

Joint Chief Controller of Imports and Exports, Madras

Vs

M/s. Aminchand Mutha Etc.

Civil Appeals Nos. 60 to 62 and 316 to 320 of 1965

(CJI P. B. Gajendragadkar, K. N. Wanchoo, J. C. Shah, J. R. Mudholkar, S. M. Sikri JJ)

21.07.1965

JUDGMENT

WANCHOO, J. –

These eight appeals by special leave against the judgment of the Madras High Court raise a common question of law and will be dealt with together. It will be enough if we give the facts of one case (Jt. Chief Controller v. Amin Chand Mutha-C. A. 60 of 1965), for the facts in the other cases are more or less similar. It appears that there was a partnership firm known as Nainmull Juthmull. This firm had a quota for import of certain things, as it was an "established importer". Established importers used to be given quotas every year and thereafter licences used to be issued to such importers on the basis of the quota allotted to them. The quota was not inheritable or transferable, but under certain circumstances to which we shall refer later it could be divided between partners where the quota-holder was a firm. The firm in the present case had three partners, namely, Amin Chand Mutha, Nainmull-Nathmull and Juthmull Mutha. On January 1, 1957, the firm was dissolved. Consequently in accordance with

Before we consider the point raised in the present appeals we shall briefly refer to the system of licensing which came into force after the Imports and Exports (Control) Act, No. 18 of 1947, (hereinafter referred to as the Act). By s. 3 of the Act, the Central Government was given power to provide for prohibiting, restricting or otherwise controlling in all cases or in specified classes of cases and subject to such exceptions, if any, as may be made by or under the order, the import, export, carriage coastwise or shipment as ship stores of goods of any specified description. This could be done by means of order published in the official gazette. The Act also made by s. 5 any contravention of any order made and deemed to have been made under the Act punishable and by s. 6 provided for cognizance of offences against the provisions of the Act.

In pursuance of the power granted to the Central Government, the Imports (Control) Order was issued on December 7, 1955 (hereinafter referred to as the Order). This Order repealed the earlier orders issued under the Act or the Defence of India Rules 1939. It provided for a system of licensing and r. 3 thereof provided that no person shall import any goods of the description specified in Sch. I, except under and in accordance with a licence or a customs clearance permit granted by the Central Government or by any officer specified in Sch. II. Form of application for licences and fees payable therefor are provided in r. 4 and r. 5 provides for conditions to be imposed on a licensee at the time of granting licences. Rule 6 gave power to the Central Government or the Chief Controller to refuse to grant a licence or direct any licensing authority not to grant licence for certain reasons. One of the reasons for such refusal was if the application for import licence was defective, and did not conform to the prescri

These are the statutory provisions under the Act and the Rules for granting licences. In order however to guide the licensing authorities in the matter of granting import licences, the Central Government issued certain administrative instructions to be followed by the licensing authorities. These instructions provided for grant of import licences to three kinds of persons-(i) established importers, (ii) actual users, and (iii) new comers : (see the Red Book of Rules and Procedure for Import Trade Control for the period January-June, 1957). We are in the present appeals concerned with established importers and may briefly indicate how established importers were dealt with in the Red Book concerned. "Established importers" were defined as persons or firms who had been actually engaged in import trade of the articles comprised in the schedule during at least one financial year falling within the basic period. The basic period out of which the established importer could select the best year for the purpose of cal

After setting out the system of granting quotas to established importers on the basis of their past imports, instructions 71 with which we are particularly concerned, laid down that quotas were granted on the pre- supposition that no change had taken place in the constitution of the firm. The expression "firm" included a partnership, a limited company and a proprietary business. It was further provided that when a change occurred in the constitution or the name of a firm or the business changed hands, the reconstituted firm would not be entitled to the quota of the original firm until the transfer of the quota rights in their favour had been approved by the Chief Controller or other licensing authority, as the case may be. Instruction 71 also provided how the transfer of quota rights would be recognised or approved. In the present case we are concerned with cl. (b) of Instruction 71, which is in these terms :-

"Where a firm is dissolved, and the partners agree to divide its business, assets and liabilities, and its goodwill is taken over by one of the partners or none of them is allowed to use it, the partners shall get their respective share in the quota rights according to the provision of the agreement."

