

Union of India and Others

Vs

M/S. Suksha International and M/S. Nutan Gems and Another

Civil Appeal Nos. 8 and 9 of 1989

(CJI R. S. Pathak, M. N. Vankatachaliah JJ)

02.01.1989

JUDGMENT

VENKATACHALIAH, J. –

1. By these two special leave petitions under Article 136 of the Constitution, the Union of Indian and the Chief and the Joint Chief Controllers of Import and Exports seek special leave to appeal from two appellate judgments of the Division Bench of the High Court of Judicature at Bombay - both dated February 17, 1987 in Appeal Nos. 179 of 1987 and 149 of 1987 - affirming in appeal orders of learned Single Judges dated September 5, 1985 in W. P. 1125 of 1985 and dated September 19, 1985 in WP 1813 of 1986, respectively, by which the writ petitions filed by M/s. Suksha International and M/s. Nutan Gems, respondents in these appeals, were allowed and the appellants directed to re-validate the Imprest Licences of the respondents and endorse them for import of OGL items, under paragraph 185 (4) of the Import-Export Policy of 1982-83 (A-M 1983).
2. Special leave, in both the petitions, is granted and the appeals taken up for final hearing, heard and disposed of by this common judgment. We heard Shri Subba Rao, learned counsel for the appellants and Shri Harish Salve, learned counsel for the respondents who were the writ petitioners before the High Court.
3. M/s. Suksha International, respondent in SLP No. 2579 of 1987, is a diamond exporter and is a registered Export House for the purpose of the Import Export Policy. The said export House was granted an Imprest Licence No. 0451365 dated June 15, 1981 of a value of Rs. 1,53,80,000 for import of 'uncut' and 'unset' diamonds with corresponding export obligation.
4. Respondent claimed that upon the due fulfillment by it of its export obligations it became entitled to revalidation and endorsement for import of OGL items of the impost. Accordingly, on September 3, 1983 the said Export house applied under paragraph 185 (4) of A-M 83 Policy, for such revalidation and endorsement of its Imprest Licence. Appellant 3 by his decision dated September 21, 1983, rejected this claim of the respondent. Aggrieved by this rejection, respondent filed in the High Court under Article 226 of the Constitution a writ petition assailing the legality of the order dated September 21, 1983 and seeking a mandamus to the appellants to endorse the Imprest Licence. Learned Single Judge of the High Court by his order dated September 5, 1985 allowed the writ petition and issued the direction prayed for. This Order was carried up in appeal before the Division Bench of the High Court in Appeal No. 179 of 1987. The appeal came to be dismissed on February 17, 1987.
5. M/s. Nutan Gems, respondent in SLP No. 2580 of 1987 is a recognised Export House which had,

similarly, been granted an Imprest Licence dated February 24, 1983 for the Import of uncut and unset diamonds with certain export obligations attached to it and that after the due discharge of the export obligations, respondent became entitled to a revalidation and endorsement of the Imprest Licence for import of OGL items. The application dated January 16, 1989 made in this behalf by the respondent was rejected by appellant 3 by his order dated March 10, 1984. M/s. Nutan Gems filed Writ Petition No. 1813 of 1985 in the High Court for issue of an appropriate writ quashing the said order of rejection and directing appellants to revalidate and endorse the Imprest Licence. On September 19, 1985, learned Single Judge allowed the writ petition. This order was affirmed in Appeal No. 149 of 1985 by the Division Bench on February 17, 1987.

6. These appellate judgments of the High Court are assailed in these appeals. Though a number of contentions are raised in the memorandum of special leave petition, the points, however pressed at the hearing admit of being formulated thus :

(a) that in the Import-Export Policy, 1982-83 the entitlement of Registered Export Houses to the facility of revalidation and endorsement of OGL items under paragraph 185 (4) is subject to and conditioned upon the express limitation in clause (7) of paragraph 185 of the Policy and that the High Court was in error in directing revalidation and endorsement without reference to the mandatory prescription in clause (7).

(b) that the High Court was in error in ignoring the contention of the appellants that respondents had rendered themselves, disentitled to relief on ground of the inordinate and unexplained delay in filing the Writ Petitions.

