific statement made by both the counsels we propose to examine the question as to whether on the facts and circumstances of the case the order of confiscation passed by the Customs Authorities and the order of imposition of redemption fine in lieu thereof should be sustained. Shri Mehta submitted, and in our judgment with considerable merit, that the endorsement on the imprest licence of the petitioners were made on November 6, 1986, that is long after the decision of the Supreme Court delivered in the cases of Raj Prakash Chemicals, Indo-Afghan Chamber of Commerce and Godrej Soaps. Shri Mehta submitted that initially the Import Control Authorities had made the endorsement in accordance with the ratio laid down by the decisions of the Supreme Court, but when the petitioners instituted contempt proceedings for not making endorsement in accordance with the decision of Mr. Justice Pratap and which was upheld right upto the Supreme Court, the Authorities changed the original endorsement and made a fresh endorsement. The fresh endorsement was in accordance with the judgment of Mr. Justice Pratap and enabled the petitioners to import all OGL items and the items which were not specifically banned in the Policy which was in operation at the time of import. Shri Mehta submitted that in pursuance of the fresh endorsement made by the authorities the petitioners opened Letters of Credit, booked orders with the foreign manufacturers and imported marble slabs on March 25, 1987. In these circumstances Shri Mehta submits that the action of the petitioners was bona fide and consequently the order of confiscation and

redemption fine in lieu thereof should be set aside. Shri Sanklecha, appearing on behalf of the respondents, on the other hand urged that the petitioners were fully conscious of the ratio laid down by the Supreme Court in the cases of Raj Prakash Chemicals, Indo-Afghan Chamber of Commerce and Godrej Soaps and inspite of that imported item which was not permissible and therefore the order of confiscation cannot be faulted with. We are unable to accede to the submission of the learned counsel. As mentioned hereinabove the initial order obtained by the petitioners from Justice Pratap enabled the petitioners to import all items except those which were specifically banned. The decision in favour of the petitioners was upheld right upto the Supreme Court. The authorities made the endorsement ignoring the decision of Justice Pratap but by referring to the decision in Raj Prakash Chemical's case. Subsequently, the Department changed the endorsement and the fresh endorsement was made in accordance with the decision of Justice Pratap. The petitioners were, therefore, told that whatever may be the decision of the Supreme Court in Raj Prakash's case they are free to import goods which are not specifically banned. In these circumstances no fault can be found with the petitioners for importing marble slabs even assuming that the import was not in accordance with the ratio laid down by the Supreme Court. It cannot be overlooked that the right to import as well as which items can be imported was not settled till the decisions of the Supreme Court and the consistent judgments delivered by this Court permitted the importers to import all items except those which were specifically banned. In these circumstances we cannot accede to the submission of Shri Sanklecha that the import made by the petitioners was not bona fide. Shri Sanklecha submitted that the decision of the Supreme Court in Navinchandra's, where the issue stands settled, was delivered on April 15, 1987. The import in the present case was prior to that date. In these circumstances, in our judgment, the import made by the petitioners cannot be faulted on the ground of mala fide and the order of confiscation was uncalled for. Consequently, the order of confiscation is required to be set aside. As the petitioners have already cleared the goods on payment of redemption fine, it is necessary to direct the respondents to refund the said amount to the petitioners.

9. Appeal No. 1047 of 1987 is directed against the judgment delivered in companion Petition, being Writ Petition No. 1725 of 1987. The imprest licence is

same as in the first case, and the import is of Potassium Cyanide, c.i.f. value of which is at Rs. 66,888/-. In this case also the Customs Authorities have passed the order of confiscation and have imposed redemption fine at Rs. 60,000/- in lieu thereof. The date of import is also in the month of March, 1987 and for the reasons recorded in the first case, the order of confiscation is required to be set aside and the redemption fine paid by the petitioners is required to be refunded by the respondents.

10. The third proceeding is Writ Petition No. 2985 of 1987, where again the import licence is the same and the goods imported are Ethyl Diglycol Ether of c.i.f. value of Rs. 99,310/-. In this matter the Customs Authorities passed order of confiscation on July 11, 1987 and did not permit the petitioners to clear the goods on payment of redemption fine. In this case also the import is in the month of March, 1987. For the reasons recorded in respect of first matter, the confiscation order is required to be set aside.

11. The last proceeding is Writ Petition No. 2270 of 1987 where again the imprest licence is the same and the imported items is Potassium Cyanide, c.i.f. value being of Rs. 4,59,522/-. The Customs Authorities have confiscated the goods without permission to redeem by order dated June 17, 1987. The import was made in April, 1987. For the reasons recorded in respect of the import of the first case, the order of confiscation is required to be set aside in this case also.

12. Accordingly, appeal No. 1105 of 1987 is allowed and the order of confiscation dated December 4, 1989 is set aside and the respondents are directed to refund the amount of redemption fine of Rs. 28,260/- to the petitioners. The amount to be refunded within eight weeks on the petitioners complying with the requisite procedure for refund. The appellants shall pay the costs of the respondents.

Appeal No. 1047 of 1987 is allowed and the order of confiscation passed by the Customs Authorities on May 19, 1987 is set aside and the authorities are directed to refund Rs. 60,000/- which was paid by the petitioners in lieu of confiscation. The amount to be refunded within eight weeks on the Petitioners complying with the requisite procedure for refund. The appellants shall pay the costs of the respondents.

In Writ Petition No. 2985 of 1987 the order of confiscation dated July 11, 1987 is set aside and the petitioners are permitted to clear the goods on payment of requisite duty and also on payment of demurrage charges to the Port Trust Authorities. It is open for the petitioners to approach the Port Trust Authorities seeking relief in regard to the demurrage charges payable. The Customs Authorities shall issue detention certificate in respect of the period from the last free day till the date of confiscation, that is July 11, 1987. The petitioners shall pay the costs of the respondents.

In Writ Petition No. 2270 of 1987 the order of confiscation dated June 17, 1987 is set aside and the respondents should permit the petitioners to clear the consignment on payment of necessary duty and on petitioners' paying the demurrage charges to the Port Trust Authorities. It is open for the petitioners to approach the Port Trust Authorities seeking relief in regard to the demurrage charges payable. The Customs Authorities shall issue the detention certificate in respect of the period from the last free day till the date of confiscation, that is June 17, 1987. The petitioners shall pay the cost of the respondents.

The petitioners are at liberty to approach the Joint Controller of Imports and Exports for seeking revalidation of the imprest licence provided some of the value of the imprest licence is still outstanding.