

PETITIONER:
ZIPPERS KARAMCHARI UNION

Vs.

RESPONDENT:
UNION OF INIDA & ORS.

DATE OF JUDGMENT: 03/09/1998

BENCH:
S.C. AGRAWAL, S.P. KURDUKAR.

ACT:

HEADNOTE:

JUDGMENT:
JUDGEMENT
S.P. LURDUKAR.J.

MS. Y.K.K. Corporation, Japan, (for short 'YKK') an international group company, having worldwide net of companies and business locations in various countries, on April 29, 1995 submitted a proposal representation to the Foreign Investment Promotion Board, New Delhi (for short 'FIPB') seeking approval to set up integrated plants for manufacturing zip fasteners (metallic and non-metallic) with hundred per cent own capital investment with no export obligation. On consideration of this proposal the FIPB forwarded the same with its recommendation to the Central Government. The Deputy Secretary to the Government of India, Ministry of Industry, Department of Industrial Policy and Promotion vide its letter dated 7th July, 1995 communicated the approval on behalf of the Government of India to YKK. Accordingly, YKK through its subsidiary company m/s YKK Zippers, Singapore (p) Ltd., the third respondent set up integrated plants at Bawal in Haryana.

(2) The petitioners claiming to be the members of various trade unions operating in the companies engaged in manufacture of zip fasteners have filed this Writ Petition under Article 32 of the Constitution of India seeking mandamus to quash the permission granted to YKK for setting up "INTEGRATED PLANTS" for manufacturing metallic and non-metallic zip fasteners in India. In addition to this prayer, a Writ of Mandamus is also sought to set aside the Notification No.S.O. 309(E) dated 30th May, 1986 and for declaration that new industrial policy of 1991 is in violation of the Industries (Development and Regulation) Act, 1951 (for short 'the Act'). First respondent is the Union of India and the second respondent is Foreign Investment Pormotion Board (FIPB).

(3) It is alleged by the petitioners that zip fasteners and its components were being manufactured in India since 1949. ever since 1971 the manufacturing of zip fasteners has been reserved exclusively for the small scale sector. Zip fasteners are broadly classified into two categories, metallic and non-metallic zip fasteners. It is undisputed that the zip fastener is the final product of various

components. There are about 150 small scale units in India engaging over 45,000 workers in the manufacturing process of various components for the end product i.e. zip fastener. Most of these manufacturers fall within the parameters of small scale industry. These manufacturers after putting their hard work and on obtaining knowhow have been manufacturing the zip fasteners and successfully competing with the international market of zip fasteners. They have been supplying zip fasteners to the manufacturers of readymade garments, leather garments and allied articles. As of today the High technology used by these manufacturers in successfully competing the world market and earning valuable foreign exchange for India. Notwithstanding this factual position the reservation contained in Section 29-B (2) (2B) read with item 38 (3) in the First Schedule of the Act, the Central Government deserved this item providing exception in case of integrated plant - manufacturing zip fasteners (metallic and non-metallic) by violating the said provisions of the Act and extending favourable treatment to the foreign investor for extraneous consideration. The action of the Central Government is illegal and be quashed.

(4) Before we deal with the contentions raised on behalf of the petitioners it may not be out of place to mention certain other proceedings in which an identical challenge was made to the Notification No. S.O. 309 (E) dated 30th May, 1986 as also to the new industrial policy in Bombay and Delhi High Courts. Writ Petition No.1987/1986 was filed in the Bombay High Court challenging the validity of Notification No.S.O. No.309(3) dated 30th May, 1986 issued under Section 29(B)(2)(2B) of the Act. This writ petition was filed by three petitioners, namely, (1) Zipper India Pvt. Ltd., (2) Kishore J. Vora; and (3) Zipper Association of India. Of course to this writ petition YKK could not be a party as it got the approval to start its integrated plant on 7.7.1995. Learned Single Judge of the Bombay High Court upheld the Notification No.S.O.No.309(3) dated May 30, 1986 and dismissed the writ petition. Appeal No.220 of 1988 filed on behalf of unsuccessful writ petitioners was dismissed by the Division Bench by its judgement and order dated February 28, 1997. The Special Leave Petition was allowed to be withdrawn by this Court.