In W. P. 1125 of 1985 (from which SLP No. 2579 of 1987 arises) the rejection of the prayer for revalidation was on September 21, 1983 and the writ petition was filed in April 1985; and in WP No. 1813 of 1985 (from which SLP No. 2580 of 1987 arises) the rejection of the prayer was on March 10, 1984 and the writ petition was filed on September 10, 1985, after a lapse of one and a half years in each case.

(c) that, at all events, the directions issued for OGL endorsement must be limited only to items as limited by the pronouncement of this Court in Rajprakash Chemicals Ltd. v. Union of India and D. Navinchandra & Co. v. Union of India and other cases bearing on the question : and not in terms now directed by the High Court.

7. We may first dispose of contention (c) on which there does not appear to be much controversy. Shri Subba Rao submitted that the High Court was in clear error in brushing aside this argument and affirming the learned Single Judge on the basis that the SLP filed by the appellants in Ripal Kumar and Co.'s case had been rejected by this Court. Shri Harish Salve, however, submitted that the decision of this Court in Indo-Afgan Chambers of Commerce v. Union of India, Rajprakash Chemicals Ltd. v. Union of India, Union of India v. Godrej Soaps (Pvt.) Ltd. and D. Navinchandra & Co. v. Union of India etc. do not have any direct bearing on the question of the entitlement of the Export Houses to revalidation and endorsement for OGL items under Para 185 (4) of A-M 1983 policy but relate to the question as to the limitations on the permissibility of the items of import, consequent upon the changes in the policy. This question becomes relevant, says Shri Salve, at a stage which is subsequent to the revalidation and endorsement of the Imprest Licence and that the position in the present case has not yet reached that stage. However, he submitted that as to the choice of items permissible for import, the matter would of course, have to be determined and

guided by these pronouncements. As contention (c) is not in controversy it is not necessary to dwell on it any further. What, however, remain to be considered are the contentions (a) and (b).

Re contention (a)

8. Clauses (3), (4), (5) and (7) of para 185 of the policy provide :

(3) Where REP licence has been issued to the Export House on its own exports, the facility of importing OGL items under sub-para (1) above will be allowed without debit to the value of such REP licence, provided the value of such imports does not exceed the value of the REP licence.

(4) The facility for import of OGL items available in sub-para (3) above, may also be allowed, on merits, to Export Houses against their advance/imprest licence on account of which they are rendered ineligible to obtain REP licence. In such cases, however, the value up to which the OGL import may be allowed, will not exceed the value to which the Export House would have been eligible to the REP licence, had he not obtained advance/imprest in question. This facility will be available to the Export House after he has discharged the export obligation imposed on the advance/imprest licence. Therefore, if by the time, the Export House becomes eligible to this facility, the advance/imprest licence has expired, or, if the original validity left unused by that time is less than six months, the licensing authority will re-validate the licence simultaneously so as to give the licence holder a time of six months for the purpose of importing OGL items under this facility.

(5) Export Houses who wish to take advantage of this facility of import of OGL items should get the licences concerned endorsed by the licensing authority as under :

This licence will also be valid for import of OGL items under para 185 of Import-Export Policy, 1982-83, subject to the conditions laid down, and shall be non-transferable.

(7) Import of OGL items by Export Houses under these provisions shall be subject to the condition, inter alia that the shipment of goods shall take place within the validity of the OGL i. e. March 31, 1983, or within the validity period of the import licence itself (without any grace period), whichever date is earlier. This restriction will also apply to licences issued before April 1, 1982 in respect of items which continue to be on OGL in 1982-83 policy. (The restriction regarding grace period will not, however, apply in cases where shipment can be made within the permissible grace period on or before March 31, 1983).

9. Appellants' contention is that clauses (4) and (7) of para 185 are part of an integrated policy scheme, providing for certain incentives to Export Houses and have to be read together and that the import of OGL items is strictly subject to the specific condition that the shipment of goods shall take place within the validity of the OGL i. e. March 31, 1983 or within the validity period of licence itself whichever date is earlier. If this condition is held to be attracted to the case of an Imprest Licence also, then, quite obviously, the claim in the writ petitions would have to fail, as the applications for revalidation is beyond the outermost time limit set of the import itself. Indeed, this question was left open by this Court while dismissing SLP No. 7389 of 1985 (Union of India) v.

