

Union of India

Vs

Godrej Soaps Pvt. Ltd. and Another

Civil Appeal No. 3418 of 1986

(R. S. Pathak, Sabyasachi Mukharji JJ)

12.09.1986

JUDGMENT

SABYASACHI MUKHARJI, J. -

1. This is an application for special leave to appeal against the order of the Division Bench of the Bombay High Court dated July 22/23, 1986 filed on behalf of the Union of India.

2. M/s Godrej Soaps (P) Limited, and a shareholder and Director of the said company, Mr A.B. Godrej who were petitioners went before the Bombay High Court in Writ Petition No. 1665 of 1986. The said petitioners who are respondents herein (hereinafter described as respondents) purchased 544.860 metric tonnes of Palm Kernel Fatty Acid on high sea basis imported under an additional licence. They challenged the action of the Customs authorities refusing to permit the clearance of the said Palm Kernel Fatty Acid in view of the decision of this Court in Raj Parkash Chemicals case [Raj Parkash Chemicals Ltd. v. Union of India, (1986) 2 SCC 297] and Indo Afghan Chambers of Commerce case [Indo Afghan Chambers of Commerce v. Union of India, AIR 1986 SC 1567 : (1986) 3 SCC 352].

3. It may be mentioned that one Messrs Dimexon a firm carrying on business of importing rough diamonds and exporting cut and polished diamonds were issued Export House Certificate under the import policy for the period 1978-79 and certain additional Licences in or about the month of July 1986 covered by the licensing period AM-79. The said licence was claimed to have been issued in compliance with the order of this Court dated April 18, 1985. As the purport of that order was the subject matter of two subsequent decisions of this Court and the genesis of the right of the present respondents was claimed from the said decision, it may not be inappropriate to refer to the said decision. The said decision was given in Civil Appeal No. 1423 of 1984. This Court held that there was no requirement of diversification of exports as a condition for the grant of Export House Certificates in the Import Policy for the year 1978-79. In that appeal, this Court confirmed the High Court's judgment quashing the order whereby the government had refused Export House Certificates on the ground that the petitioners in those cases had not diversified its export and as such were not entitled to Export House Certificates. The High Court quashed that order. This Court confirmed that direction of the High Court and further directed the Union of India and its employees to issue the necessary Export House Certificates for the year 1978-79 within a period of three months from the date. This Court further directed as follows :

Save and except items which are not specifically banned under the prevalent import policy at the time of import, the respondents shall be entitled to import all other items whether canalised or otherwise in accordance with the relevant rules. Appeals are

disposed of accordingly with no order as to costs.

This direction was given by a Bench of three learned Judges consisting of S. Murtaza F. Ali, A. Varadarajan and one of us (Sabyasachi Mukharji, J.).

4. According to the petitioners before the Bombay High Court in pursuance of the order of this Court, Import Trade Control Authority issued diverse additional licences expressly covered by the licensing period AM-79 whereunder the description of the goods was as under :

This licence is valid for import of items permissible to export houses under additional licence category as per para 176 of Import Policy for 1978-79 excluding those items which were banned in the Policy for the period 1978-79 and which have been banned in the Import Export Policy volume 1, 1985-88. The additional licence category import shall be subject to the provisions of para 176 of the import policy for 1978-79.

5. It was the contention of the petitioners before the Bombay High Court that it was absolutely clear that the holders of the said licences would be entitled to import items permissible to export houses under the additional licence category as per para 176 of the Import Policy for 1978-79.

6. It may be mentioned that the said direction of this Court came up for consideration before this Court again in Civil Appeal No. 4978 of 1985 - Raj Parkash Chemicals Ltd. v. Union of India [Raj Parkash Chemicals Ltd. v. Union of India, (1986) 2 SCC 297]. This Court clarified the decision in that case which was rendered by a Bench of three learned Judges consisting of V. D. Tulzapurkar, J. and both of us (R.S. Pathak and Sabyasachi Mukharji, JJ.).

