

M/S KAJARIA EXPORTS LTD. AND ORS.

v.

UNION OF INDIA AND ORS.

APRIL 7, 1995

[S.C. AGRAWAL AND SUJATA V. MANOHAR, JJ.]

Import and Export Policy 1984-85 :

White Cement—Import of—Held Open General Licence item covered under appendix 6 List 8 Part III Item 33—Held not a canalised item under Appendix 5 Part B Item at Serial No. 8—‘White Cement’ ‘Ordinary Portland Cement’—Distinction between.

Imported Cement Control Order 1978 : Clause 2(a)—‘Cement’—Definition of.

The appellant imported 5000 metric tonnes of white cement and sought its clearance as an Open General Licence item under Appendix 6 List 8 Part III Item 33 of the Import and Export Policy for 1984-85. The clearance was denied on the ground that it was a canalised item under Appendix 5 Part B item at serial No. 8 of the Import and Export Policy and a show cause notice was issued to the appellants. The appellants challenged the show cause notice before the High Court which by an interim order allowed clearance of goods on appellants' furnishing of a bank guarantee as well as undertaking to pay interest in the event of dismissal of their writ petitions. Pursuant to the interim order the respondent adjudicated the matter and held that white cement could not be imported under Open General Licence and consequently imposed a penalty of Rs. 29,57,000 and also directed enforcement of bank guarantee. The High Court also dismissed the appellants' petitions by holding that white cement could not be imported under Open General Licence and was covered by Appendix 5 Part B Item at Serial No. 8 of the Import and Export Policy and was a canalised item. Against the Judgment of the High Court appeals were preferred before this Court.

Allowing the appeals and setting aside the impugned judgment, this Court

A HELD : 1. For the purposes of import, white cement is not a canalised item under entry at Serial No. 8 of Appendix 5 Part B of the Import and Export Policy for 1984-85. [232-H]

B 2. In item No. 8 itself there is a clear reference to the manner in which cement which is covered by that item is to be imported. The item refers to the policy of the Government in the Ministry of Industry in connection with import of cement and specifically states that import by the State Trading Corporation shall be governed by such policy. The policy of the Government in the Ministry of Industry is therefore, directly relevant for the purpose of interpreting this item and is reflected in the order called **C** the Imported Cement Control Order 1978. The definition of cement under clause (2) of the Order excludes white cement from the purview of the Order. In other words, white cement is not considered to be a canalised item which can be imported by the State Trading Corporation of India. Had it been so considered, the Imported Cement Control Order of 1978 would have included white cement within the scope of its definition. Further a Press Note issued by the Government of India, Ministry of Industry **D** dated 27th February 1982 also refers, *inter alia* to the import of ordinary portland cement by the State Trading Corporation and makes no reference to the import of white cement. [230-G, H, 231-A, B, F, 232-B]

E *Re : M/s. Purbachal International and Anr.*, (1985) 21 E.L.T. 673 (Cal.), approved.

3. The order imposing penalty is set aside. However, the appellants are bound to pay all duties of customs in relation to this import with interest @ 15% per annum from the date of adjudication till payment.

F [223-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4922-23 of 1994.

From the Judgment and Order dated 23.3.94 of the Bombay High Court in W.P. No. 2506/84 & 15 of 1985.

G K.N. Bhat, Umopathy Gupta and Rakesh K. Sharma for the Appellants.

K.N. Bajpai, G. Prakash and V.K. Verma for the Respondents.

H The Judgment of the Court was delivered by

MRS. SUJATA V. MANOHAR, J. The appellants imported 5000 metric tonnes of white cement which arrived at the Port of Bombay on or about 17.11.1984. The appellants filed bills of entry for home consumption in respect of the goods so imported and sought clearance of the said goods as an Open General Licence Item under Appendix 6 List 8 Part III Item 33 of the Import and Export Policy for April 1984-March 1985. Clearance, however, was not permitted. The respondents issued a show-cause notice claiming that white cement was not importable under Open General Licence since it was a canalised item under Appendix 5 Part B Serial No. 8 of the Import and Export Policy for April 1984-March 1985. The show-cause notice was challenged by the appellants by filing writ petitions in the High Court.

