

Raj Parkash Chemicals Ltd., and Another

Vs

Union of India and Others

Civil Appeal No. 4978 of 1985

05.03.1986.

JUDGMENT

PATHAK, J. –

1. This appeal is directed against the judgment and order dated August 16, 1985 of a Division Bench of the High Court of Bombay summarily rejecting an appeal filed by the appellants against the dismissal of their writ petition by a learned Single Judge of that High Court.

2. The first appellant, Raj Parkash Chemicals Limited, is a public limited company with its registered office at Bombay. It is engaged in the manufacture of acrylic ester monomers (Butyl Acrylate, Ethyl Acrylate, 2-Ethyl Hexyl Acrylate and Methyl Acrylate) at its factory in Tarapur, Maharashtra. These items are used by various industries engaged in the manufacture of Binders required in textiles, leather and paint and paper industries. The second appellant is the Managing Director and a shareholder of the appellant company. In February 1975, the appellants were granted an industrial licence for manufacturing acrylic ester monomers in a total quantity of 3000 tonnes per annum. The installed capacity of the factory is, however, 1000 tonnes per month. It commenced manufacture in December 1980, and was until then the only manufacturer in India of acrylic ester monomers. In the year 1981 the Indian Petrochemicals Corporation Limited, a public sector organisation, also entered the market and began to manufacture acrylic ester monomers at its factory at Baroda, which possesses a capacity of 10,000 tonnes per year.

3. In the period before 1980 in the absence of any indigenous manufacture of acrylic ester monomers, the Government of India permitted the import of those items on Open General Licence. There after in the Import Policy 1981-82, with a view to protect indigenous industry and to conserve foreign exchange the Government of India placed acrylic ester monomers in Appendix 5 (List of Restricted Items), and in July 1981 Ethyl Acrylate was taken from Appendix 5 to Appendix 3 (List of Banned Items). A public notice dated July 7, 1981 announced that Export Houses which were eligible to import Ethyl Acrylate would be allowed to import it only to the extent of irrevocable Letters of Credit opened before the date of the notice. Under Import Policy 1982-83, the nomenclature of the headings of the appendices was altered, and the heading "List of Banned Items" of Appendix 3 was changed to "List of Limited Permissible Items". Likewise, the heading "Absolutely Banned List" of Appendix 4 was altered to "List of Non-permissible Items (Banned)". And the heading "List of Restricted Items" of Appendix 5 became the "List of Automatic Permissible Items". Ethyl Acrylate remained in Appendix 3, and all other acrylic ester monomers remained in Appendix 5. Under Import Policy 1983-84, the headings of Appendices 3, 4 and 5 remained as they were, and all four acrylic ester monomers were placed in Appendix 3 (List of Limited Permissible items). Under Import Policy 1984-85, there was another change in the nomenclature of the headings of the appendices. Appendix 2 Part A became the "List of Banned Items" and Appendix 2 Part B became the "List of Restricted Items". Appendix 3 continued to be

the "List of Limited Permissible Items". Appendix 5 was the "List of Canalised Items". Appendix 6 mentioned the import of items under Open General Licence. That nomenclature and arrangement was reflected again under Import Policy 1985-88, except that Appendix 4 was deleted and the new Appendix 6 (the "Open General Licence" list) contained Part II now which listed items open to import under Export House Additional Licence. Under both Import Policies, 1984-85 and 1985-88 the four acrylic ester monomers appeared at item 9 to Appendix 3 (List of Limited Permissible Items). Changes in the nomenclature of the headings of the appendices in the Import Policy 1982-83 and thereafter were considered necessary in the context of loans and financial assistance received from international agencies to bridge the gap in India's balance of payment, and because the Import Policy of India is considered a vital document by foreign countries in the formulation of their fiscal policies. The change in the nomenclature did not alter the principle underlying the grouping of items under the various heads. Each grouping was determined and continued to be so determined in accordance with two major objectives of import policy, the conserving of foreign exchange by limiting the total imports to a level ensuring that payment for them could be met by the available foreign exchange resources or by maintaining a minimum deficit in the balance of trade, and the further objective of giving impetus to, and protecting, the development of indigenous industries by limiting the import of corresponding manufactured products. The items in Appendix 3 (List of Limited Permissible Imports) were those whose import was not permissible ordinarily but could be permitted by the government if their import was necessary and justified on the merits of the relevant consideration mentioned in the Import Policy, while the import of items Absolutely Banned (and later simply described as "Banned") was not permissible at all.

