

OSWAL WOOLLEN MILLS LTD. & ANR.

v.

UNION OF INDIA & ORS.

July 11, 1983

[S. MURTAZA FAZAL ALI AND A. VARADARAJAN, JJ.]

Import Policy, 1981-82—Paragraph 138 (1)—Replenishment Licence acquired by transfer by a Trading House—Whether endorsement can be refused on the ground that Replenishment Licence had not been issued against export of its own products ?

The appellant which was a manufacturer-exporter as well as a recognised Trading House acquired a Replenishment Licence by transfer from another manufacturer-exporter and, desiring to import raw materials, components, etc., required for use in its factories under that Licence, sent it to the third respondent requesting that the transfer of the Licence in its name be recognised and an endorsement made thereon to make it valid for import of items permitted under paragraph 138 (1) of the Import Policy, 1981-82. The third respondent rejected the request on the basis of an office Circular dated 31-8-1981 issued by the second respondent which directed the licensing authority not to grant endorsement under paragraph 138 (1) unless the Replenishment Licence had been issued to the applicant against export of its own products.

The appellant's writ petition challenging the validity of the circular dated 31-8-1981 as well as the order made on its application for endorsement of the licence was rejected by the High Court.

Allowing the appeal,

HELD: Paragraph 140 of the Import Policy, 1981-82 clearly states that Replenishment Licence will be issued in the name of the Registered Exporter only and will not be subject to 'Actual User' condition and that except for cases covered by paragraphs 136 (2), 185 (2) and 186 (1) the licence holder may transfer the licence in full or in part in favour of any other person and that the licence holder or such transferee may import the goods permitted therein but the facility of paragraphs 136, 137 and 146 shall not be available to any transferee unless the transferee is himself a Registered Exporter and can satisfy the Custom Authorities at the time of clearance of the goods of his *bona fides*. The goods sought to be imported by the appellant on the basis of the Replenishment Licence in question do not fall under paragraphs 136 (2), 137, 146, 185 (2) and 186 (1) mentioned in paragraph 140. Reco-

gnised Trading Houses like the appellant are entitled to certain facilities under paragraph 195 (4) and one of them mentioned in paragraph 195 (4) (ii) is import replenishment licences transferred to them by others. Thus, the appellant is entitled under paragraphs 140 and 195 (4) (ii) to the facility of the Import Policy as a transferee of the Replenishment Licence issued in the name of the actual manufacturer-exporter against exports made by that manufacturer-exporter. [370 B-E]

The contention of the respondents that under paragraph 138 (1) the facility to import raw materials, etc., under the Replenishment Licence is available only to the actual manufacturer-exporter against whose exports the Replenishment Licence was issued amounts to reading into paragraph 138 (1) the words "against the exports of products manufactured by them" after the words "manufacturer-exporters" and before the words "will be valid...". That is what is sought to be done by the impugned Circular dated 31-8-1981. The High court was right in saying that the Circular appears to change the Import Policy but it erred in saying that the condition mentioned in the impugned order is found in paragraph 138 (1). No such condition is to be found in paragraph 138 (1). It is significant that paragraph 138 (1) was not mentioned in paragraph 140. It is also significant that in the Import Policy for the subsequent year 1982-83 the words "against their exports of products manufactured by them" have been actually inserted in paragraph 138 (1) after the words "Replenishment Licences issued to manufacturer-exporter" and before the words "will be valid...". [370 E-H, 371 A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 591 of 1982

Appeal by Special leave from the Judgment and Order dated the 18th November, 1981 of the Delhi High Court in Civil Writ Petition No. 2581 of 1981.

WITH

Writ Petition No. 802 of 1982 :

(Under article 32 of the Constitution of India).

Soli J. Sorabjee and *Rajiv Dutta* for the Appellant.

M.M. Abdul Khader, Girish Chandra & Miss A. Subhashini, for the Respondent.

V.M. Tarkunde and *Rajiv Dutta* for the Petitioner in WP.