Pursuant to an interim order passed in the writ petitions, the appellants were allowed to clear the goods on furnishing a bank guarantee of a nationalised bank for 35% of the C.I.F. value of the goods imported as also an I.T.C. bond for the full C.I.F. value. The appellants also gave an undertaking that in the event of failing in the petition, they will pay interest on the amount covered by the I.T.C. bond at 15%. They also gave certain other undertakings as recorded in the interim order. Under the interim order, the respondents were allowed to proceed with adjudication under the impugned show-cause notice. Accordingly the 5th respondent adjudicated the matter and passed an order dated 13th January, 1986 holding that white cement was covered at Serial No. 8 Appendix 5 Part B of the Import and Export Policy 1984-85. Hence it could not be imported under Open General Licence. The import of white cement without an import licence, therefore, was not permissible and the goods imported were liable for confiscation under Section 111 (d) of the Customs Act, 1962, read with Section 3 of Import (Control) Order, 1955. Respondent No. 5 passed an order imposing penalty of Rs. 29,57,000 and directed that the bond/bank guarantee executed by the appellants shall be enforced forthwith as the goods were already cleared and were not available for confiscation.

The writ petitions challenging the show-cause notice were dismissed by the High Court by its judgment and order dated 23rd of March, 1994. The High Court held that white cement did not fall under Appendix 6 List 8 Part III Item 33 and could not be imported as an Open General Licence Item. The High Court held that white cement was covered by Appendix 5 Part B Serial No. 8 and was a canalised item. The present appeals are from

A the above judgment and order of the High Court.

Under the Import and Export Policy for April 1984 - March 1985, chapter 22 lays down Rules for the interpretation of the policy. Paragraph 242 (f) provides, "Any item in Appendices 2 to 5 or 8 with a specific or a generic description, will preclude the eligibility to its import under Open
B General Licence, except where the policy allows this clearly". Appendix 5 Part B Serial No. 8 covers the following :

"8. Cement including Clinker :-

C In the case of cement including clinker, the import will be made only by the State Trade Corporation of India (STC), under Open General Licence on the basis of foreign exchange released by the Government in its favour, imports, distribution, and pricing will be made by the STC as per the connected policy of Government in the Ministry of Industry."

D We have to consider whether this item would cover white cement. If white cement is not covered by the above item then it would fall under Appendix 6 List 8 Part III Item 33 which is as follows :

E "33. All other items permitted under Open General Licence in terms of the Import Policy in force, other than these covered by Paras I and II above."

F *Prima facie*, one would be inclined to hold that cement would cover all types of cement including white cement. Hence white cement should be considered as a canalised item, importable only by the State Trading Corporation of India under Open General Licence as set out in Item 8 of Appendix 5 Part B above. In fact this is what has been held by the High Court. However, our attention has been drawn to certain other provisions which are relevant for the purposes of interpreting Item No. 8 in Appendix 5 Part B. In Item No. 8 itself there is a clear reference to the manner in
G which cement which is covered by that item is to be imported. The item provides that (1) import will be made only by the State Trading Corporation of India on the basis of foreign exchange released by the Government of India in its favour; and (2) import, distribution and pricing will be made by the State Trading Corporation as per the connected policy of Govern-
H ment in the Ministry of Industry. The item, therefore, refers to the policy

of the Government in the Ministry of Industry in connection with import of cement and specifically states that import by the State Trading Corporation shall be governed by such policy. A

The policy of the Government in the Ministry of Industry is, therefore, directly relevant for the purpose of interpreting this item. In this connection, the central Government has made an order called the Imported Cement Control Order, 1978. In Clause 2(a) of the Order 'cement' is defined as follows : B

"2(a): 'Cement' means any variety of cement imported into India but does not include oil-well cement and white cement and coloured cement (other than grey portland cement)." C

