

IN THE HIGH COURT OF DELHI AT NEW DELHI
L.P.A. 627/2004 & CMS.7616-7618/2004

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Date of Decision : 22 November, 2004

M/S. RUBFILA INTERNATIONAL LIMITEDAppellant
Through: Mr. Neeraj K. Kaul, Sr. Advocate
with Mr. Abhishek Jain, Advocate

Versus

UNION OF INDIA & OTHERSRespondents
Through: Mr. P.P. Malhotra, ASG with
Ms.Meera Bhatia, Ms. Gurpreet Kaur, Advocates

CORAM:

THE HON'BLE MR.JUSTICE D.K. JAIN
THE HON'BLE MR.JUSTICE S.RAVINDRA BHAT

1. Whether reporters of local papers may be allowed to see the judgment.?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

} yes

S.RAVINDRA BHAT, J.

CM 7618/2004 (delay)

For the reasons stated in the application, the delay in filing the appeal is condoned. The application stands disposed of.

L.P.A. 627/2004 & CMS.7616-7617/2004

1. This appeal is directed against the judgment and order of a learned Single Judge dated 23.01.2004 in WP No.832/04. The issue for consideration is regarding legality of two circulars of respondent No.2. Those circulars defined the period of validity of advance licenses issued between 1999 to 03.07.2003. The appellant founded its action on a complaint of discrimination and arbitrariness.

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27 In exercise of powers under the Foreign Trade (Development and Regulation) Act 1992, the Central Government notified the Export and Import policy 1997-2002 (EXIM Policy). The Director General of Foreign Trade, under Para 4.11 of that policy is empowered to prescribe the procedure for issue of licenses of different categories. Pursuant to that power, a Handbook (hereafter "Handbook") containing two volumes was issued. Relevant portions of Para 4.15 and 4.16 of that Handbook are extracted below :-

"4.15 (a) The validity of import license from the date of issue of license shall be as follows :-

(i)	Advance license as per chapter-7 and replenishment license for Gem & Jewellery as per chapter-8 of the Policy	18 months
(ii)	EPCG license	24 months
(iii)	Others including CCP, DFRC and DEPB, unless otherwise specified	12 months
(iv)	Advance license for Turnkey project	18 months or Co-terminus with the contracted duration of execution of the project whichever is later
(v)	Advance license for Annual Requirement	12 months

xxxx xxxx xxxx

(c) The period of validity means the period for shipment/dispatch of goods covered under the license. The validity of an import license is decided with reference to the date of shipment/dispatch of the goods from the supplying country as given in paragraph 15.15 of this Handbook and not the date of arrival of the goods at an Indian port.

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4.16 The license may be revalidated on merits by the licensing authority concerned, which has issued the license, for a period of six months at a time but not beyond a period of 12 months reckoned from the date of expiry of the validity period. However revalidation of freely transferable licenses and stock and sale license shall not be permitted.

Xxxx xxxx xxxx

3 Annual amendments were carried out to the EXIM policy as on 31.03.2000 31.03.2001 and 31.03.2002, with corresponding amendments to the Handbook. As far as the present appeal is concerned, there have been no material amendments.

4 The appellant manufactures and exports heat resistant latex rubber threads. It applied for and was granted advance licenses as per the policy for the duration mentioned in para 4.15 (supra) of the Handbook. The dates on which such licenses were issued, together with the corresponding entitlement in respect of quantities; the validity of such licenses with their permissible extensions and their utilization, in terms of quantities used for import, are extracted in the form of a chart, reproduced below:-

S.No.	license No. & Date	Latex qty Entitled Wet (Tonnes)	Latex Qty Used	Balance	Validity Extensions (18+6+6)	with
1	10001686/101/10 1/05 19.02.1999	603.00	510.00	93.00	31.08.2001	