7. As this Court has observed in Indo Afghan Chambers of Commerce v. Union of India [Indo Afghan Chambers of Commerce v. Union of India, AIR 1986 SC 1567 : (1986) 3 SCC 352] the order dated April 18, 1985 has been considered by this Court in Raj Parkash Chemicals Ltd. v. Union of India [Raj Parkash Chemicals Ltd. v. Union of India, (1986) 2 SCC 297] to mean that : (SCC pp. 355-56, para 4)

only such items could be imported by diamond exporters under the Additional Licences granted to them as could have been imported under the Import Policy 1978-79, the period during which the diamond exporters had applied for Export House Certificates and had been wrongfully refused, and were also importable under the Import Policy prevailing at the time of import, which in the present case is the Import Policy 1985-88. These were the items which had not been "specifically banned" under the prevalent Import Policy. The items had to pass through two tests. They should have been importable under the Import Policy 1978-79. They should also have been importable under the Import Policy 1985-88 in terms of the order dated April 18, 1985.

The Court had no occasion to consider the significance of the words "whether canalised or otherwise" mentioned in the order dated April 18, 1985 because that point did not arise in the case before it. The respondents rely on those words in this case in order to justify the import of the commodity under consideration.

8. What did the Court intend by those words ? We have seen that a diamond exporter can import the items he was entitled to import under the Import Policy 1978-79 provided they are importable also under the Import Policy ruling at the time of import. They are items which are open to import by an Export House holding an Additional Licence for sale to eligible Actual Users (Industrial). These are

items which could be directly imported, for example, the items enumerated in Part 2 of List 8 of Appendix VI of the Import Policy 1985-88. These are items which are not 'canalised'. 'Canalised' items are those items which are ordinarily open to import only through a public sector agency. Now although generally they are importable through a public sector agency only, it is permissible for the Import Policy to provide an exception to that rule, and to declare that an importer may import a canalised item directly. For instance, paragraph 75(1) of the Import Policy 1985-88 entitles a Trading House holding an Additional Licence to directly import canalised items in Appedix V Part A to the extent laid doen in that Policy. There is nothing to prevent an Import Policy from providing in the future that an Export House holding an Additional Licence can directly import certain canalised items also. In that event, in view of the aforesaid discussion, an Export House holding an Additional Licence will be entitled to import items open ordinarily to direct import (non-canalised items) as well as items directly importable although on the canalised list. It is in that sense that the Court could have intended to define the entitlement of a diamond exporter. He would be entitled to import items "whether canalised or not", if the Import Policy prevailing at the time of import permitted him to import items falling under each category. The Court would not know whether in the future certain canalised items could be imported directly by an Export House holding an Additional Licence. The possibility of a policy being framed in the future enabling an Export House holding an Additional Licence to directly import items which are 'non-canalised' and also items which are 'canalised' cannot be ruled out. It is in this light that the Court can be said to have used the words "whether canalised or otherwise" in its order dated April 18, 1985.

9. The point from a slightly different angle was considered in Writ Petition No. 199 of 1986 in Indo Afghan Chambers of Commerce with Civil Appeal No. 664 of 1986 [Indo Afghan Chambers of Commerce v. Union of India, AIR 1986 SC 1567 : (1986) 3 SCC 352] dated May 15, 1986 by a Bench consisting of both of us (R.S. Pathak and Sabyasachi Mukharji, JJ.). There Indo Afghan Chambers of Commerce and its President aggrieved by the grant of additional licences to the respondents, M/s Rajnikant Brother and M/s Everest Gems for the import of dry fruits came to this Court. This Court examined some of the contentions. This Court reiterated that by the order dated March 5, 1986 [Raj Parkash Chemicals Ltd. v. Union of India, (1986) 2 SCC 297], this Court has construed its order dated April 18, 1985 referred to hereinbefore to mean that only such items could be imported by diamond exporters under the Additional Licences granted to them as could have been imported under the Import Policy 1978-79, the period during which the diamond exporters had applied for Export House Certificates and had been wrongfully refused, and were also importable under the Import Policy prevailing at the time of import which in the present case was the Import Policy 1985-88 i.e. it meant to say that those importable at the time when licence was refused and must continue to be importable at the time when import is sought i.e. 1985-88. These were the items which were not specifically banned under the prevalent Import Policy. That is the construction. The items had to pass through two tests. These should have been importable under the Import Policy 1978-79. These should have been importable under the Import Policy 1985-88 in terms of the order dated April 18, 1985. The Court examined the facts of that case.

10. Regarding dry fruits, this Court observed as follows : (SCC p. 359, para 12)

In our opinion the respondents diamond exporters are not entitled to import dry fruits under the Import Policy 1985-88 under the Additional Licences possessed by them. They are also not entitled to the benefit extended by the judgment of this Court dated March 5, 1986 [Raj Parkash Chemicals Ltd. v. Union of India, (1986) 2 SCC 297] to those diamond exporters who had imported items under irrevocable Letters of Credit opened and established before October 18, 1985. It appears from the record before us that the respondents diamond exporters opened and established the irrevocable

Letters of Credit after that date.