The Judgment of the Court was delivered by

VARADARAJAN, J. This appeal by special leave is directed against the judgment of a Division Bench of Delhi High Court dismissing the Civil Writ Petition No. 2581 of 1981 *in limine*, with the obser=

A vation that the Circular dated 31.8.1981 issued by the second respondent, the Joint Chief Controller of Imports and Exports, New Delhi appears to change the Import Policy, that the contention that the condition mentioned in the order impugned in the Writ Petition is not found in paragraph 138 of the Import Policy for 1981-82 is not acceptable, that a reading of paragraph 138 (1) of the Import Policy shows that the Import Replenishment (REP) Licence, if transferable and an endorsement is sought thereon, must be with regard to the materials mentioned in the (REP) Licence and not any other material and that the contention of the first respondent, the Union of India that the endorsement could only be against the export by the applicant himself is correct.

C The appellants have filed the Writ Petition No. 802 of 1982 under Article 32 of the Constitution against the same three respondents and for the same reliefs prayed for in the Civil Appeal, viz. (1) quashing the Circular dated 31.8.1981 issued by the Joint Chief Controller of Imports and Exports, New Delhi as being *ultra vires* and null and void, (2) directing withdrawal of the order dated 7.12.1981 of the third respondent, the Deputy Chief Controller of Imports and Exports, Amritsar, refusing to make the endorsement on the (REP) Licence, (3) issuing a direction to respondents 2 and 3 to make the endorsement contemplated in paragraph 138 of the Import Policy 1981-82 on the (REP) Licence and (4) restraining respondents 2 and 3 from implementing the Circular dated 31.8.1981 and the order dated 7.12.1981.

F The parties will be referred to in the Civil Appeal as arrayed in the Writ Petition before the High Court for the sake of convenience.

G No copy of the Writ Petition filed before the High Court has been produced in this Appeal. The case of the petitioners as set out in the special leave petition is this : The first petitioner M/s Oswal Woollen Mills Ltd., Ludhiana was originally a registered Export House within the meaning of paragraph 5 (7) of the Import Policy, 1981-82, and has been a manufacturer-exporter since 1971 and is now also a recognised Trading House as the first petitioner's Export House Certificate has been converted into a Trading House Certificate in terms of paragraph 195 (1) of the Import Policy, 1981-82. Recognised trading houses are entitled to certain facilities under paragraph 195 (4) of the Import Policy, 1981-82, and one of them

mentioned in paragraph 195 (4)(ii) is import replenishment (REP) Licences transferred to them by others. Paragraph 195(4) (ii) reads as under:

“Trading Houses will be granted the following facilities under the Import Policy:- Import replenishment (REP) Licences transferred to them by others.”

For obtaining the said facility the first petitioner acquired by transfer the Replenishment (REP) Licence, viz. “Import Licence No. PW/2941/669/C/XX/78/Z/80 dated 27th February, 1981 for total value of Rs.2,02,781” from the licence holder who was himself a manufacturer-exporter under a transfer letter dated 8.7.1981 and sent it to the third respondent for the purpose of obtaining endorsement thereon. Paragraph 140 of the Import Policy, 1981-82 provide for transfer of (REP) Licences and reads as under:

“The REP Licence will be issued in the name of a Registered Exporter only and will not be subject to ‘Actual User’ condition. Except for cases covered by paragraphs 136(2), 185(2) and 186(1), a licence holder may transfer the licence in full or in part in favour of any other person. The licence holder or such transferee may import the goods permitted therein but the facility of paragraphs 136(2), 137 and 146 shall not be available to any transferee unless the transferee is himself a Registered exporter and can satisfy the Custom Authorities at the time of clearance of the goods, of his bonafides”.

Thus the (REP) Licence holder and the transferee of the same are in the same position as regards the right to import on the basis of the licence, but the transferee of the licence has to satisfy certain other conditions, viz. that he should himself be a Registered Exporter and should satisfy the Custom Authorities of his bona fides at the time of clearance of the goods in regard to the facilities provided in paragraphs 136 (2), 137 and 146 of the Import Policy, 1981-82. The first petitioner is a manufacturer-exporter holding a valid Registration Certificate No.FIED/TD-E3(153)/78-132 dated 21.7 1978 and was keen to Import under the (REP) Licence acquired by transfer on 8.7.1981 raw materials, components, consumables and packing materials required for use in its factories in terms of paragraph 138(1) of the Import Policy, 1981-82 which reads as under:

