UNION OF INDIA AND ORS. A

v.

M/S. CHOWGULE AND CO. LTD. AND ORS.

JANUARY 24, 2003

[SYED SHAH MOHAMMED QUADRI AND ASHOK BHAN, JJ.] B

Export-Import Policy—Trading houses—Grant of exim scrips/REP licence under new policy for exports made when old policy was in force—Entitlement to 20% premium instead of additional licence as per Circular dated 5.5.1993— C
Claim rejected by authorities—High Court quashed the rejection order and directed Government to pay 20% premium instead of additional licence—On appeal held, trading houses entitled to additional licence but subject to condition that items imported would be relatable to import policy in force—Hence High Court right in its direction—Export-Import Policy April, 1988-March, 1991 and April 1990-March, 1993—REP Circular No.11/93, 5.5.1993. D

Under the Export-Import Policy for April 1988-March 1991, trading houses were eligible for the benefit of additional licences of value defined against the export of processed iron ore under the policy. This policy was terminated and new policy was introduced for April 1990-March 1993. Respondent company recognized as trading house exported processed iron E
ore during the period April 1989 to March 1990 and applied for additional licence of a defined value in June 1990. Controller as well as other authorities rejected the claim. A Circular was issued which provided that if applications for grant of additional licence are pending in respect of the exports made and export proceeds are realised prior to 1.3.1992 then F
instead of issuing the licences, 20% premium shall be paid. Respondent claimed 20% premium which was rejected. Aggrieved respondent filed writ petition for quashing of the orders of the authorities and direction to the appellants to pay premium of 20% in terms of the Circular, instead of issuing of additional licence. High Court allowed the petition. Hence the present appeals. G

Appellants contended that there was no application from the party pending for entitlement of additional licence as their application was rejected; that the rejection was not contrary to law or null and void or in excess of jurisdiction; that the claim for additional licence in subsequent H

A **year was ineligible under the new policy although that might have been available under the old policy; and that the respondents had to lodge their right/entitlement to get the additional licence under the new policy for the exports made during the period when the old policy was in force.**

Dismissing the appeals, the Court

B

HELD: 1. Export-Import Policy for April 1988-March 1991 (old policy) provides that eligibility to the additional licence was to be determined on the basis of the admissible exports made in the preceding licensing year. Transitional arrangements of the policy for April 1990-March 1993 (new policy) provides that where the applications from export houses/trading houses for additional licences for any of the preceding licensing year, have not been disposed of by the end of the licensing year, licences will be issued as per the relevant policy provisions prevailing during the period to which the additional licences relate. This is subject to the condition that the items which can be imported would be relatable to the import policy in force, i.e., the new policy. In the instant case application is pending as the controversy is still alive being adjudicated then the licence has to be issued as per the relevant policy provisions prevailing during the period to which the additional licence relates which would be under the old policy. The entitlement of the export houses/trading houses to get the additional licence has not been taken away. Therefore, under the new policy as well, the export houses/trading houses would remain entitled to the additional licence for the exports made during the period when the old policy was in force however, subject to the condition. Hence there is no infirmity in the order of High Court and is in strict conformity with the Circular 11 of 93 dated 5.5.1993.

C

D

E

F

1.2. The submission that respondents had to lodge their right/entitlement to get the additional licence under the new policy for the exports made during the period when the old policy was in force cannot be accepted. The application for the additional licence could be made only after the end of the fiscal year, as only thereafter the export house could know its entitlement. [550-D-H; 551-A, B]

G

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2185-88/1994.

From the Judgment and Order dated 16.12.93 of the High Court of Bombay in WP Nos. 480, 490, 522, 521/93.

H

P.P. Malhotra, G.L. Sanghi, T.V. Ratnam, P.Parmeswaran, Dhruv Mehta, Ms. Shalini Gupta, Mohit Chaudhary, S.K. Mehta, P.S. Sudheer, K.J. John, Gopal Jain, Amit Dhingra and P.H. Parekh for the appearing parties. A

The Judgment of the Court was delivered by

BHAN, J. 1. Union of India has filed these appeals against a common judgment/order of the High Court of Bombay, Panaji Bench, Goa dated 16th December, 1993 passed in Writ Petition Nos. 480 of 1993, 490 of 1993, 522 of 1993 and 521 of 1993 filed by the respondents who were the petitioner before the High Court. By the impugned judgment the High Court has quashed the orders passed by the authorities rejecting the claim of the respondents for grant of additional licence against the export orders. But because of the intervening circumstances, i.e., issuance of REP Circular No.11 of 1993 dated 3th May, 1993 by the Directorate General of Foreign Trade, instead of granting the additional licence the Union of India has been directed to pay to the respondents the premium amount of 20% in terms of the said Circular. Union of India was directed to work out the amount payable subject to the respondents producing the Bank Certificate in respect of the realisation of foreign exchange of export proceeds. B C D