Instruction 72 provided for documentary evidence to be produced by the applicants in support of their case for transfer of quotas.

It will be seen that these administrative instructions do not create any right as such in favour of persons with whom they deal. They are for guidance of the authorities in the matter of granting quotas for the purpose of the Order. That is why when cl. (b) of Instruction 71 provides for division of quota rights it lays down that the partners shall get their respective share in the quota rights according to the provision of the agreement between them. Once the Chief Controller is satisfied, on the evidence produced before him that the firm had certain quota rights and had been dissolved, he has to divide the quota rights between partners in accordance with the provisions of the agreement between them. As we read cl. (b), it is clear that where the conditions contained in Instruction 71 are fulfilled, the Chief Controller must divide the quota rights in accordance with the provisions of the agreement between the partners of the firm that has been dissolved. Clearly therefore these administrative instructions

Two views have been expressed by the High Courts in this behalf. The Madras High Court took the view in Jain's case (1) I. L. R. [1959] Mad. 850 that "where a firm is dissolved and the partners agree to divide the business, assets and liabilities, the partners shall get their respective share in the quota rights according to the terms of the agreement. Such rights would accrue to each of the partners from the date of the agreement. " The Madras High Court further held that even where the approval of the Chief Controller is made after the licensing period for which application has been

made is over, the approval dated back to the time when the firm was dissolved and the agreement to divide the quota rights was made. The licensing authority therefore according to this view has to deal with the application for licence on the basis that the approved quotas were given to the partners of the dissolved firm from the date of the agreement and cannot refuse the licence only on the ground that the approval was granted

The other view is taken by the Bombay High Court in *Jagannath v. Varadkar* (2) A. I. R. [1961] Bom. 244. It was held in that case that the transfer of quota rights was a condition precedent to the grant of an import licence. The person in whose favour such a transfer had been recognised or sanctioned was consequently entitled to rely upon that transfer for a period subsequent to such sanction or recognition and not for any anterior period, even though the application for licence might have been made in proper time before the import period expired.

We have given the matter careful consideration and are of opinion that the view taken by the Madras High Court is correct. We have already pointed out that on a proper interpretation of Instruction 71, there is no doubt that the Chief Controller is bound to divide the quota of a firm consisting of partners which has been dissolved in accordance with the provisions of the agreement between the partners provided the necessary evidence has been produced before him, as required by Instruction 72 in that behalf. Such being the nature of the proceeding before the Chief Controller it follows that when he gives approval to the division of the quota between the partners of a dissolved firm in accordance with the agreement between them, the approval must take effect from the date of the agreement between the partners. It might have been a different matter if the Chief Controller had the power to refuse division of the quota rights under these instructions; but he has no such power and must divide the quota in accordance

The fact that in his letter of approval the Chief Controller usually says that the quota rights admissible to the dissolved partnership should in future be divided between the partners would not necessarily mean that the quotas for the partners were to take effect only after the date of approval. If the division of quota has to be recognised by the Chief Controller on production of evidence required by Instruction 72 and this division has to be in accordance with the agreement between the partners of a dissolved firm, the approval must relate back to the date of agreement, for it is the agreement that is being recognised by the Chief Controller. In such a case the fact that the Chief Controller says that in future the quota would be divided, only means that the original quota of the undissolved firm would from the date of the agreement of dissolution be divided between partners as provided thereunder.