Messrs H. Patel & Co. In its order dated July 19, 1985 this Court said :

..... We, however, make it very clear that we express no opinion on the validity of the above said contention based on paragraph 185 (7) referred to above. The true effect of the said provision is left open to be considered in an appropriate case when an occasion arises to do so.

10. Shri Salve, submitted that in the very nature of the procedure and exercise inherent in the effectuation of an Imprest Licence, as distinguished from Replenishment Licence, the Export House has first to import the uncut and unset diamonds and thereafter fulfil its export obligations of cut and polished diamonds as a necessary antecedent for the effectuation of its entitlement to a revalidation and endorsement for OGL items. The very nature of the time-consuming transaction that are required to be gone through proceeding the very creation of the right to revalidation and endorsement are inconsistent with the feasibility of compliance with the time schedule in para 185 (7). Learned counsel says that the view that should commend itself, both on construction and in equity, is that having regard to the innate differences in the nature of the obligations and conditions to be fulfilled between the holders of Imprest Licences on the one hand and the Replenishment Licences on the other and having regard, further to the circumstances that Export Houses, which under Imprest Licences, have first to import uncut and unset diamonds and thereafter fulfil their export obligations before becoming entitled to the import of OGL items, it would be a wholly unreasonable exercise in construction to import the condition in clause (7) into clause (4) and that clause (4) should, therefore, be treated on its true construction, as a special provision constituting an exception to the generality of the provision in clause (7). Otherwise, says counsel, the resulting position would be that the satisfaction of the cumulative conditions in clauses (4) and (7) by an Export House under an Imprest Licence would well nigh be impossible.

11. This way of harmonising clauses (4) and (7) of para 185, it is submitted, has commended itself to the High Court in several other writ petitions involving the interpretation of clauses (4) and (7) of paragraph 185 of the A-M 1983 policy. Shri Salve submits that it is reasonable to exclude Imprest Licences from the requirement of clause (7).

12. We have considered the rival contention on the point. Para 185 (4) was intended to provide certain incentives to the Export Houses which, upon grant of Imprest Licences, fulfil their countervailing obligations in the matter of export commitments. The provision is a beneficial one. Clause (4) and (7), no doubt, on their plain wording present certain constructional difficulties and the view sought to be put across by Shri Subba Rao for the appellants, on the plain language of clause (7), is not without possibilities. However, the basis of the harmonious construction which commended itself to the High Court in other similar cases appear to us to advance and promote the objects of the policy in paragraph 185 (4) and is, at all events, not an unreasonable view to take of the matter. In some of these cases this Court has declined to interfere with this interpretation by rejecting petitions for special leave. Acceptance of the interpretation suggested by Shri Subba Rao would, in our opinion, unduly restrict the scope of the beneficial provision and, in many instances which would otherwise fall within the beneficial scope of the policy in para 185 (4), take away with one hand what the policy gives with the other. We think we should accept the submission of Shri Harish Salve which is consistent with the view taken of the matter by the High Court in other cases and hold that the conditions in para 185 (4) of the policy would not be attracted to the case of Export Houses which are granted Imprest Licences.

13. Accordingly we hold and answer contention (a) against the appellants.

Re Contention (b)

14. This pertains to appellants' plea of delay as a bar to relief. Appellants have aired a serious grievance over this aspect. Shri Subba Rao strenuously contended that the respondents had approached the High court after an inordinate and unexplained delay of over on and half years in each of these cases and that appellants' objection as to the disentitlement of the respondents to relief on the ground of delay was not even so much as adverted to by Learned Single Judge or the Division Bench. Learned Counsel submitted that promptitude and vigilant pursuit of legal remedies with diligence is basis to the entitlement to relief in the jurisdiction under Article 226, which is both extraordinary and discretionary and that in the present cases the delay of one and a half years in moving the court should have been held crucial particularly where grant of import licence is cancelled.