(5) Zipper Association of India than filed Civil Writ Petition No. 3297 of 1975 in the High Court of Delhi, at New Delhi under Article 226 of the Constitution of India challenging the New Industrial Policy, 1991 and office Memorandum No.9(90)/91-FC (1) dated 22.8.1991. There was also a challenge to the Notification No.309/E dated 30.05.1986. In these proceedings respondent Nos.3 and 4 were arrayed as respondents. The High Court of Delhi vide its judgement and order dated 1.7.1996 dismissed the writ petition. Special Leave Petition (C) No.1952 of 1996 was also dismissed by this Court on 15.7.1997. The present Writ Petition was filed on September 23, 1996 under Art.32 of the Constitution of India by Zippers karamchari Union and it was tagged and heard along with Special Leave Petition. This Court by its order dated 12.8.1997 admitted Writ Petition for final disposal but dismissed the Special Leave Petition. It is in this backdrop we have to examine various challenges led by the petitioners in this Writ Petition. The third and fourth respondent are thus required to face the second round of litigation in this Court at the instance of Zippers Karamchari Union.

(6) Mr. Shanti Bhushan, learned Senior Counsel appearing in support of this Writ Petition urged that ever since 1973 the policy of the Central Government was to promote small scale

industries as reflected in the Notification dated 16.2.1973 wherein 53 industries were exclusively reserved for the small scale sector which included zip fastener industry. This policy underwent various changes from time to time but zip fastener industry remained untouched. However, the Notification dated 30.05.1986 brought about a change making an exception in respect of integrated plant manufacturing zip fasteners vide Notification No.S.O.309 dated 30.5.1986. It is under this notification YKK was granted permission to set up an integrated plant in India. This approval granted by the 1st respondent (Union of India) is ultra virus the provisions of Section 29-B(2B) of the Act To supplement this submission he relied upon the provisions of Section 29-B (2B) of the Act which read as under:-

29-B Power to exempt in special cases:- (1) If the Central Government is of opinion, having regard to the smallness of the number of workers employed or to the amount invested in any industrial undertaking or to the desirability of encouraging small undertakings generally or to the stage of development of any scheduled industry, that it would not be in public interest to apply all or any of the provisions of the Act thereto, it may, by notification in the Official Gazette, exempt, subject to such conditions as it may think fit to impose, any industrial undertaking or class of industrial undertakings or any scheduled industry or class of scheduled industries as it may specify in the notification from the operation or all or any of the provision of this Act or any rule or order made thereunder.

(2B) The Central Government shall, with a view to determining the nature of any article or class of articles that may be reserved for production by the ancillary, or small scale industrial undertakings, constitute an Advisory Committee consisting of such persons as have, in the opinion of that Government, the necessary expertise to give advice on the matter.

Item 38 in Schedule 1 reads thus:

1.....,
2.....; and

(7) The reading of the above provisions and Entry 38 in Schedule, the Legislature's intent is quite clear that the zip fasteners (metallic and non-metallic) were reserved for small scale industry under Section 29-B(2B) read with Entry 38(3) in the Schedule of the Act. But however, the Central Government may constitute an Advisory Committee consisting of such persons as have in the opinion of the Government necessary expertise to give advice on that matter. The question that needs to be considered is as to whether the Notification dated 30.5.1986 issued under the Act is valid and sustain role. The relevant portion of the said Notification reads as under:-

Against Sl.No.148, for the entries in the second and third columns, the following shall be substitute namely:-

"30391301 Zip fasteners non-metallic except in the case of integrated plants manufacturing all components".

Against Sl.No.387, for the entries in the second and third columns, the following shall be substituted, namely:-

"34090601 Zip Fasteners metallic except in the case of integrated plant manufacturing all components".

(8) From the preamble of the notification itself, it is quite clear that in view of the recommendations made by the Advisory Committee constituted under sub-section 2-B of Section 29(B) of the Act, the Government of India dereserved the integrated plant manufacturing all components. The concept of integrated plant is well known in the business circle to mean that all components needed for the end product are manufactured under one roof.

