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UNION OF INDIA

v.

M/S. GODREJ SOAPS PVT. LTD. AND ANR.

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SEPTEMBER 12, 1986

[R.S. PATHAK & SABYASACHI MUKHARJI, JJ.]

Import Policy 1985-88:

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List 8 of Part 2 of Appendix 6—Additional licence holders—import of ‘canalised’ items—Permissibility of—This Court’s order dated April 18, 1985—‘Whether canalised or otherwise’—Interpretation of.

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The respondents purchased certain quantity of palm kernel fatty acid on high seas basis from a firm which had imported it on the strength of an additional licence issued to it pursuant to the order of this Court dated 18th April 1985 in C.A. No. 1423 of 1984—*Union of India v. Rajnikant Brothers*. The Customs authorities refused to permit clearance of the goods on the ground that they were canalised items and could not be imported even under such additional licences.

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The respondents filed a petition under Art. 226 challenging the action of the Customs authorities. A Single Judge of the High Court permitted the clearance of the goods, which order was affirmed by the Division Bench.

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In the appeal to this Court on behalf of the appellant-Union of India it was contended that the direction given by the High Court was contrary to the directions given by this Court in *Raj Prakash’s* and *Indo Afghani Chamber’s* cases.

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On behalf of the respondents it was contended: (1) that the holders of the additional 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; (2) 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

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A (industrial); and (3) that the respondents were actual users (industrial) because these were used by them for their production.

Allowing the appeal of the Union of India,

B HELD: 1. 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
C 1985-88. These are items which are not 'canalised'. [776F-H]

D 2. '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. [776H; 777A]

E 3. Paragraph 75(1) of the Import Policy 1985-88 entitles a Trading House holding an Additional Licence to directly import canalised items in Appendix V Part A to the extent laid down 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 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
F 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
G 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 18th April, 1985. [777B-E]

H *Raj Prakash Chemical's case*, [1986] 2 SCC 297 and *Indo Afghan Chamber of Commerce's case*, AIR 1986 S.C. 1567, followed.

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 is the present case was the Import Policy 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 18th April, 1985. [777G-H; 778A-B]

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5. 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. [779B-C]

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6. 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 of Appendix 6 of the Import Policy of 1985-88 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 such cannot be allowed to be imported against additional licence granted pursuant to the order of this Court dated 18th April, 1985. [779D-E]

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7. The goods were purchased by the respondents only on 27th June, 1986 after they were aware of the judgment of this Court in *Raj Prakash's* case as well as *Indo Afghan Chambers of Commerce's* case. No question of any restitution of rights arises. [779F]

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8. The acid in question comes within specific prohibition of Item 9 in Part-B 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. The actual importation was not by the respondents but by somebody else. [780A-B]

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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3418 of 1986

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A From the Judgment and Order dated 22/23.7.1986 of the Bombay High Court in Appeal No. 565 of 1986.

A.K. Ganguli and Sushma Relan for the Appellant.

B Soli J. Sorabjee, J.B. Dadachanji, R. Narain, Mrs. A.K. Verma, D.N. Mishra, Aditya Narayan and Harish N. Salve for the Respondents.

The Judgment of the Court was delivered by

C **SABYASACHI MUKHARJI, J.** This is an application for special leave to appeal against the order of the Division Bench of the Bombay High Court dated 22nd/23rd July, 1986 filed on behalf of the Union of India.

D 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 Karmel 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 Karmel Fatty Acid in view of the decision of this Court in *Raj Prakash Chemical's* case [1986] 2 SCR 297 and *Indo Afghan Chamber of Commerce's* case AIR 1986 S.C. 1567.

F 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 18th April, 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.” (Emphasis supplied in view of the contentions now sought to be raised in these proceedings).

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.)

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.”

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.

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 Prakash Chemicals Ltd. & Anr. v. Union of India & Ors.*

A (supra). 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).

B As this Court has observed in *M/s Indo Afghan Chambers of Commerce and another v. Union of India and others* (supra) the order dated 18th April, 1985 has been considered by this Court in *Raj Prakash Chemicals Ltd. and another v. Union of India & others* (supra) to mean that:

C “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.”

E 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.

F 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 Appendix V Part A to the extent laid down 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 18th April, 1985.

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* (supra) dated 15th May, 1986 by a bench consisting of both of us (R.S. Pathak & 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 Brothers 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 5th March, 1986, this Court has construed its order dated 18th April, 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

A 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 18th April, 1985. The Court examined the facts of that case.

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Regarding dry fruits, this Court observed as follows:

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“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 5th March, 1986 to those diamond exporters who had imported items under irrevocable letters of credit opened and established before 18th October, 1985. It appears from the record before us that the respondents diamond exporters opened and established the irrevocable letters of credit after that date.”

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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 highseas 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 18th April, 1985 in Civil Appeal No. 1423 of 1984—*Union of India v. Rajnikant Brothers*. 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.

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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 10th July, 1986 permitted the clearance of the goods in question.

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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 23rd July 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 Prakash's* case (supra) and *Indo Afghan Chamber's* case (supra).

In respect of Palm Kernal 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.

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 of Appendix 6 of the Import Policy of 1985-88 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 such cannot be allowed to be imported against additional licence granted pursuant to the order of this Court dated 18th April, 1985. As we have mentioned hereinbefore the respondents were fully aware of the position in law and they purchased goods on 27th June, 1986, there is no equity in their favour.

In this case no injustice would be done by this order. The goods were purchased by the present petitioners only on 27th June, 1986 after they were aware of the judgment of this Court in *Raj Prakash's* case (supra) as well as *Indo Afghan Chambers of Commerce's* case (supra). No question of any restitution of rights arises.

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

- A 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 is mentioned hereinbefore, being M/s Dimexon Co. In the premises, the view of the Bombay High Court cannot be sustained.
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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 appellants are entitled to the costs.

C A.P.J.

Appeal allowed.