15. The pleadings in the writ petitions are not before us. We will proceed on the assumption that appellants had taken this objection before the learned Single Judge of the High Court and raised the plea as to the bar of delay in their appeals before the Division Bench of the High Court. If this point had been taken, we are afraid the High Court was not justified in ignoring it or brushing it aside. Indeed the learned Single Judge of the High Court allowed the writ petitions in both these cases by short orders in similar terms, relying upon an earlier decisions dated August 19/20, 1985, in Writ Petition No. 2477 of 1984. The relevant part of the order reads :

Relevant facts and circumstances of this petition are similar to the relevant facts and circumstances in Writ Petition No. 2477 of 1984 decided by this Court on August 19/20, 1985. Besides, as in the said Writ Petition No. 2477 of 1984, in the present case also there is no such delay as to preclude the petitioners from the relief claimed. In all the circumstances and for reasons stated in Writ Petition No. 2477 of 1984 the following order is passed on this Writ Petition.

2. The petition succeeds and the same is allowed.

Thereafter the learned Judges proceeded to issue specific directions.

16. Shri Subba Rao would say that the reference in the order by learned Single Judge to the contention on the point of delay as bar to relief had nothing to do with the specific contention of the appellants that there was inordinate and unexplained delay in approaching the court. This, learned counsel submits, would be clear, by a reference to the aspect of the delay dealt with and considered in WP No. 2477 of 1984, on which the learned Single Judge relied. The order of the same learned Single Judge in WP No. 2477 of 1984, in which the particular aspect of delay is considered is at para 8 of that order. That para in the order in WP No. 2477 of 1984 reads :

Mr. Joshi, learned Counsel for the respondents, submitted that the petitioners were not entitled to relief because of delay. It is not possible to agree. After the redemption certificate of November 16, 1983, application for revalidation and OGL endorsement was made within four months therefrom on March 12, 1984. There is, in the circumstances, no such delay as to warrant its rejection on that ground. The contention thus fails and is rejected.

17. Shri Subba Rao submits that the delay referred to in the above paragraph is the delay in seeking revalidation and endorsement after the issue of redemption certificate and not the delay in filing the writ petition and that in both the present cases the plea of delay in filing the writ petitions has not

received due consideration by the High Court. Shri Subba Rao referred to a number of pronouncements of this Court, to substantiate that such unexplained delay particularly in matters dealing with import licences would bar relief and that unexplained delay, by itself and without more, is a factor disentitling a person to relief. He submitted that absence of prejudice to the opposite party by itself, would not justify delay and that in the context of grant of import licences passage of time brings with it, as here, problems of conflicting policy consideration. Where changes of policy would impart crucial significance to the delays, courts, learned counsel says, should insist upon even a higher degree of promptitude. He, accordingly, submitted that the writ petitions should be dismissed on the ground alone of delay in filing them.

18. This contention of the appellant cannot be brushed aside. If appellants had raised a specific plea of delay as a bar to the grant of relief - and the delays in the present cases, having regard to the nature of the subject-matter, were not inconsiderable - it was perhaps necessary for the High Court to have specifically dealt with the plea. The aspect of delay adverted to by the learned Single Judge in the course of the order was a different one.

19. However, we think it would be somewhat unfair for the respondents, who have succeeded in the High Court, to decide the question without an opportunity to them to satisfy the court as to the reasons, if any, for the delay and as to the sufficiency of such reasons. We assume that the plea had been taken before the High Court by the appellants as this submission of the learned counsel for the appellant was not controverted. We think it would be appropriate that the appellants' appeals before the High Court are remitted to the High Court for such consideration as the appellate bench may now bestow on this contention of the appellants. If the appellate bench is persuaded to view that the delay is satisfactorily explained it may proceed to confirm the orders of the learned Single Judge, subject, of course, to the question of permissibility of the importable items to be determined in the light of the pronouncements of this Court referred to at contention (c). If, on the contrary the delay is held by the Division Bench to be such as to disentitle respondent to relief, the Division Bench may proceed to allow the appeals and dismiss the writ petitions. All other controversies in the appeal shall be held to have been concluded in favour of the respondents.

20. Accordingly, the appellate judgments of the High Court under appeal are set aside and the Appeals Nos. 149 of 1987 before the High Court are remitted for a fresh disposal as indicated above. The High court might also consider the desirability of a very early disposal of the appeals. These appeals are disposed of accordingly. There will, however, be no order as to costs in these appeals.

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