(9) Mr. Shanti Bhushan, learned Senior Counsel urged that under Section 29-B (2B) of the Act, the Central Government thought it fit to reserve Zip Fasteners (Metallic and Non-Metallic) industry under Item 38 of Schedule I for small scale industry. Any change in the policy of dereservation by notification would be illegal and ultra vires Section 29-B(2B) of the Act. In our considered view, the rigidity of such a construction to section 29-B(2B) would not promote the object and spirit underlying the said section. The industry engaged in manufacture of zip fasteners (metallic and non-metallic) still continues to be in the province of small scale industry. The Notification dated May 30, 1986 however, dereserved only an integrated plant.

(10) It is, therefore, quite clear that even today manufacturing of zip fastener (metallic and non-metallic) would continue to be a small scale industry. What has been dereserved in an integrated plant. It is taken out from the purview of small scale industry. This change was made on the basis of the recommendation of the Advisory Committee constituted under sub-section 2(B) of Section 29-B of the Act.

(11) A very identical question was raised before the Bombay High Court in Appeal No. 220 of 1988 decided on February 28, 1991 by the Division Bench. The Report of the Advisory committee was also tendered before the said court. The Bombay High Court reproduced a passage from the Report of the Advisory Committee which reads as under:-

"Although there are some units in the small scale sector, most of these are small in operation and they do not carry out all the operations in-house. This has resulted in indifferent quality. Smuggling of zip fasteners is taking place on a very large scale. Much of the technology is in the machines itself which has been developed by the manufacturers of zip-fasteners. An integrated unit for manufacture of components in-house to ensure high quality will require large investment, with which it is possible to get specially foreign collaboration."

(12) The Advisory Committee therefore, made recommendations to the Central Government which thought it fit to accept the same and consequently the Notification came to be issued on May 30, 1986.

(13) The Bombay High Court after considering the ambit of sub-section (2B) of Section 29-B and Sections 10, 11, 11-A and 13 of the Act held that the Notification dated 30th May, 1986 was not violative of any of the provisions of the Act. This dereservation is holding the field since then.

(14) It was then contended by Mr. Shanti Bhushan, Learned Senior Counsel that the Notification dated May 30, 1986 issued by the Central Government is arbitrary, irrational and discriminatory. This Notification has brought about an artificial classification in the small scale units and an integrated plant which is violative of Guarantee of Equality contained in Article 14 of the Constitution of India. The said Notification is totally detrimental to the small scale units which are manufacturing zip-fasteners (metallic and non-metallic). In our considered view, there is no

substance in this submission because the integrated plant is a class by itself and totally different from the small scale industry which is engaged in manufacturing zip fasteners metallic and non-metallic. The submission raised on behalf of the petitioner must, therefore, fail.

(15) There is also another aspect which needs to be considered in the light of the expanding market of readymade garments, leather garments and other articles where zip fasteners metallic and non-metallic are used. Since 1983, the export of these goods gaining a good support in the international market and naturally if India wants to compete with other countries engaged in the said business will have to improve upon the quality of its goods. In 1983, the Directorate General of technical Development, Government of India and appointed a study team and the said team was entrusted with the work of finding out as to (1) whether small scale units manufacturing zip fasteners (metallic and non-metallic) have necessary machinery for the manufacture of zip colla/teeth or they are simply importing zip chain and components and assembling the same into finished zips; and (2) the quality of indigenous zips vis-a-vis the imported ones. The quality of indigenous zip fasteners would be an important factor. The study team during its survey found that zip fasteners were smuggled into India on large scale and they were being used by the manufacturers of readymade garments and leather garments and other allied articles. The Government of India accepted the report of the said study team and with a view to have quality zip fasteners (metallic and non-metallic) and in order to compete with the world market and also to generate employment in the field of readymade garments and leather industry, it thought fit to derevalue an integrated plant manufacturing zip fasteners. The object seems to be that all components of zip fasteners if manufactured in an integrated plant, the same will have a quality control which will compete with the world market in that behalf. It is in these circumstances we are of the considered opinion that the Notification dated May 30, 1986 is neither illegal, irrational nor discriminatory.