A “REP Licence issued to manufacturer-exporters will be valid for import of any other items of raw materials components, consumables and packing materials required by them for use in their factories. However, import of banned items will be allowed only upto 20% of the face value of the REP Licence subject to the condition that the value of ‘single’ item should not exceed Rs.1 lakh. B REP Licences issued to manufacturer-exporters, who want to avail of this facility will be issued with an ‘Actual User’ condition and such licences will not be transferable. It is also open to the manufacturer-exporter to make use of this facility only for a part of his REP entitlement and to get for the remaining part a freely transferable C REP Licence”.

D The first petitioner requested the third respondent by his letter dated 23.9.1981 that the (REP) Licence in question may be transferred to him and suitable endorsement may be made thereon to make it valid for import of the items permitted under paragraph 138 with ‘Actual User’ and non-transferable conditions. But the third respondent refused that request by his letter No.O-33/Q/OO 80/EPT/ASR/85 dated 15.10.1981 on the basis that the endorsement in paragraph 138 is admissible only for the manufacturer-exporters against their own exports. This refusal is based on a total misconstruction of paragraph 138 of the Import Policy, 1981-82. That decision is based on an office Circular dated 31.8.1981 issued by the second respondent, which, in substance, directs the Licensing Authority not to grant endorsement under paragraph 138 of the Import Policy, 1981-82 unless the (REP) Licence had been issued to the applicant against the export of his own products. The Circular dated 31.8.1981 reads as under: E F

G “Attention is invited to para 2 (iii) of REP Circular No. 10/80 dated the 4th August, 1980 regarding endorsement to be made by the Licensing Authorities on REP Licence sought to be utilised under para 138 of the Import Policy, 1981-82. The said para 138 is meant for REP Licence issued to manufacturers on the exports of the products manufactured by them. Therefore, before making endorsement of the REP Licence under the said para 138 the Licensing Authority concerned should make sure that the REP Licence, in question was issued to the applicant against export of his own products, i.e. H

for which the licensee was registered as a manufacturer-exporter, as per the relevant registration-cum-membership certificate held by him. Similarly, the facility under para 138 (7) is meant for those manufacturers only whose product was actually exported and not for other manufacturers of the same product."

The Circular is without the authority of law and cannot amend or modify paragraph 138 of the Import Policy, 1981-82. The petitioners filed the Writ Petition in the High Court after the third respondent failed to send a reply to their notice dated 2.11.1981 by which he was called upon to withdraw the decision contained in his letter dated 15.10.1981 and to make the necessary endorsement under paragraph 138 of the Import Policy, 1981-82 on the (REP) Licence mentioned above. The Writ Petition was dismissed by the High Court *in limine*.

The respondents have filed a counter-affidavit for meeting the averments made in the special leave petition. They have admitted that (REP) Licences issued on exports made on or after 1.4.1978 are not subject to 'Actual User' condition and are freely transferable to any person without any necessity for endorsement or permission from the Licensing authority except for certain cases as provided in paragraph 140 of the Import Policy, 1981-82. The facility was extended to manufacturer-exporters and manufacturers who exported their goods through others by permitting them to utilise the import replenishment (REP) licence accruing to them on the export of the products manufactured by them for importing not only the items utilised by them in the products exported but also other items of raw materials, components, consumables and packing materials required by them for use in their factories. But it is evident from paragraph 138 of the Import Policy, 1981-82 that the facilities provided in that paragraph can be availed against (REP) Licences issued to manufacturer-exporters only on their own exports or against (REP) Licences issued to manufacturers whose products are exported through another exporter. This facility is, therefore, not available to manufacturer-exporters against (REP) Licences acquired by them by transfer from other Registered Exporters even if the latter is a manufacturer-exporter.