Further we would like to make it clear that quotas should not be confused with licences. Quotas are merely for the purpose of informing the licensing authority that a particular person has been recognised as an established importer for import of certain things. Thereafter it is for the licensing authority to issue a licence to the quota holder in accordance with the licensing policy for the half year with which the licence deals. For example, if in a particular half year there is an order of the Central government prohibiting the import of certain goods which are within the quota rights, the licensing authority would be entitled to refuse the issue of licence for import of such goods whose import has been banned by the Central Government under the Act by notified order. Thus the approval of the Chief Controller under Instruction 71 is a mere recognition of the division made by the partners of a dissolved firm by agreement between themselves and in that view the recognition must clearly relate back to the date

It was next urged that the application when it was made to the Joint Chief Controller was not

complete inasmuch as it did not mention what quota the particular partner had. That is undoubtedly so for the applications in the present cases stated that the firm had been dissolved and application had been made to the Chief Controller for division of the quota of the original firm between the partners according to the agreement between them. To that extent the application was defective. It is pointed out that under Instruction 13 application for licence has to be made before a certain date and has to be complete in all respects. It was further urged that it is always open to the Joint Chief Controller to reject an application which is defective and is thus incomplete. Assuming that is so, one should have expected such a defective application being dismissed immediately after the last date for making the application had expired and the Joint Chief Controller should have given that as the reason for the rejection o

The last point urged was that subsequent to October 1957, Government of India changed its policy with respect to import of fountain pens with which some of the present appeals are concerned. This it was urged amounted to a ban on the import of fountain pens and it would not be open to the Joint Chief Controller to issue any licence for any period, be it January-June 1957, after the import of fountain pens had been banned from October 1957. Now there is no doubt that it is open to the Central Government under s. 3 to prohibit the import of any article but that can only be done by an order published in the official gazette by the Central Government under s. 3. The High Court has found that no such order under s. 3 of the Act has been published. Nor has any such order by the Central Government been brought to our notice. All that has been said is that in the declaration of policy as to import, the word "nil" appears against fountain pens. That necessarily does not amount to prohibition of import of fountain pen

The appeals therefore fail and are hereby dismissed with costs. There will be one set of hearing fee.

MUDHOLKAR, J. –

A common question of law arises for decision in these appeals. The essential facts bearing on this question being more or less similar it would be sufficient to state those which give rise to Civil Appeal No. 60 of 1965. A partnership firm styled as Nainmull Juthmull carried, on, amongst other things, the business of importing goods from foreign countries. As an established importer, the Joint Chief Controller of Imports and Exports Madras had granted it a quota for import of certain commodities. On the strength of this the firm used to be granted import licences every half year. There were three partners in that firm, namely, Aminchand Mutha, Nainmull Nathmull and Juthmull Mutha. On January 1, 1957 the firm was dissolved. On March 25, 1957 Aminchand Mutha made an application to the appropriate authority for the grant of an import licence in respect of the period January-June, 1957 stating in his application the facts that the firm Nainmull Juthmull held a quota certificate, that the firm was

The point which is urged on behalf of the respondents in these appeals is that the Joint Chief Controller is bound to grant an import licence for the period for which it was sought even though the division of quota rights was approved by the Chief Controller subsequent to the expiry of the licensing period provided that the application for the grant of the licence was made within time and an application for division of quota rights is made before the expiry of the licensing period. The contention of Mr. Viswanatha Sastri who appears for all these respondents is that in such cases the approval of the Chief Controller of the division of quota rights even though accorded after the expiry of the licensing period would relate back to the date of dissolution of the firm or at any rate to the date of the application for approval.

It would be appropriate to advert now to the legal position pertaining to the import of foreign goods. In the first place there is the Imports & Exports (Control) Act, 1947. Sub-section (1) of s. 3 of that Act, amongst other things, provides that the Central Government may by order published in the Gazette prohibit, restrict or otherwise control in all cases or in specified classes of cases and subject to such exceptions, if any, as may be made by or under the order " (a) the import.... of goods of any specified description". Sub-section (2) makes the provisions of s. 19, Sea Customs Act applicable to goods with respect to which any order under sub-s. (1) of s. 3 of the Imports & Exports (Control) Act, 1947 has been made. Sub- section (3) of that section provides as follows :

"Notwithstanding anything contained in the aforesaid Act, the Central Government may, by order published in the Official Gazette, prohibit, restrict or impose conditions on the clearance, whether for home consumption or for shipment abroad of any goods or class of goods imported into the Provinces of India."