2. The facts which are common to all the appeals being similar are taken from the appal: *Union of India* v. *Chowgule & Co. Ltd. & Ors.*

3. Respondent is a limited company incorporated under the Companies Act, 1956. It is engaged, *inter alia*, in the export of processed iron ore of Goa origin. It is also recognised as a trading house. Under the Import Export Policy for April 1988-March 1991 (hereinafter referred to as 'the old policy') trading houses were eligible for the benefit *inter alia* of additional licences of defined value against the export of processed iron ore under the policy. Old policy was terminated and instead a new policy starting w.e.f. April 1990-March 1993 (for short 'the Now Policy') was introduced. During the period 1.4.1989 to 31.3.1990 the respondents had exported processed iron ore of the value of Rupees 21,92,15,711.69. On 4.6.1990 the company applied to the Assistant Chief Controller of Import & Exports for additional licence of a value of Rs. 2,12,63,924 against the said exports. The application was rejected by the Assistant Chief Controller of Import & Exports on 24th September, 1990 on the ground that application for additional licence for the licensing year 1990-91 could not be considered on the basis of the items appearing in Appendix 12 of the New Policy because there was no provision for grant of licence under the heading transitional arrangements in terms of E F G H

A the paragraph 222 of the New Policy. Respondents preferred an appeal which was dismissed on 21th January, 1991. Likewise second appeal was dismissed on 12th March, 1992. Review Petition filed by the respondents was also rejected on 9th June, 1993.

4. Government of India, Ministry of Commerce, Directorate General of
B Foreign Trade, Udyog Bhavan, New Delhi issued REP Circular No. 11/93 dated 5th May, 1993 (hereinafter referred to as 'the Circular 11 of 93') providing therein:

> "(b) Where the applications for issue of Exim Scrips/REP etc. licences are pending in respect of exports made and export proceeds realised
C there against prior to 1.3.92, the 20% premium will be straightway paid, instead of issuing the licences, provided that licensing authority after processing the application and determining the eligibility for issue of licences is satisfied that the applicant is eligible for grant of Exim Scrips/REP etc. licences."

D

5. On 14th July, 1993 respondents lodged its claim for 20% premium instead of additional licence for the licensing year April-March 1991 against exports of processed iron ore in the proceeding licensing year April-March 1990. The claim of the company was rejected by the Deputy Director General of Foreign Trade, Panaji vide letter dated 1st September, 1993 on the ground
E that minerals and ores appearing in Appendix 12 of the policy book 1990-1993 were ineligible for additional licence.

6. Aggrieved against the aforesaid sets of orders the respondents filed the writ petitions in the High Court of Bombay, Panaji Bench, Goa seeking two-fold relief. Firstly, for quashing of the orders passed by the various
F authorities as mentioned above refusing their prayer for additional licence and secondly a writ of mandamus or any other appropriate writ directing the Union of India of forthwith pay to them premium of 20% of Rs. 2,12,63,924/- being the face value of the additional licence for April-March 1991 to which the respondents were entitled to under the Circular 11 of 1993.

G

7. The respondents in their writ petitions raised three-fold contentions firstly it was urged on their behalf that by exporting processed iron ore during the period 1.4.1989 to 31.3.1990 under the import export policy for the years 1988-1991 (old Policy), they had acquired a vested right to get additional licence in the licensing year April-March 1990-1991 of the value
H prescribed in the import export policy relevant for April 1988-March 1991

and the said right could not be defeated by the provisions of the new policy. Secondly, it was contended that on a true construction of the relevant provisions of the import export policy for April 1990-March 1993, in particular, paragraph 220 thereof, the respondents were entitled to additional licence for the licensing year April 1990-March 1991 against exports of processed iron ore made in the preceding licensing year, i.e., April 1989-March 1990 and that the authorities have misconstrued the relevant provisions. Thirdly, it was contended that the Union of India was precluded by the doctrine of Promissory Estoppel for denying the additional licence to the company during the licensing year April-March 1991 of the value defined having represented to the Trading Houses/Exporters that they would be entitled to the additional licence, the parties having acted upon that representation and having exported processed iron ore during the period 1.4.1989 to 31.3.1990.