2	10001725/1/01/1 521.00 01/05 30.03.1999	0	521.00 30.09.2004
3	1010004551/2/03 565.00 /00 30.03.2001	0	565.00 30.09.2003
4	1010004201/2/03 485.00 /00 27.02.2001	0	323.00 31.08.2003
5	1010003209/2/02 485.00 /00 31.10.2000	0	485.00 30.04.2003
	Total 2659.00		1987.00

5 The advance licensing scheme entitles an exporter to import the quantities indicated, subject to certain conditions. A period of 18 months is granted, as per Para 4.15 and one of the conditions imposed is that the export obligation has to be fulfilled. The appellant had fulfilled that obligation within the initial period stipulated, in respect of the five licenses. The question involved in these proceedings is as regards the period for re-validation under Para 4.16.

6 On 20.02.1999, a circular was issued whereby the import of natural rubber under such advance license was not permitted; instead it was stipulated that such rubber had to be sourced through the State Trading Corporation (hereafter 'STC'). The appellant, therefore, approached the STC on 28.04.2001 for supply of latex rubber against the advance licenses held by it. The STC declined the request, on 01.05.2001 and stated that the scheme of sale of rubber against

advance license was not in vogue.

7 The direction issued by the second respondent in respect of import of natural rubber under the advance-licensing scheme was contained in various other circulars. One such circular dated 03.09.2001 was impugned before the Bombay High Court. A Division Bench of the Bombay High court, by its judgment and order dated 01.10.2002 reported as *Narendra Udeshi Vs. Union of India*¹ quashed the circular prohibiting import of natural rubber. It also quashed the show cause notice proposing to cancel an advance license.

8 The respondents carried the matter to the Supreme Court under Article 136. By order dated 07.05.2003, leave to appeal was declined.

9 In the above view of the matter, the conclusions of the Bombay High Court became final. The respondents issued a circular on 03.07.2003, which noticed the history of the litigation culminating with the order of the Supreme Court. It advised all licensing authorities to decide about admissibility of import in the light of the Bombay High Court decision and the EXIM provisions and procedures.

10 The appellant approached respondent No.2 on 16.07.2003 and pointed out that it had completed its export obligations before

¹ 2003 (156) ELT 819

procuring duty free raw materials. It sought for revalidation of all licenses for a period of one year from the date of revalidation, to permit import of goods. In the meanwhile, a writ petition was preferred by it earlier, being WP 4915/02 before this court. There, the circular dated 20-2-1999 was impugned. That writ petition was disposed off on 29.08.2003, by a Single Judge of this Court on the statement of the respondents that upon the appellant's making a representation, their case would be considered.

III. The respondents issued a circular (hereafter called 'the first circular') dated 10.10.2003. This was in continuation of the circular dated 03.07.2003. The material portion of this circular is extracted below :-

"(a) Fresh Advance Licenses/DFRC/Advance Licence for annual requirement can henceforth be issued for import of Natural Rubber as per normal Policy Provisions.

(b) In respect of Licences issued on or after 20.02.1999, which covered Natural Rubber as one of the items but import/procurement of which could not be made direct import of the same may now be allowed by RLAs. In cases where validity of License has expired, the same may be revalidated after cancelling ARO, if any, up to 31.12.2003. Such revalidation may also be allowed by RLAs in respect of Licenses covering Natural Rubber as one of the items and issued prior to 20.02.1999, wherein imports could not be affected. However, for such revalidation no fee or application in Appx. 10G of the Hand Book (Vol.I) shall be required.

(c) Cases where applications were filed on or after 20.02.1999 with Rubber as one of the inputs or the sole input but Licenses have not been issued, or issued after excluding natural rubber as input, would be reviewed

and Natural Rubber may be included or fresh Licenses may be issued as the case may be after obtaining declaration that no benefit of drawback has been claimed on natural rubber used in export production. If the license was expired, the same may be revalidated up to 31.12.2003 by the RLA. However, for such revalidation no fee or application in Appx. 10G shall be called. This shall be applicable even in respect of license where No Bond or EODC has been issued by RLA."