Section 5 provides for certain penalties for contravention of any order made or deemed to have been made under the Act. In exercise of the powers conferred by s. 3 the Government of India promulgated on December 7, 1955 an Order for the control of import trade. Clause (3) thereof runs thus :

"Restriction on import of certain goods.-Save as otherwise provided in this Order, no person shall import any goods of the description specified in Schedule I, except under, and in accordance with, a licence or a customs clearance permit granted by the Central Government or by any officer specified in Schedule II."

Clause 4(1) provides for making an application for grant of a licence to import. Clause (5) provides for attaching conditions to a licence issued under the Order. Clause (6) confers power on the Government of India or the Chief Controller of Imports & Exports to refuse to grant a licence for any of the reasons specified in that clause. Clause 8 empowers these authorities to suspend the issue of licences or debar a licensee from receiving licences and clause 9 provides for cancellation of licences. The grounds on which action can be taken under either of these clauses are also specified in them. It is not necessary to refer to the other clauses of this Order. Appended to the Order are schedules contemplated by cl. (3) of the Order. Amongst the grounds for refusal of licence under cl. (6) the following are relevant for the purpose of deciding the point which arises before us:

- " (a) if the application for a licence does not conform to any provision of this Order;
- (e) if the application for an import licence is defective and does not conform to the prescribed rules;
- (g) if the applicant is not eligible for a licence in accordance with the Import Trade Control Regulation;"

Reading the Act and the Import Control Order together it would follow that no person is entitled to import into India goods or commodities included in Schedule I of the Order except in accordance with the provisions of the Act and of an Order promulgated thereunder by the Government of India or as permitted by that Order. The Import Control Order, save in cases falling within cl. (11) of that Order, prohibits the import of any commodity set out in Schedule I except under a licence issued under the Order. The granting of licences for import of commodities into India and the allotment of the requisite foreign exchange for the purpose is regulated by the policy framed in that behalf from

time to time by the Government of India. The commodities sought to be imported by each of the respondents are those included in Schedule I and could be imported only under a licence. Each of them claims to be an established importer in the sense that he is entitled to a proportionate quota which had been allotted to the dissolved

The principles to be borne in mind while dealing with applications for licence for import are set to in what is known as "Red Book" which is issued by the Government from time to time with respect to each licensing period. The title of the book is "Import Trade Control Policy". The procedure to be followed by the authority while dealing with applications for import licences is given not only in this book but also in what is called the "Handbook". The Red Book in addition to the instructions, also contains the "Policy Statement" which gives details of licensing policy for the particular licensing period dealt with in that book. The instructions divide the intending importers into four broad categories (a) established importers; (b) actual users; (c) newcomers and (d) others who do not come in any of the above categories (see para 22 of the Handbook). The share available to the applicants in these categories is fixed from time to time. We are here concerned with category (a), that is, with established importer

" (b) Division of Quota Rights.-Where a firm is dissolved, and the partners agree to divide its business, assets and liabilities, and its goodwill is taken over by one of the partners or none of them is allowed to use it, the partners shall get their respective share in the quota rights according to the provision of the agreement."

In these appeals we are concerned only with cases which fall under this sub-paragraph. Consideration of all the provisions of the Act and the order along with the instructions leaves no doubt that no person has a right to import a foreign commodity into India the import of which is prohibited. Where, however, the ban on import of foreign goods is permitted to be lifted in favour of a person who has obtained a licence for import under the Order he can make an application for grant of a licence. But even then he must comply fully with the requirements specified in the Control Order and make the application in the prescribed form. The instructions contained in the Handbook and the Red Book including those in paragraph 71 are meant for the guidance of the Licensing Authority and cannot be put higher than administrative instructions. It would follow, therefore, that such instructions would not confer a legal right upon an exporter for the division of the quota rights of a dissolved firm and for treating him as an he question which we are called upon to decide. Further, even though a firm is an established importer it cannot be said to possess a legal right to import according to its quota. If the firm itself had no legal right to import according to its quota there is no room for saying that upon its dissolution each of its erstwhile members would acquire a right to import either in proportion to their respective shares in the firm or in the proportion provided for in the agreement where under the dissolution was effected or be entitled to be treated as an established importer. The Government, however, with a view to ensure a fair administration of the licensing system has given instructions in paragraph 71 of the Red Book to certain authorities to divide the quota rights of the dissolved firm in the manner provided in sub-para (b). The failure of the authority concerned to abide by these instructions may conceivably draw upon that authority certain consequences but would not confer any justiciable right upon any mem