4. The Import Policy 1978-79 incorporated a scheme under which Registered Exporters were registered as Export Houses and granted special facilities to strengthen their negotiating capacity in foreign trade and to build up a more enduring relationship between them and their supporting manufacturers. They were eligible for the grant of Export House Certificates on the basis of the exports actually made in the three-year base period 1975-76, 1976-77 and 1977-78. Export House were entitled to the following facilities :

- (i) Import replenishment licences eligible to them as Registered Exporters,
- (ii) Import replenishment licences transferred to them by others,
- (iii) Import of items placed on Open General Licence, and
- (iv) Additional Licences.

Replenishment Licences issued in the names of Export Houses, or transferred to them by others, entitled them to import capital goods placed on Open General Licence subject to Actual Users condition, and raw materials, components, and spares placed on Open General Licence for Actual Users (Industrial). The Additional Licence granted for 1978-79 would be valid for the import of items appearing in Appendix 5 (List of Restricted Items) and Appendix 7 (Restricted List - Iron and Steel Items) excluding, however, the items appearing in Appendix 26. An Additional Licence would also be valid for import of raw materials, components and spares placed on Open General Licence for Actual Users (Industrial), the Export House being obliged to dispose of the items so imported to eligible Actual Users only.

5. Several diamond exporters including the fourth respondent, N. Nayankumar and Company, and the fifth respondent, Rajnikant Brothers, applied for Export House Certificates and consequent

Additional Licences. Their applications were refused on the ground that they had not diversified their exports. A number of writ petitions were filed in the High Court of Bombay and in the High Court of Delhi, and in each case the High Court held that the ground for rejecting the application was invalid and directed the grant of an Export House Certificate and an Additional Licence to the applicant. As those orders became the subject of corresponding appeals by the Union of India in this Court which were disposed of by this Court by its order dated April 18, 1985, the construction of which is central to the controversy in this appeal, it would be appropriate to refer to those orders at this point.

6. Taking the orders seriatim passed by the High Court of Bombay there is first the order dated November 26, 1982 by Pendse, J. in Writ Petition No. 1458 of 1979 filed by Narendra Mafatlal Mehta, whereby the learned Judge directed the grant of an Export House Certificate under Import Policy 1978-79 to the petitioner, but while extending the time for making application for an Additional Licence he held the petitioner entitled to those facilities only which were provided by paragraph 174 of that Import Policy. Thereafter, the same learned Judge passed an order dated November 11, 1983 in Writ Petition No. 1293 of 1979 filed by D. Navinchandra & Co. in which, while directing the grant of an Export House Certificate under the Import Policy 1978-79 to the petitioner, Pendse, J. noted the objection on behalf of the government that some of the items which could have been imported under the Import Policy 1978-79 could have been banned under the Import Policy 1983-84, and the learned Judge observed that if any item was banned under the Import Policy 1983-84 the petitioner would not be entitled to import that item even though it was not banned under the Import Policy 1978-79. Another objection by the government that the petitioner should not be permitted to import items which were canalised items under the Import Policy 1983-84 was rejected by Pendse, J., and he observed that canalised items were not banned items and the petitioner should not be compelled to approach the canalising agency for the import of items which were not canalised items under the Import Policy 1978-79. He directed that the petitioner would not be entitled to import only those items which were specifically banned under the Import Policy 1983-84 prevalent at the time of import. On December 23, 1983, Pendse, J. passed an order in Writ Petitioner No. 761 of 1983 filed by Messrs N. Nayankumar and Company where he directed the issue of an Export House Certificate to the petitioners under the Import Policy 1978-79 and held the petitioners entitled to an Additional Licence for the import of items in the same terms as was set forth in the order dated November 11, 1983 in the earlier case. The fourth order in the series was passed on January 25, 1984 by Bharucha, J. in Writ Petition No. 1084 of 1983 filed by Messrs Mehta Gems, and that learned Judge taking note of the orders passed earlier by Pendse, J. in similar cases, also directed the issue of an Export House Certificate to the petitioners and while granting time to the petitioners for applying for an Additional Licence he directed :

Save and except items which are specifically banned under the prevalent import policy at the time of import, the petitioners shall be entitled to import all other items whether canalised or otherwise.