12 The appellant represented to the respondents on 31.10.2003 stating that the period of validity of licenses that had been in force but could not be utilized because of the restrictions/ban, namely, 31.10.2003 was far too short. Accordingly it requested the extension of validity of such licenses until 31.12.2004.

13 The respondents issued yet another circular on 11.12.2003. As per this circular, the outer limit with regard to the validity of licenses for the import of natural rubber in respect of licenses issued on or after 20.02.1999, was extended to 31.03.2004.

14 The appellant approached this Court under Article 226 on the ground that even though it had fulfilled the stipulation of fulfilling export obligations, it was nevertheless denied the benefit of advance license for import of duty free natural rubber in respect of the licenses in question. The appellant averred that as per the licenses, it could have imported rubber at far lower prices than were actually borne by it because of the action of the respondents. The appellant averred that it

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was unable to use the licenses and that when it approached the STC for procurement of rubber, the same was denied. The embargo imposed on the import of the natural rubber was lifted finally on 10.10.2003. The logical corollary as per the scheme contained in the EXIM policy ought to have been that the licenses were to be validated as per the Handbook (under Para 4.16) for at least a period of one year. The appellant therefore sought for the quashing of the circulars dated 10.10.2003 and 11.12.2003 to the extent that they prescribed a shorter time limit for existing advance licenses.

15. In the judgment under appeal, after noticing the submission that the time period fixed for operation of the advance licenses in question were inordinately short, it was held that the fixing of a time period for which extension ought to be granted is essentially executive in nature, not within the domain of the Court in exercise of writ jurisdiction. It was also held that the period of six months could not be termed as whimsical or absurdly low to call for interference. Based on these conclusions, the writ petition was dismissed *in limine*.

16. This matter was heard at some length; on 13th September 2004, respondent sought and was granted, five days time to file its reply, since a return had not been filed before the learned Single Judge. However the counter affidavit was filed only on 04.10.2004.

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17. Mr. N.K. Kaul, learned senior counsel appearing for the appellant submits that the prescription of a period of roughly six months in two separate orders as the period of validity of licenses issued after 20.02.1999, is arbitrary. Learned counsel submits that such a restriction is wholly unwarranted and has no correlation to the objective sought to be achieved by the EXIM policy and the Handbook. It was further submitted that the impugned circular of 10.10.2003 as regards the time restriction of fresh licenses, prescribes that they would be valid for the period mentioned in the Handbook. However, the treatment meted out to licenses issued between 20.02.1999 and 10.10.2003, is discriminatory as they have been given an extended validity of only six months.

18. Learned counsel for the appellant also submits that the grant of time until 31.03.2004 is not through a single indivisible period, but through a broken period of two months (between 11.10.2003 & 11.12.2003) and three months (12.12.2003 and 31.03.2004). This meant that manufacturers and importers could not effectively avail of the benefits having regard to the nature of the transaction which implied planning, placing orders upon foreign suppliers and making payment through letters of credit etc. It was also submitted that there being no policy preventing the import of natural rubber once an exporter fulfilled all

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conditions contained in the license relating to export obligation, there was really nothing to justify curtailing the periods mentioned in paras 4.15 and 4.16 (supra). Accordingly, learned counsel submitted that the denial of the normal period of re-validation spelt out in terms of the Handbook, which remains un-amended even today [as regard to Para 4.16] is arbitrary. The appellants also relied upon the doctrine of legitimate expectation to press home their claim.