Now, what has happened here is that though the applications for licences were made for a specified period within the time allowed they were rejected and the applicants were informed by the licensing authority that the division of quota rights would be given effect to only for future periods inasmuch as the divisions were recognised by the appropriate authority after the expiry of the particular periods to which the applications for import licences related. As rightly pointed out by my brother

Wanchoo J. a quota right is not something which is transferable or heritable in law. It would follow therefore that recognition of a division of quota rights ad thus treating him as an established importer, though he was not one, is no more than a concession given by the appropriate authority in pursuance of administrative instructions. Where, therefore, the recognition of a division of quota rights is accorded by the Chief Controller of Imports and Exports, as was doe in these cases, only in respect of future imports,

"Whether the constitution of the firm has undergone any change after the issue of the quota certificate to the firm ? If so, quote No. and date of orders issued by the appropriate authority sanctioning transfer of quota rights in favour of the applicant."

This clearly shows that an application as an established importer can be made by a firm or person claiming the whole or a part of the quota only after the appropriate authority has sanctioned transfer of quota rights. For, the information required by this sub-para to be furnished cannot possibly be furnished till the recognition of the division is accorded by the Chief Controller of Imports and Exports. The consequence that would ensue, if an application is made for grant of a licence without furnishing the information required by this sub-para is that application would have to be treated as defective and would, therefore, be liable to be rejected under cl. (6) of the Control Order. Here, on the respondent's own showing the appropriate authority had not recognized the division of the dissolved firm's quota rights by the date on which he made an application for grant of an import licence for the period January to June 1957. He could not thus claim to have been an established importer though he purported to ap

It is, however, said that the recognition of the division must relate back to the date of the mutual dissolution of the firm or at least to the date of the application to the Chief Controller for recognition of the division. A similar argument was advanced before a Bench of the Bombay High Court of which I was a member in *Jagannath Prabhashankar Joshi v. Varadkar* (1) 63 Bom. L. R. 1. and in rejecting it I observed as follows :

"There is one more thing which we would like to point out and that is that an application for the grant of an import licence to a firm, which has undergone a change in its constitution, could be made only after the sanction regarding transfer of the quota rights is issued in its favour. That is what is provided in paragraph 13. Therefore, the application made by the petitioners to the first respondent on the 27th of December, 1957 cannot be regarded as a proper application at all. This is made clear in the Form itself which amongst other things requires the following to be answered :

'Whether the constitution of the firm has undergone any change after the issue of the quota certificate to the firm? If so, quota No. and date of orders issued by the appropriate authority sanctioning transfer of quota rights in favour of the applicant.'

"It is clear from this position that unless the quota certificate in favour of the reconstituted firm is sanctioned by the Chief Controller of Imports and Exports, that firm would not be entitled to obtain an import licence on the ground of its being an established importer and a grantee of a quota certificate."

The decision to the contrary in *Jain's case* (2) I. L. R. [1959] Mad, 850 was also cited in *Jagannath's case* (1) 63 Bom L. R. 1. and in particular the following observations therein :

"We are in entire agreement with this reasoning. Sub-clause (b) of paragraph 74 is quite clear that where a firm is dissolved and the partners agree to divide its business, assets and liabilities the partners shall get their respective share in the quota rights according to the provisions of the agreement. Such rights would accrue to each of the partners from the date of the agreement. The fact that approval of the agreement (assuming such approval is necessary) is given by the Chief Controller of Imports and Exports on a later date, it cannot be said that the rights of the partners would accrue only on and from the date of such approval. The words 'in future' can be understood to mean 'from the date of the dissolution'."