This definition of cement excludes white cement from the purview of the Order. Under Clause 2(C) 'agent' is defined to mean the State Trading Corporation of India or any person who acquires cement from the State Trading Corporation of India. This Order, therefore, has a direct link with the cement imported by the State Trading Corporation of India as a canalising agency under Appendix 5 Part B, Serial No. 8 of the Import and Export policy for April 1984-March 1985. The Order provides for the sale and transport of such cement, prices at which the State Trading Corporation may sell cement, maintenance and production of accounts and so on. The State Trading Corporation, therefore, is required to import and sell cement in accordance with the Imported Cement Control Order of 1978 which excludes white cement from its purview. In other words, white cement is not considered to be a canalised item which can be imported by the State Trading Corporation of India. Had it been so considered, the Imported Cement Control Order of 1978 would have included white cement within the scope of its definition. It is not disputed that this Order was in force during the period covered by the Import and Export Policy for April 1984-March 1985. D E F

The Cement Control Order of 1967 also excludes from the definition of cement, white cement. This Order, however, is under the Industries (Development and Regulation) Act, 1951 and is made for the purpose of securing equitable distribution and availability at fair prices of cement. So this Order will not be of direct relevance while interpreting the entry at Serial No. 8 of Appendix 5 Part B. The Imported Cement Control Order of 1978, however, is of direct relevance for the purpose of interpreting this G H

A entry, and a combined reading of both these would clearly show that white
cement was not considered as a canalised item under the said entry. The
appellants have also relied upon a Press Note issued by the Government
of India, Ministry of Industry dated 27th February, 1982 which also refers,
inter alia, to the import of ordinary portland cement by the State Trading
B Corporation and makes no reference to the import of white cement.

The appellants have also drawn our attention to the composition of
white cement which is different from ordinary portland cement. Properties
of white cement are also somewhat different from those of ordinary
portland cement. In commercial parlance, white cement is considered as a
C different commercial commodity. It is submitted before us that if a cus-
tomer asks for cement from a cement dealer, he will get ordinary portland
cement and not white cement. Our attention was drawn to a decision of
the Calcutta High Court in *Re : M/s. Purbachal International & Anr.*, (1985)
21 E.L.T. 673 (Cal.). A learned Single Judge in that judgment has discussed
D at length the properties of ordinary portland cement as against the proper-
ties of white cement. He has set out the relevant portions of a booklet
issued by the Indian Standards Institution under the title "Indian Standard
Specification for White Portland Cement". It states :

E "White Portland Cement is generally meant for non- structural use.
White Portland Cement is made from raw material containing very
little iron oxide and manganese Oxide. Limited quantities of cer-
tain chemicals, which will improve whiteness of cement without
affecting the physical properties, may be added during manufac-
ture....."

F There is a separate booklet issued by the Indian Standards Institution
under the title "Indian Standard Specifications for Ordinary and Low Heat
Portland Cement" which also provides the terminology, manufacturing
process, chemical requirements, physical requirements etc. of ordinary
portland cement. The chemical requirements of white Portland cement and
G ordinary and low heat portland cement are quite distinct and separate. The
learned Single Judge has also observed that the pricing of the two com-
modities is quite different. Their chemical composition and uses are also
quite different, and in the commercial world, the two are treated as dif-
ferent commodities. He has, therefore, held that for the purposes of
H import, white cement is not a canalised item at Serial No. 8 of Appendix

5 Part B. We respectfully agree with these findings of the learned Single Judge. What is more important, the entry in question makes a clear reference to the connected policy of the Government in the Ministry of Industry in connection with the items canalised at Serial No. 8 of Appendix 5 Part B. This connected policy of the Government is reflected in the Imported Cement Control Order of 1978, the Cement Control Order, 1967 and the Press Note which do not cover within their ambit white cement.

In the premises, the appeals are allowed. The impugned judgment of the High Court is set aside. The appellants are, however, bound to pay all duties of customs in relation to this import. If they have not done so already, they shall do so within weeks from today. The amount of customs duties required to be paid by the appellants shall bear interest@ 15% per annum from the date of adjudication till payment. The order imposing penalty, however, is set aside. The respondents shall be entitled to realise the bank guarantee furnished by the appellants towards any unpaid duty together with interest. Looking to the circumstances, however, there will be no order as to costs.

T.N.A.

Appeals allowed.