11. Bearing in mind the aforesaid enunciation of law, we have to examine this case. It is the case of the respondents, Godrej Soaps Co. Ltd. and its Director that they have purchased 544.860 metric tonnes of Palm Kernel Fatty Acid (now called 'the said acid') on high seas basis from M/s Dimexon. M/s Dimexon had imported the said acid on the strength of an Additional Licence issued to it pursuant to the order of this Court dated April 18, 1985 in Union of India v. Rajnikant Bros [CA 1423 of 1984 dated April 18, 1985]. The Customs authorities, according to the said respondents, refused to permit clearance of the said acid on the ground that the canalised items could not be imported even under such additional licence. The respondents, therefore, filed a writ petition in this Court requiring the Union of India and the Customs authorities to permit clearance of the said acid. It may be mentioned, the said acid was not a canalised item under the Import Policy 1978-79. It is a canalised item under the current Import Policy 1985-88.

12. As the government refused to permit clearance of the said goods because the said goods were canalised, the learned Single Judge of the Bombay High Court by its order dated July 10, 1986 permitted the clearance of the goods in question.

13. Aggrieved by the said order, Union of India preferred an appeal before the Division Bench of the Bombay High Court. The Division Bench was pleased to, by its order dated July 23, 1986, allow clearance of the goods. It is the submission of the Union of India that this direction was contrary to the directions given in Raj Parkash case [Raj Parkash Chemicals Ltd. v. Union of India, (1986) 2 SCC 297] and Indo Afghan Chambers case [Indo Afghan Chambers of Commerce v. Union of India, AIR 1986 SC 1567 : (1986) 3 SCC 352].

14. In respect of Palm Kernel Fatty Acid which is a canalised item listed as item 9(v) in Appendix V Part B of the Import Policy 1985-88, there is no provision in that Policy which permits the import of such item by an Export House holding an Additional Licence. Therefore, the claim of the diamond exporters, or, as in this case a purchaser from the diamond exporter, must fail because it is not open to import by the diamond exporter under any provision of the Import Policy 1985-88.

15. Therefore, we are unable to accept the contentions of the respondents and both on grounds of equity and construction, we are of the opinion that this appeal must be allowed and decision of the High Court of Bombay impugned in this appeal must be set aside. As importation of canalised items directly by holders of additional licences are banned, it should not be construed to have been permitted by virtue of the order of this Court and the items sought to be imported do not come within List 8 of Part 2 Appendix 6 of the Import Policy of 1985-888 against additional licences. The goods in question which were sought for by the respondents fall under item 9 Part B of Appendix 5 which is the canalised item and as such cannot be allowed to be imported against Additional Licence granted pursuant to the order of this Court dated April 18, 1985. As we have mentioned hereinbefore the respondents were fully aware of the position in law and they purchased goods on June 27, 1986, there is no equity in their favour.

16. In this case no injustice would be done by this order. The goods were purchased by the present petitioners only on June 27, 1986 after they were aware of the judgment of this Court in Raj Parkash case [Raj Parkash Chemicals Ltd. v. Union of India, (1986) 2 SCC 297] as well as Indo Afghan Chambers of Commerce case [Indo Afghan Chambers of Commerce v. Union of India, AIR 1986 SC 1567 : (1986) 3 SCC 352]. No question of any restitution of rights arises.

17. It was further submitted that in any event under item 1 of Appendix 6 (import of items under Open General Licence) of the Import Policy, 1985-88, raw materials, components and consumables (non-iron and steel items) other than those included in the Appendices 2, 3 Part A, 5 and 8 will be permissible by the Actual User (Industrial). It was submitted that the respondents herein were Actual Users (Industrial) because these were used by them for their production. This contention cannot be accepted firstly because it comes within specific prohibition of item 9 in Part B of Appendix 5 being fatty acid and acid oil which were importable only by the State Trading Corporation of India under Open General Licence on the basis of foreign exchange released by the government in its favour. Secondly the actual importation was not by the petitioners but by somebody else as mentioned hereinbefore, being M/s Dimexon Co. In the premises, the view on the Bombay High Court cannot be sustained.

18. In that view of the matter special leave is granted. The appeal is allowed. The order of the High Court under challenge is set aside. The appellant is entitled to the costs.

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