19 Mr. P.P. Malhotra, learned Additional Solicitor General appearing for the respondents justified its stand. He submitted that there is no vested or legal right inhering any person for grant of an import license. According to him, the terms of the EXIM policy empowered the second respondent to effect changes in regard to the procedure for issuance of license. The period mentioned in the Handbook fell within the realm of procedure. He, therefore, submitted that no person has a right to insist upon continuance of a procedure. He next submitted that prescription of periods of validity of such licenses is one of the policy, having regard to various factors. According to him, the interests of domestic growers impelled the Government to restrict licenses for natural rubber and source sales through STC. The entry of imported natural rubber threatened such domestic growers; consequently, manufacturers/exporters were required to purchase rubber from STC. The Central Government, he stated, spent a considerable amount -

Rs.56 crores - In furtherance of this initiative. Eventually the scheme of supply through STC could not be sustained. The learned Additional Solicitor General also submitted that no discrimination can be inferred through the impugned circulars. According to him, the licenses issued after 10.10.2003 stand on a different footing. According to him the licenses issued after 20.02.1999 but before 10.10.2003, fell in a different category since the policy of the Government at that point in time was different.

20. The learned Additional Solicitor General lastly submitted that there is no question of any legitimate expectation or other expectation arising in favour of the appellants, for extension of a policy benefit, or continued existence of any policy. In support of this, he relied upon the judgments of the Supreme Court reported as *Kasika Vs. Union of India*² and *PTR Exports Vs. Union of India*³

21. It would, for the purposes of deciding the present controversy, be necessary to notice the reasoning, which impelled the Bombay High Court to quash the circular, which prohibited import of natural rubber. The court held that public notice dated 20th May 2002 (prohibiting such imports) issued by the DGFT, [second respondent here] could not be sustained as it was inconsistent with the EXIM

² AIR 199SC 874

³ 1996 (5) SCC 268

policy framed by the Central Government and that in fact it purported to amend the EXIM policy provisions which power is exclusively vested in the Central Government and not with the DGFT. The court further held that:

" By prohibiting import of natural rubber under the advance license in the Handbook of procedures, the DGFT has encroached upon the powers of Central Government and purported to amend the EXIM policy 2002-2007 which power is not conferred upon the DGFT. As stated hereinabove Section 6(3) of the Act expressly prohibits the DGFT from exercising the power of amending the EXIM policy. Therefore, in the absence of any power under the statute, the ALC circulars and the public notice dated 20th May 2002 to prohibit import of natural rubber under advance license could not be issued by the DGFT. The said circulars and public notice being wholly contrary to the policy provisions of the Central Government, cannot be sustained and are liable to be quashed and set aside."

The special leave petition of the respondents was rejected. The order of the Supreme Court reads as follows:

"Application for impleadment is allowed. Heard learned counsel for the parties. Learned counsel for the impleading party contends that by the impugned order one million small growers of rubber will be affected by the advance license issued to the respondent herein. We noticed that in the impugned judgment the High Court has held that it is open to the Government of India to change the policy in regard to grant of advance license for natural rubber on duty free basis. If the Government of India thinks such interest of growers should be protected, is for them to take an appropriate decision.

On the facts of this case, we find no merit in this special leave petition and the same is dismissed."

(emphasis supplied)

22. The above course of litigation indicates that the challenge to the policy not to permit import of natural rubber, under a class of licenses- in which the subject matter of controversy admittedly falls- succeeded on the ground of *lack of competence* of the second respondent. The Supreme Court upheld the findings of the Bombay High Court. On an express plea about the need to protect domestic growers, the Court indicated that nothing prevented the Central Government from formulating a policy.

23. The submissions of the respondents have to, therefore, be viewed keeping in mind the following:

- a) the policy of not allowing import of rubber under advance licenses, issued by the second respondent, was held to be illegal, and beyond its competence;
- b) The Supreme Court too, upheld the findings of the Bombay High Court as regards the lack of competence, *on merits*. The issue, therefore, attained finality.
- c) The Central Government did not formulate any policy restricting the scope of the licenses or prohibiting the import of rubber, either during the period of the restriction imposed by the second respondent (20-2-1999 to 10-10-2003) or

thereafter.

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- d] the second respondent has not amended The Handbook.
 - e] the appellant had been granted the subject licenses.
However, it could not utilize them since, during the initial period, the circulars of respondent No 2 prohibiting import were in force;
 - f] the appellant sought for, but was refused, supply of natural rubber, by STC.