The Circular dated 31.8.1981 was issued only in order to ensure that the manufacturer-exporter avails of this facility only

A against (REP) Licence issued on exports of his own products in terms
of the policy stated in paragraph 138 and to clarify that the facility
is available only to those manufacturers whose products were actually
B exported through another exporter and that the facility was not
available to other manufacturers of the same products. The special
facility was given and is intended to strengthen the production of the
units whose products were exported by allowing them to import by
the (REP) Licence not only the items utilised in the products exported
but also other items of raw materials, components, consumables and
packing materials required by the same unit. For obvious reasons,
this facility has not been extended to (REP) Licences which were
C transferred by exporters to a unit which did not contribute to the
product exported against which the licence was issued.

D Paragraph 138 (1) of the Import Policy, 1981-82 is clear enough
and admits of no other interpretation than the one contained in the
impugned Circular dated 31.8.1981. The Circular has neither
amended nor modified the Import Policy, 1981-82 contained in para-
graph 138. The special benefits referred to in paragraph 138 are
not transferable and, therefore, the transferees of the (REP) Licences
like the petitioners cannot validly import the said items. The
E decision of the Licensing Authority refusing to make the endorse-
ment asked for by the letter dated 23.1.1981 on the (REP) Licences
acquired by the petitioners was in accordance with the policy-men-
tioned in paragraph 138. The grounds urged by the petitioners are
without substance and amount to distortions of the contents of
paragraphs 136, 138 and 140 of the Import Policy, 1981-82. The
Writ Petition was *rightly dismissed* by the High Court *in limine*.

F As the same reliefs which are sought in the Civil Appeal are
sought even in the Writ Petition also it is not necessary to refer to
the petitioners' contentions raised in the Writ Petition and those
raised by the respondents in the counter-affidavit filed by them in
this judgment. Our findings in the Civil Appeal will suffice to dispose
G of the Writ Petition one way or the other.

H The first petitioner was originally a Registered Export House
within the meaning of paragraph 5 (7) of the Import Policy, 1981-82
and has been a manufacturer-exporter since 1971. It has become a
recognised Trading House as its Export House Certificate has been
converted into a Trading House Certificate in terms of paragraph
195 (1) of the Import Policy, 1981-82. Recognised Trading Houses
are entitled to certain facilities under paragraph 195 (4), and one of

them mentioned in paragraph 195 (4) (ii) is import replenishment (REP) Licences transferred to them by others. The import replenishment (REP) licence mentioned above was issued to a manufacturer-exporter against his actual export. The first petitioner got that licence transferred to it by a letter dated 8.7.1981 as provided for in paragraph 140 of the Import Policy, 1981-82 for obtaining the facility under paragraph 195 (4) (ii). Thereafter an application dated 23.9.1981 was made by the first petitioner for recognition of that transfer and for an endorsement being made on the said licence forwarded with that letter to the third respondent to enable the first petitioner to import raw materials, components, consumables and packing materials required by it for use in its own factories as per the first part of paragraph 138 (1) of the Import Policy, 1981-82. In that letter it is stated that the first petitioner proposes to utilise the licence for the import of raw materials, components, consumables and packing materials required by it for use in its own factories in terms of paragraph 138 (1) of the Import Policy, 1981-82 and that the licence may, therefore, be transferred in the name of the first petitioner and an endorsement may be made on it to make it valid for import of the items permitted under paragraph 138 with the 'Actual User' and non-transferable conditions. This request was rejected by the third respondent by his letter dated 15.10.1981 on the ground that the (REP) Licence in question was issued to the licensee against the export of his own products, i.e. for which the licensee was registered as a manufacturer-exporter as per the relevant registration-cum-membership certificate held by him. There is no dispute about these facts.

The petitioners' contention is that the first petitioner is entitled to import the raw materials, components, consumables and packing materials required by it for use in its own factories in terms of paragraph 138 (1) of the Import Policy, 1981-82 as the transferee of the (REP) Licence permitted by paragraph 140 of the Import Policy, 1981-82 notwithstanding the fact that the first petitioner is not the manufacturer-exporter against whose exports the (REP) Licence in question was issued but a Trading House who got the said licence transferred by the letter dated 8.7.1981 as per paragraph 195 (4) (ii) of the Import Policy, 1981-82. The respondents' contention is that as the first petitioner is not the manufacturer-exporter to whom the (REP) Licence was issued against his export it is not entitled to import the raw materials etc. mentioned in the first petitioner's

A letter dated 23.9.1981 under paragraph 138 (1) of the Import Policy, 1981-82. The question is which of these contentions is correct.