8. The appellants apart from raising certain preliminary objections regarding the maintainability of the writ petitions which were rejected by the High Court and which have not been pressed before us did not dispute the factual statements of facts made in paragraphs 1 to 8 in the writ petitions stating that these were matters of records. In so far as the claim of the respondents for 20% premium it was contended that there was no application from the party pending for entitlement of additional licence as their application for additional licence was rejected. It was denied that their action in rejecting the application of the respondents for the grant of additional licence was contrary to law or null and void or in excess of jurisdiction. That the claim for additional licence in subsequent year was ineligible under the new policy although that might have been available under the old policy, which, however, ceased to exist after 31st March, 1990. Claim of respondents/writ petitioners that they had acquired any vested right to get an additional licence by virtue of exports made during the year 1989-1990 was denied. That the amendment made in the policy was valid and the consequences flowing thereof were in the public interest and, therefore, not opened to challenge. Circumstances which necessitated the amendment in public interest were set out. According to the appellants the export incentive was subject to changes from time to time during the policy period. A change when it was brought in the policy after 30th March 1990 could thus be made and was binding upon the parties and that the said amendment was made in public interest particularly taking into account that in spite of other existing financial burden on the exchequer, incentive on iron ore was further amounting to large amount of outflow of foreign exchange by way of additional licence and higher REP benefits. For these reasons, according to the appellants, there did not arise any question of

A any promise having been made by the government to the Trading Houses/ Exporters and, therefore, the principal of Promissory Estoppel could not be invoked and the same was not applicable to the facts of the case. It was maintained that the application for additional licence made by the respondents was rejected in accordance with the position of law as it obtained on that date.

B

9. It may be highlighted that appellants did not dispute that the respondent's company was a recognised Trading House. The extent of export of processed iron ore made by the respondents between 1.4.1989 to 31.3.1990 and the value thereof stated in the writ petition were not controverted. The C value shown by the respondents for the purpose of additional licence was also not disputed. No issue as regards the net foreign exchange earnings as may have been earned against the export of iron ore was raised. Except from contending that the respondents were ineligible for grant of additional licence as per the new policy it was not stated that the application for licence was liable to be rejected on any other ground. Issuance of the Circular 11 of 93 D for payment of premium in the manner provided instead of additional licence to which the applicant may have been entitled to was also not disputed.

10. The High Court by the impugned order independent of and relying upon an earlier division bench judgment of its own court held that the writ petitioners were entitled to the grant of additional licence and accordingly E quashed the orders passed by the authorities rejecting their claim for the additional licence. Because of the coming into force of the Circular 11 of 93 instead of directing the authorities to grant the additional licence it was declared that the respondents would be entitled to the payment of premium of 20% in terms of the relevant clause of which extracted in paragraph no.4 F of this judgment,

11. The short point to be decided in these appeals is: as to whether the respondents who were admittedly entitled to grant of additional licence under the old policy stand debarred from claiming the said additional licence because of the new import export policy which came into force from 1st April, 1990 G and further the applicability of the Circular 11 of 93 dated 5th May, 1993 and the effect thereof.

12. Before addressing on the controversy, the salient features of the old import export policy effective for April 1988-March 1991, which was terminated on 30th March, 1990 and was replaced by the new import export H policy April 1990-March 1993, may be set out. Paragraph 211 of the old

policy sets out the objectives of the scheme for registration of export houses and trading houses. It states that it is to grant recognition and facilities to a select band of efficient registered exporters who would develop a strong marketing capability and that it is expected that they would operate as highly specialized and dynamic institutions with a strong marketing infrastructure and act as an important instrument for export growth. Paragraph 212 provides that the eligibility for grant of Trading Houses/Export Houses certificate shall be determined on the basis of the net foreign exchange earnings from the exports actually made during the past period subject to the conditions set out in sub-paragraph (2) of the said paragraph. Paragraph 215 provides for additional licence. Thereunder the Trading Houses/Export Houses will be eligible to additional licence on the basis of the admissible exports made in the preceding licensing year and that the value of this licence will be calculated at 10% of the Net Foreign Exchange (NFE) earnings on the total eligible exports made in the preceding licensing year. Remaining part of the paragraph is not material and, therefore, is not being set out. Sub-paragraph (2) laid down that the additional licence shall be valid for the export of the items listed thereunder. Sub-paragraph (8) provides that the items permissible shall be those eligible under the policy on the date of issue of the licence. Paragraph 218, *inter alia* provides that where the application for additional licence have not been disposed of by 31st March of the preceding licensing year, the rate of entitlement will be the same as permissible during the licensing year to which the applications pertained but the items to be allowed will be as per the import policy on the date of the licence. Appendix 12 of the old policy does not list iron ore as ineligible product for import replenishment licence or additional licence.