(16) It was then contended by Mr. Shanti Bhushan, Learned Senior Counsel that the integrated plant of YKK owns hundred percent equity capital of foreign national without any corresponding export obligation. The manufacture of zip fasteners (metallic and non-metallic) does not require access to high technology and world markets and if this be so, the Central Government had committed a serious illegality while permitting YKK to set up an integrated plant for manufacturing zip fasteners (metallic and non-metallic) with its hundred percent equity capital without any export obligation. He submitted that grant of such permission to YKK would mean that they can expand the industry as they like. They could also use the sophisticated machinery where minimal labour is needed. The production would be on huge scale and resultantly thousands of labourers engaged in the small scale units in manufacturing zip fasteners (metallic and non-metallic) would be rendered jobless and that is how the petitioner would be vitally affected in a very immediate near future. In a social welfare state and particularly India being a developing country when labour is available in abundance who are equally competent to meet the needs of the country in producing zip fasteners (metallic and non-metallic), their talent will go waste and they would be rendered jobless. He, therefore, urged that the Notification dated May 30, 1986 must be struck down. To supplement this submission, he drew

our attention to the statement on Industrial Policy of Government of India and in particular paragraph 30-B (I), (III) and (V) which read as under:-

"(I) Approval will be given for direct foreign investment up to 51 percent foreign equity in high priority industries (annexure III). There shall be no bottlenecks of any kind in this process. Subh clearance will be available if foreign equity covers the foreign exchange requirement for imported capital goods. Consequential amendments to the Foreign Exchange Regulation Act, 1973, shall be carried out.

(II) xxx xxxxxxxx xxxxxxxxxxxxxx
xxxx

(III) Other foreign equity proposals, including proposal involving 51 percent foreign equity which do not meet the criteria under (i) above, will continue to need prior clearance. Foreign equity proposals need not necessarily be accompanied by foreign technology agreements.

(IV) xxxxxxxx xxxxxxxxxxxxxx

(V) A specially empowered Board would be constituted to negotiate with a number of large international firms and to approve direct foreign investment in select areas. This would be a special programme to attract substantial investment that would provide access to high technology and would markets. The investment programmes of such firms would be considered in totality free from pre-determined parameters or procedures".

(17) Relying upon this policy statement, Mr. Shanti Bhushan urged that government policy is to promote 51% equity share holding by the foreign companies/nationals that too in a field where it would provide access to high technology and world markets. According to learned counsel, there is nothing on the record to indicate that the government while granting permission to YKK to set up an integrated plant for manufacturing zip fasteners (metallic and non-metallic) had considered that an integrated plant would be such which "would provide access to high technology and world markets". The integrated plant for manufacture of zip fasteners (metallic and non-metallic) does not involve an access to high technology and would markets. If this be so, Counsel urged that the above policy statement on Industrial Policy. He however, conceded that expression and used in Clause V "..... access to high technology and world markets" could be read as 'or' yet the approval granted to YKK to start integrated plant for manufacture of zip fasteners (metallic and non-metallic) would be totally opposed to the Industrial Policy of Government of India. This submission again does not appeal to us. Because it has come on the record that YKK has acquired a world wide reputation in the manufacture of zip fasteners (metallic and non-metallic). Mr. Hiroshi Mitani, Managing Director of 4ht respondent in his affidavit dated July 31, 1997 has highlighted the salient features of YKK corporation in the field of manufacturing zip fasteners all over the world. It is stated "YKK have the would richest variety of items which are required by customers. YKK Zippers are produced by using high technology. The chart prepared with the nucleus technology along with new technology is annexed as Annexure "B". In paragraph 14, it is stated "a large number of Indian exporters, manufacturers etc. are already using Zippers made by YKK to meet the standard required in International Market. In the domestic market a number of

counterfeit zip fasteners bearing the brand YKK have appeared and are in circulation for which the answering respondent has instituted the suit for perpetual injunction, infringement of trade marks, passing off and Rendition of Account etc. which shows that the product manufactured by YKK is in demand in India. We wish to state that counterfeiting of YKK brand in India is rampant many international burers specify use of YKK zippers. Many of them have had their own brand names damaged due to supply of garments with counterfiet Zippers from India and are becoming wary of sourcing such garments from Indian suppliers."

(18) After giving our careful thought to the pleadings of the parties before us, we are of the considered opinion that having regard to the quality and worldwide reputation carried by YKK zip fasteners, it would be reasonable to include that it would provide access to the world market which is indicated in the statement on Industrial Policy in paragraph V sub clause V quoted hereinabove.