Paragraph 140 clearly states that (REP) Licence will be issued in the name of the Registered Exporter only and will not be subject to 'Actual User' condition and that except for cases covered by paragraphs 136(2), 185(2) and 186 (1) the licence holder may transfer the licence in full or in part in favour of any other person and that the licence holder or such transferee may import the goods permitted therein but the facility of paragraphs 136, 137 and 146 shall not be available to any transferee unless the transferee is himself a Registered Exporter and can satisfy the Custom Authorities at the time of clearance of the goods of his bonafides. The goods sought to be imported by the first petitioner on the basis of the (REP) Licence in question do not fall under paragraphs 136 (2), 137, 146, 185 (2) and 186 (1) mentioned in paragraph 140 of the Import Policy, 1981-82. Paragraph 195(4)(ii) grants to Trading Houses like the first petitioner the facilities under Import Policy, viz., the import replenishment (REP) Licences transferred to them by others. Thus the first petitioner is entitled under paragraphs 140 and 195 (4) (ii) to the facility of the Import Policy as a transferee of the (REP) Licence issued in the name of the actual manufacturer-exporter against exports made by that manufacturer-exporter. The contention of the respondents that under paragraph 138(1) the facility to import raw materials etc. under (REP) Licence is available only to the actual manufacturer-exporter against whose exports the (REP) Licence was issued amounts to reading in to paragraph 138 (1) the words "against the exports of products manufactured by them" after the words "manufacturer-exporters" and before the words "will be valid...". That is what is sought to be done by the impugned Circular dated 31.8.1981. The present contention of the respondents is that the Circular dated 31.8.1981 only clarifies paragraph 138 (1) of the Import Policy, 1981-82 and does not amend or modify that paragraph. That is not how the learned Judges of the High Court have understood the Circular in their judgment under appeal. The learned Judges have stated in their judgment that the Circular dated 31.8.1981 appears to change the Import Policy and that the contention of the petitioners before them that the condition mentioned in the impugned order dated 15.10.1981 is not found in paragraph 138 of the Import Policy, 1981-82 is not acceptable to them. The learned Judges were right in saying that the Circular appears to change the Import Policy but they have erred in saying that the condition mentioned in the impugned order dated 15.10.1981 is found in paragraph 138 (1) of the Import Policy, 1981-82. We are unable to find any such

condition in paragraph 138 (1) of the Import Policy, 1981-82. It is significant to note that paragraph 138 (1) was not mentioned in paragraph 140 of the Import Policy, 1981-82. It is also significant to note that in the Import Policy for the subsequent year 1982-83 the said words "against their exports of products manufactured by them" have been actually inserted in paragraph 138 (1) after the words "REP Licences issued to manufacturer-exporter" and before the words "will be valid within the overall value for import of any items of raw materials, components, consumables, spares and packing materials required by them for use in their factories subject to 'Actual User' condition". In view of the respondents' contention that the Circular dated 31.8.1981 is only clarifactory of paragraph 138 (1) of the Imort Policy, 1981-82 and does not amend or modify that paragraph it is unnecessary for us to go into the question whether the Circular issued by the Joint Chief Controller of Imports and Exports can validly amend the Import Policy, 1981-82. On a perusal of the relevant paragraphs of the Import Policy, 1981-82 mentioned above we agree with Mr. Soli J. Sorabjee, Senior Advocate for the appellants that the condition mentioned in the third respondent's impugned letter dated 15.10.1981 is not there in paragraph 138 (1) of the Import Policy, 1981-82, that the Circular dated 31.8.1981 is invalid and that the rejection of the petitioners' request made in the letter dated 23.9.1981 by the third respondent in the letter dated 15.10.1981 is unwarranted, and the request, should have been complied with. We are unable to agree with Mr. M.M. Abdul Khadar, Senior Advocate for the respondents that the condition mentioned in the letter dated 15.10.1981 is to be found in paragraph 138 (1) of the Import Policy, 1981-82. Accordingly, we allow the appeal with costs and the Writ Petition witout costs.

H.L.C.

Appeal & Petition allowed.