24. The objects of the EXIM policy are to enable an exporter to import raw materials, etc for producing goods for export. They are by way of incentive (See *S.B International Ltd-vs- Asst Director General of F.T* ,⁴ where it has also been held that there is no vested right inhering in favour of an applicant, for the grant of advance license). The respondents' contention about there being no vested right for grant of a license in favour of a person is therefore well founded. Equally, we are conscious of the fact that the doctrine of legitimate expectation has limited application. As remarked in a decision⁵ it [legitimate expectation] is " not the key which unlocks the treasury of natural justice and it ought not to unlock the gates that shuts the court out of review on the merits." In *P.T.R. Exports (Madras) (P) Ltd. v. Union of India*, (*supra*, at page 272 of SCC reports) it was held that :

⁴ AIR 1996 SC 2921

⁵ *Union of India -vs- Hindustan Development Corporation* 1993[3] SCC 499

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"The doctrine of legitimate expectation plays no role when the appropriate authority is empowered to take a decision by an executive policy or under law. The court leaves the authority to decide its full range of choice within the executive or legislative power. In matters of economic policy, it is a settled law that the court gives a large leeway to the executive and the legislature. Granting licences for import or export is by executive or legislative policy. Government would take diverse factors for formulating the policy for import or export of the goods granting relatively greater priorities to various items in the overall larger interest of the economy of the country"

The limitations of testing state or public actions on a sole application of "legitimate expectation" have been judicially spelt out.⁶ That doctrine is only a facet of Article 14 of the Constitution in requiring non-arbitrary treatment; by itself, it does not give rise to an enforceable right. It is only while testing the action taken by a government authority, in judicial review, as to whether it is arbitrary, that the doctrine is relevant.

25. The mandate of Article 14 covers all State action. Non-arbitrariness, and fairness, if one can so term them, are the two cornerstones of a "legal behavioral baseline" that cannot be shifted or altered. Therefore every action, even a change of policy, in any realm of state activity has to be informed, fair, and non-arbitrary. In *Union of India v. International Trading Co*⁷ the Supreme Court held that:

"While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give the

⁶ *State of W.B. v. Niranjana Singha*, (2001) 2 SCC 326, at page 329 and *Food Corp'n. of India v. Kamdhenu Cattle Feed Industries* 1993 (1) SCC 71.

⁷ 2003 (5) SCC 437, at page 445

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impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play.

26. The focus of inquiry therefore is whether the impugned notifications are arbitrary or unfair, in that they impose a restricted period for the purpose of revalidation.

27. In the present case, it is not possible for the respondents to justify the differential treatment based on the circulars that banned import of natural rubber. Those circulars were held illegal; the judicial declaration became final in that even the Supreme Court declined to interfere, in the matter. Hence, those circulars cannot afford a defence in the present proceeding as a justification for the treatment that is facially discriminatory. Equally, there has been no action on the part of the respondents, in public interest, or in the interest of domestic growers, restricting the import of natural rubber, in terms of the EXIM Policy after the order of the Supreme Court. These factors are critical, since the contention taken by the respondents is that the appellants have no vested right, nor can found their claim on legitimate expectation, and that policy imperatives justify the shortened period for revalidation in the case of old licenses.

28. The differential treatment of old licenses as regards restriction in time (for re-validation) has also been justified on the basis that the Respondent No.2 has the power, under the Handbook to amend procedure; that the period of validity (or its time limit) is a matter of procedure, and that no one has a vested right in procedure. We are unable to persuade ourselves to that view. The existence of power alone cannot be a justification for differential treatment. Even if it is accepted that the period is a matter of procedure, the issue that would remain un-addressed is the rationale for

- i) a shorter re-validity period in the case of licenses issued prior to 10-10-03 (namely until 31-12-03, later extended to 31-3-04)
- ii) normal period of validity, (18 months) and re-validation periods (6 months+ 6 months) as per the Handbook, in the case of fresh licenses and
- iii) absence of any amendment in the Handbook.