(19) Mr. Nariman, learned Senior Counsel urged that the integrated plant which has already been set up by YKK through its subsidiary company, the third and 4th respondent at Bawal in Haryana is highly sophisticated plant involving high technology. He also urged that the third respondent the subsidiary of YKK corporation, Japan being would leaders in zip fasteners have acquired high reputation because of use of the high technology used in their integrated plant for manufacture of metallic and non-metallic zip fasteners. Having considered the pleadings of the parties before us we are of the firm opinion that having regard to the quality and worldwide reputation earned by YKK zip fasteners, it would not be out of place to mention that it would provide access to the world market which is indicated in the Statement on Industrial Policy in paragraph 39 Clause V quoted hereinabove. Consequently we hold that approval granted to YKK is neither illegal non contrary to the Industrial Policy, 1991.

(20) Coming to the other limb of the argument of Mr. Shanti Bhushan Learned

Senior Counsel that many workers of the present petitioner association would be

rendered jobless has also no force. We are told that as of today, there are as

many as 17 Indian companies which have been granted licences and are outside

the purview of small scale units. This statement appearing in the affidavit of

Shri Hiroshi Metani in paragraph 12 is contested on behalf of the petitioners

contending that many of these Indian companies have been rendered non-functional because of variety of reasons. But, however, the fact remains

that some of the Indian companies have started integrated plants for manufacture of metallic and non-metallic zip fasteners, whether they are successful in their attempt or not is really not a decisive factor. In this

behalf, it is really not a decisive factor. In this behalf, it is also necessary to highlight the ratio between the production and requirement of zip

fasteners (metallic and non-metallic) in India. In paragraph 7, Shri Hiroshi

Mitani has stated that in 1997, the production of YKK was 2.2 corer pieces

. The said figure was calculated on the basis that Indian Market size is about

100 crore pieces. Therefore, YKK production was 2-3% of the Indian Market in the year 1997. In 1998 onwards the production of YKK is going to be 9.2 crore pieces i.e. 9-10% of the local market. There is no effective denial to this statement in the rejoinder filed on behalf of the petitioners and if this fact has any bearing upon the factual state of requirement, it is quite clear that yet a sizeable market is available to the Indian manufacturers and the apprehension entertained by the petitioner appears to us a mere figment of imagination.

(21) On 15th July 1997, when this Court heard this writ petition for preliminary hearing, it observed as under:-

W.P. (C) No. 781/96.

"One of the submissions of the learned counsel for the petitioner is that even according to the opinion of the Minister of State, Industries Department as contained in his Note dated 5/9/1995 (at pages 109-110 of the paperbook), entry to the multinational company should be allowed with a 75 per cent export commitment as is normally done in clearing cases of 100 percent foreign equity where relatively low technology is involved, this condition should have been imposed on the respondent company".

(22) Mr. Shanti Bhushan, Learned Senior Counsel urged that non-imposition of condition of export commitment on YKK was totally wrong, irrational and contrary to the note submitted by the Minister of State while allowing entry to the multinational company in India. A strong reliance was sought to be placed by Mr. Shanti Bhushan on the note of Minister of State dated 5th September, 1995 which reads thus:-

"Secretary's point that YKK would help domestic readymade garment industry is valid. It is quite clear that YKK was allowed primarily as a result of Ministry of Textiles intervention in emphasizing the need to supply an internationally acceptable brand for the export oriented Ready Made Garment Industry. This objective could be better served if YKK is allowed entry with a 75% export commitment as is normally done in clearing cases of 100% foreign equity where relatively low technology is involved. YKK could supply to domestic readymade garment units against their advance licences on a deemed export basis. In no circumstances should we permit the decimation of the small scale sector in a low technology/low priority industry. It is therefore, recommended, that permission to YKK be amended to include a 75% export commitment."