13. Paragraph 204 of Chapter XV of the new policy provides that in the case of exports made prior to 1.4.1990 against which REP licence was issued on or after 1.4.1990, the rate of import replenishment will be as admissible on the date of export but subject to the conditions laid down in 1988-1991 policy book. Chapter XVI deals with deemed exports. Under paragraph 210 the deemed exports will qualify for grant of import replenishment licence. The material provision, however, is contained in Chapter XVIII. Part-A thereof deals with Export Houses/Trading Houses. The objective is similar to that of earlier policy. The eligibility criteria laid down in paragraph 218 for the grant of export/trading housing certificate is to be determined on the basis NFE earnings from the exports actually made in the preceding three licensing years termed as "base period". The earnings from export *of products in* Appendix 12 shall not qualify for this purpose. Paragraph 220 deals with

A additional licence and provides, *inter alia*, that the export houses/trading houses will be eligible for additional licences on the basis of admissible exports made in the preceding licensing year and the value of the licence will be calculated at the rate of 10% NFE earnings on the total eligible exports made in the preceding licensing year. Paragraph 222 deals with transitional arrangements and the same reads as under:

B

> "222. Where the applications from Export Houses/Trading Houses for Additional Licences for any of the preceding licencing year, have not been disposed of by the end of the licensing year, licences will be issued as per the relevant Policy provisions prevailing during the
> C period to which the Additional Licences relate, subject to the condition that the permissibility of the items allowed for import against such licences will be governed by the relevant provisions of the Import Policy in force, at the time of their actual import."

14. Coming to the point raised it is to be noticed that paragraph 215 of
D the old policy is clear and provides that eligibility to the additional licence was to be determined on the basis of the admissible exports made in the preceding licensing year. Paragraph 222 of the new policy which has been extracted above provides that where the applications from export houses/ trading houses for additional licences for any of the preceding licensing year,
E have not been disposed of by the end of the licensing year, licences will be issued as per the relevant policy provisions prevailing during the period to which the additional licences relate. Meaning thereby that if an application for additional licence for any preceding licensing year is pending which in this case shall be deemed to be pending as the controversy is still alive being adjudicated then the licence has to be issued as per the relevant policy
F provisions prevailing during the period to which the additional licence relates which in the present case would be under the old policy. The grant of additional licence in paragraph 222 has been made subject to the condition that the permissibility of the items allowed for import against such licences will be governed by the relevant provisions of the import policy in force at the time
G of their actual import meaning thereby that the items which can be imported would be relatable to the import policy in force, i.e., the new policy. Transitional arrangements stated in paragraph 222 makes it abundantly clear that the applications from export houses/trading houses which have not been finally disposed of by the end of the licensing year would be entitled to the issuance of the additional licence as per the relevant policy provisions
H prevailing during the period to which the additional licences related. The

entitlement of the export houses/trading houses to get the additional licence has not been taken away. The only condition to which the additional licence has been subjected is that the permissible items allowable for import against such (additional licensing) would be governed by the provisions of the import policy in force at the time of their actual import. Contentions raised on behalf of the Union of India that the respondents/writ petitioners had to lodge their right/entitlement to get the additional licence under the new policy for the exports made during the period when the old policy was in force cannot be accepted. The application for the additional licence could be made only after the end of the fiscal year, as only thereafter the export house could know its entitlement. The High Court was, therefore, right in holding that the interpretation put by the authorities on the new policy in declining the claim of the respondents for the grant of additional licence was unacceptable. Under the new policy as well, the export houses/trading houses would remain entitled to the additional licence for the exports made during the period when the old policy was in force but subject to the condition that they would be allowed to import against the additional licence such items which are governed by the policy in force at the time of the import of the goods.

15. For the reasons stated above, we do not find any infirmity in the orders passed by the High Court in quashing the order passed by the authorities rejecting the claim of the respondents for grant of additional licence.

16. Similarly, we do not find any infirmity in the orders passed by the High Courts in the issuance of writ of mandamus directing the Union of India to forthwith pay to the respondents the premium of 20% instead of issuing the additional licence in terms of the Circular 11 of 93. Circular 11 of 93 provides that where application for grant of additional licence are pending in respect of the exports made and export proceeds relating to the period prior to 1.3.1992 then instead of issuing the licences, the 20% premium shall be paid. The order passed by the High Court is strictly in conformity with the Circular 11 of 93 issued by the appellants itself.

17. Bank guarantee given by the respondents in pursuance to the Order of this Court dated 28.3.1994 shall stand discharged. The appeals being without any merit are, therefore, dismissed. Parties shall bear their own costs in these appeals.

R.P.

Appeal dismissed.