Then followed the order dated January 30, 1985 passed by Sawant, J. in Notice of Motion No. 1194 of 1984 in Writ Petition No. 761 of 1983 filed by N. Nayankumar & Co. and the order directed :

1. The respondents should make the following endorsement on the licence in question :

This licence is valid for import of items permissible to export houses under additional licence category as per paragraph 176 of the Import and Export Policy for

the period 1978-79 excluding those items which are banned for the period 1978-79 and which have been banned during the import policy for the period 1984-85. The additional licence category import allowed to be imported subject to the provisions of paragraph 176 of the Import and Export Policy for the period 1978-79.

2. The banned items referred to above mean items which are "banned" and "absolutely banned".

3. The petitioners will take out a separate motion for Import Replenishment (REP) Licence transferred to them by others, if any.

4. No other order on the present motion and the motion stands disposed of as above with no order as to costs.

7. Adverting to the orders passed by the High Court of Delhi in the several writ petitions filed before it, we find that the High Court by its order dated July 15, 1980 in Writ Petition No. 250 of 1979 filed by Jayantilal Mangalji Mehta held the petitioner entitled to an Export House Certificate under the Import Policy 1978-79, and observed that the certificate would operate with effect from the "original entitlement keeping in view the date of the application and the year for which it was applied". On September 3, 1982 the High Court directed in Civil Writ Petition No. 251 of 1979 filed by Vijay Trading Company that an Export House Certificate for the year 1978-79 should be issued to the petitioner and declared him entitled to all the consequential Replenishment and Additional Licences, and further directed, on a concession made by the petitioner that he would be satisfied if he was permitted to import those items only which were not banned in the year 1980-81, (as the case had originally come up for hearing on July 15, 1980), that the Replenishment and Additional Licences be issued in those terms. Thereafter, on April 7, 1983 the High Court while disposing of Writ Petition No. 1501 of 1981 filed by Rajnikant Brothers, ordered the renewal of their Export House Certificate for the year 1978-79 and directed that as they had filed the Writ Petition on May 11, 1981 they would be entitled to the consequent licences for the import of those items only which were open to import under the Import Policy 1981-82. The High Court went on to observe :

It may be that some of the items, which were permitted to be imported in the year 1981-82 may now have been absolutely banned under the Policy for the current year, i.e. 1983-84. In such a case the petitioner, of course, cannot be permitted to import those items. If, for example, an item which could be freely imported under the Policy for the year 1981-82 is now only canalised, then the petitioner may still be entitled to import that item because merely canalising an item cannot be regarded as import of that item being absolutely banned.

8. It has been mentioned earlier that the Union of India appealed against the orders of the High Court of Bombay and the High Court of Delhi, the appeals being Civil Appeal No. 1423 of 1984 (Union of India v. Rajnikant Brothers) and Civil Appeals Nos. 3232, 3233 and 29020 to 29027 of 1984. A number of special leave petitions, being S.L.Ps. Nos. 13826 to 13829 of 1983, 9161, 9174, 10868, 952 to 971, 7190, 2892 to 2899, 8224 of 1984, 14471 of 1982 and 9338 of 1983 were also disposed of along with the appeals. The orders dated April 18, 1985 disposing of those cases reads as follows :

We have heard counsel for the parties and have gone through the judgments of the High Courts of Bombay and Delhi. We are unable to find, in the fact and

circumstances of the case, any requirement of diversification of exports as a condition for the grant of Export House Certificates in the Import Policy for the year 1978-79. While confirming the High Court's judgment quashing the order impugned in the writ petitions in the High Court we direct the appellants to issue the necessary Export House Certificates for the year 1978-79. The Export House Certificates shall be granted within 3 months from this date. Save and except items which are 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. The appeals are disposed of accordingly with no order as to costs.

9. Pursuant to the orders of this Court and of the High Court of Bombay and the High Court of Delhi, the diamond exporters have been issued Additional Licences which permit them to import item such as acrylic ester monomers.