In a recent decision, viz *State of U.P. v. Johri Mal*,⁸ the Supreme Court held as follows :

"where administrative action is challenged under Article 14 as being discriminatory, equals are treated unequally or unequals are treated equally, the question is for the Constitutional Courts as primary reviewing courts to consider the correctness of the level of discrimination applied and whether it is excessive and whether it has a nexus with the objective intended to be achieved by the administrator. For judging the arbitrariness of the order, the test of unreasonableness may be applied.

⁸ (2004) 4 SCC 714, at page 735

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A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness."

29. On a consideration of the facts, and the principles applicable, we cannot agree with the reasoning in the judgment under appeal. The record does not indicate any rationale for discriminating between fresh licensees and old licensees (who could not utilize the period of license due to the prohibition imposed by the respondent No.2, which was held to be illegal). Neither any policy, nor any material was shown to us to justify the impugned differential treatment. In order to sustain an attack on classification, the state has to show that the differentiation is intelligible. Here, the only differentiation is on the basis of date, which in turn is based on the existence of old (in some cases, even lapsed) licenses which could not be utilized on account of the illegal prohibition imposed by Respondent No. 2. Hence, that differentia, in a sense has the effect of perpetuating the illegality that had been found by the Bombay High Court, and concluded with the order of the Supreme Court. Such an illegitimate basis of differentiation is impermissible under Article 14, in that it is founded on an illegality.

30. The second aspect of classification is the existence of a rational nexus between the differentia and the object sought to be achieved. Even if it were assumed- *arguendo*- that a valid differentiation exists, the

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respondents, in our view have failed to establish how that has a rational nexus with the object sought to be achieved- by the EXIM Policy. As observed earlier, the objective of every such EXIM Policy is to optimize exports, and one of the mechanisms adopted is advance import licensing, as an incentive. The respondents have failed to show how that objective is promoted or sub-served better by shortening the period of re-validation in respect of old licenses, and retaining the period mentioned in the Handbook for fresh licenses.

31. The impugned policy also, in our considered view, is also arbitrary and unreasonable. Had the respondents really wanted to protect domestic growers, nothing prevented them from responding appropriately; the order of the Supreme Court expressly kept that liberty open. However, imports as per normal policy parameters, for normal/ existing and prescribed periods are permissible for fresh licenses. Yet, for old licensees who could not utilize the period permitted, due to the illegal restrictions, a truncated validity period has been prescribed. This course is impermissible, as it amounts to singling out those affected by an illegal event for further differentiation, in the absence of any public policy imperative.

32. In the light of the above conclusions, the appeal is entitled to succeed. As far as relief is concerned, it would be necessary to keep in

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mind that the appellants have already secured the benefit of one period stipulated, namely six months, for re-validation of their licenses. That period was not given by one order, but in installments. Yet, it would not be appropriate for us now to give any further relief on that score.

33. The appeal is therefore allowed, and the judgment of the learned single judge is set aside. The writ petition of the appellant is allowed. We hold and declare that:

a) the impugned circulars dated 10-10-03 and 11-12-03 to the extent that they shorten the period of re-validity of licenses issued prior to 10-10-03, are arbitrary and discriminatory;

b) the appellants are entitled to seek re-validation (of the licenses that could not be worked out/utilized on account of the prohibition imposed in the policy dated 20-2-1999), on the same terms as in the case of fresh licensees, after adjusting the periods permitted to them, through the two impugned orders dated 10-10-03 and 11-12-03;

c) the respondents are directed to consider and process the application of the appellant within 4 weeks.

34. All pending interlocutory applications, are disposed of in the light

of the above directions:

No costs.

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S. Ravindra Bhat

S.RAVINDRA BHAT, J.

D.K. Jain

D.K.JAIN, J.

NOVEMBER 22, 2004