(23) Admittedly, YKK was granted permission to set up integrated plant for manufacture by the Government of India on 7th July, 1995. It is thus clear that the note of the Minister of State is dated 5th September, 1995 after the permission was granted to YKK. The question is what is the effect of such a note. Shri Om Prakash, Deputy Secretary to the Government of India. Ministry of Industry, in his affidavit has stated:

"..... A copy of a note allegedly signed by the then Minister of State for Industry, dated 5-9-1995 has been filed from which it appears that Shri M.Arunachalam on 5-9-1995 as the then Minister of State for Industry had recommended that the

permission granted to MS. YKK Corporation be amended to include a 75% export commitment. In this connection, I submit that the file in which this note is said to have been written by the then Minister of State for Industry is not available in the concerned office, i.e. Office of the Development Commissioner for Small Scale Industries. I am making this submission on the basis of communication No. 9(10)/95-Chem. dated 22-7-1997 from the office of the Development Commissioner for Small Scale Industries."

(24) He further stated that the Industry Minister is a cabinet rank minister and a note made by the Minister of State can only be his viewpoint/recommendation to the Industry Minister who has to take a final decision on such recommendation. The grant of approval to MS YKK Corporation with the approval of the Empowered committee on foreign investment under the Chairmanship of Finance Minister (Dr. Manmohan Singh), preceded the said note of the then Minister of State for Industry. The approval letter was issued on 7th July, 1995 and the note of the Minister of State was made on 5th September, 1995. This note was considered in the department of Industrial Policy and Promotion which is the department dealing with the foreign investment violation as well as matters relating to approval of foreign and domestic investment. The department of Industrial Policy and Promotion expressed the view that the approval granted to MS YKK Corporation is in consonance with the notification dated 25th July, 1991 incorporating the list of items reserved for small scale sector. According to the guidelines for the Foreign Investment Promotion Board issued through press note No. 3(1997 series) dated 17th July, 1997, no conditions specific to the letter of approval issued to a foreign investor would be changed or additional condition be imposed subsequent to the issue of letter of approval. The stand of the central government contained in the affidavit in reply is that it would neither be desirable nor legally permissible to prescribe 75% export obligation on YKK. The industry Minister on 13th March, 1997 having considered all aspects of the matters and the note of the Department of International Policy and Promotion has granted approval to YKK Corporation and did not impose any export obligation on YKK.

(25) Mr. Vaidyanathan, Learned Addl. Solicitor General appearing for the Union of India urged that since the said note of the Minister of State dated 5th September, 1995 was after letter of approval issued to the YKK corporation on 7th July, 1995 and that there is no material on the record to indicate that such a note was approved by the Minister of Industry. He further stated that it would not be possible to impose such a condition after a lapse of such a long period. He, therefore, urged that no relief whatsoever could be granted to the petitioner on the basis of the said note.

(26) Mr. Nariman, Learned Senior Counsel urged that noting made by the officer/Minister of State on the government file cannot be used to alter the situation and, therefore, a letter of approval granted to YKK Corporation on 7th July, 1995 cannot be varied. In support of his submission, he drew our attention to the decision of this Court in State of Bihar etc. etc. Vs. Kripalu Shanker etc. etc. 1987 (3) SCR 1. In our considered view, it would not be possible to direct the first respondent to impose the condition in tune with the note dated 5th September, 1995 made by the Minister of State. The Minister of the cabinet rank holding the

protfolio of Industry has granted the approval to YKK Corporation on 7th July, 1995. It is a matter of government policy and in our opinion no sustainable ground was urged before us to hold that the approval granted to YKK was contrary to the government policy. The Court would not be justified in inter ering in such matters when it is satisfied that a grant of approval to YKK was neither irrational, non for any extraneous consideration. Incidentally, it may also be mentioned that the third and fourth respondent have commenced the production of zippers in their factory at Bawal, Haryana on 21st March, 1997 with the investment of 90 crores. Any change in the terms and conditions of the approval at this stage may lead to several legal complications.

(27) For the foregoing conclusions, we are of the considered view that the petitioner has made out no case for grant of any of the reliefs claimed in this petition under Article 32 of the Constitution of India. The Writ Petition is thus devoid of any merit. The Writ Petition, therefore, stands dismissed. In the cirrcumstances of the case, parties are directed to bear their own costs.

(28) When I circulated my draft judgment for approval to Brother Rajendra Babu, J., he agreed with my judgment. But, however, he has given a separate concurring judgment to which both of us agree.
END.