Dealing with them I observed as follows :

"With respect, we cannot accept the view taken by the learned Chief Justice and concurred in by the learned Judge. In so far as quota rights are concerned, Chagla C.J. in an unreported judgment dated 17th March, 1957 in Chimanlal Popatlal v. B. M. Choksey (Appeal No. 12 of 1957) observed as follows :

'But this quota has no market-value; it is not ordinarily transferable or assignable. It is merely a licence or a permit given to a particular party to enable him to import paper into India and as such it has no inherent value.'

"Thus, according to this Court a quota right is not a 'property' which is transferable in law. If that view is correct-and with respect we think it is,-it follows that by reason of the dissolution of the partnership, no transfer takes place with respect to quota rights. It is true, that the Import and Export Authorities are required to take into account a transfer of quota rights, but that is so, because of the instructions specifically issued in this regard by the Central government and which are to be found in the Book entitled 'Import Trade Control Policy'. These rights, such as they are, must be said to be a creation of the Government notifications and would necessarily be exercisable to the extent and in the manner provided in those notifications. In paragraph 72 of the 'Import Trade Control Policy' Book it is clearly laid down that when a change occurs in the constitution of a firm the re-constituted firm will not be entitled to the quotas of the original firm until the transfer of the quota rights in th

I shall maintain the view that I took. I would, however, add that by saying 'the rights such as they are', what I meant was that even if the transfer be said to confer rights, the rights themselves being the creation of the instructions contained in para 72 of the Red Book (corresponding to para 71 of the Red Book for January-June, 1957) would arise only upon strict compliance with the instructions. It is true that here there is no transfer by the firm of its quota rights but upon its dissolution there was a division of its quota rights by the erstwhile partners amongst themselves. Under sub-para (a) (ii) of para 71 no one would be entitled to the firm's quota but under sub- para (b) the quota would be distributed amongst the partners according to the provision in that behalf in the agreement of dissolution. The case being one of the business of the firm changing hands as contemplated by the opening words of para 71 the approval of the Chief Controller of Imports and Exports to the division of quota rights was

In support of the contention that the approval of the Chief Controller of Imports and Exports would relate back to the date of dissolution it was contended that since the Chief Controller of Imports and Exports had no right to refuse to recognize a transfer (on the division of quota rights) the rights of

the transferee would accrue to him as from the date of the transfer. I cannot accede to the proposition that in no circumstances can the Chief Controller of Imports and Exports refuse to recognize a transfer. Indeed, in Jagannath's case (1) 63 Bom. L. R. 1 such recognition was refused on the ground that the requirements of the instructions had not been carried out. It was only after the parties concerned carried them out by the subsequent execution of proper document that the transfer was recognized. There might conceivably be other cases in which recognition of transfer or division of quota rights could be properly refused. The argument is, therefore, on its very face clearly untenable.

To sum up the position is this. The respondent made an application for grant of licence to import a commodity included in Schedule I to the Control Order upon a form meant to be used by an established importer. On the date of the application he was not an established importer and was, therefore, incompetent to apply for an import licence upon the basis that he was an established importer. No doubt, he was member of a firm which was an established importer and held a quota right for import of commodities included in Schedule I. No application was made by or on behalf of that firm because that firm had been dissolved before the respondents made an application for grant of import licence. The right to a quota is not a legal right and it is only in pursuance of certain administrative instructions that the licensing Authority allots quotas to established importers. In pursuance of these instructions the Chief Controller of Imports and Exports is empowered to recognise the division of quota allotted to a firm whic

In the result I would allow the appeals, set aside the judgment of the High Court and dismiss the writ petition with costs in all the courts. There will be only one hearing fee in all these appeals.

ORDER

In accordance with the opinion of the majority the appeals are dismissed with costs. One set of hearing fee.

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