10. The appellants are aggrieved by the grant of such Additional Licences and see in the import of items under those licences grave danger to their indigenous industry. Moreover, they say, valuable foreign exchange will unnecessarily go out of the country. In the circumstances, the appellants filed Writ Petition No. 11676 of 1985 in this Court complaining that the order dated April 18, 1985 of this Court was being misinterpreted and, in consequence, the import of acrylic ester monomers was being allowed. On August 1, 1985, this Court dismissed the writ petition with liberty to the appellants to move the High Court of Bombay. The appellants then filed Writ Petition No. 1549 of 1985 in the High Court of Bombay, but the Writ petition was rejected in limine by Pendse, J. on August 12, 1985. An appeal from that order, being Appeal No. 726 of 1985, was dismissed by a Division Bench on August 16, 1985. The appeal was dismissed on the ground, inter alia, that the withdrawal or cancellation of the additional endorsement made on the Additional Licences would conflict with the order of this Court and would amount to modifying or nullifying it. Therefore, the appellant filed a special leave petition in this Court, and on special leave being granted, this appeal is now before us.

11. It is admitted between the parties in this appeal that the fundamental question for consideration is the true meaning and scope of the order dated April 18, 1985 made by this Court. There is no dispute that the diamond exporters enjoying the benefit of the order are entitled to the issue of Export House Certificates under Import Policy 1978-79 and to the facilities flowing from such grant. There can also be no dispute that the consideration whether the items sought to be imported by such diamond exporters are canalised cannot act as an impediment to the import directly made by them. The order declares further that such diamond exporters shall be entitled to import all items "save and except items which are specifically banned under the prevalent import policy at the time of import". The controversy between the parties centres around the meaning of the expression "specifically banned", specially in the context of an Additional Licence granted to such diamond exporter.

12. Shri V.M. Tarkunde, counsel for the appellant company, contends that under the aforesaid order dated April 18, 1985 Export Houses holding Additional Licences are prohibited under the Import Policy 1985-88 from importing items other than those appearing in Part II of List 8 of Appendix 6 because that is their only entitlement under paragraph 265(4) of that Import Policy. It is urged that as acrylic ester monomers do not appear in that list the holders of Additional Licences have no right to import that item. In other words, so far as the holders of Additional Licences are concerned the import of acrylic ester monomers is specifically banned under the Import Policy prevalent at the

time of import. Our attention is drawn to the orders mentioned earlier of Pendse, J. and Bharucha, J. of the High Court of Bombay, wherein the same expression, "specifically banned", also appears, and which orders were the subject-matter of the appeals disposed of by the order dated April 18, 1985 of this Court. It is submitted further that the order passed by Sawant, J., which constitutes the format for the endorsements made on the Additional Licences granted to the diamond exporters must be construed in line with the earlier order of Pendse, J., in spelling out the intent of the word "banned". It is also pointed out that Sawant, J. used two expressions in his order, "banned" and "absolutely banned" as indicating the scope of the word "banned" used earlier in his order. This, learned counsel says, clearly means that diamond exporters were prohibited from importing even those items, such as acrylic ester monomers, which suffered a qualified ban that is to say "banned" although not "absolutely banned". In his submissions, Shri Tarkunde initially refuses to attach significance to the headings of the appendices to the Import Policy but, he urges, even if they are taken into account the result would be the same. He points out that under the Import Policy 1978-79 an Additional Licence was valid for the import of raw materials placed on Open General Licence for Actual Users (Industrial) and the relevant item 1 of Appendix 10 (List of Items on Open General Licence) excluded from import the items under Appendix 3 (Banned List). As acrylic ester monomers did not appear in that list nor were excluded by the other terms of item 1 of Appendix 10 they could, under the Import Policy 1978-79, be imported under Open General Licence by the holder of an Additional Licence, who was under paragraph 176 of the Import Policy, obliged to dispose them of to Actual Users (Industrial) only. But now under the Import Policy 1985-88, prevalent at the time of import, the holder of an Additional Licence is no longer entitled to import acrylic ester monomers because that item is now inserted in Appendix 3 Part A, which by a change of nomenclature, is currently described as the List of Limited Permissible Items. Further, learned counsel contends, inasmuch as the purpose of issuing Additional Licences is to satisfy the needs of small scale manufacturers who are unable to import directly the small quantities of raw materials required by them, and therefore the holder of an Additional Licence is obliged to supply the imported item to Actual Users (Industrial), regard must be had to the circumstance that under the Import Policy 1985-88 even Actual Users are debarred from importing acrylic ester monomers because this item has been placed in Appendix 3 Part A. Item 1 of Appendix 6 of the Import Policy 1985-88, which lists the items to be imported under Open General Licence, excludes the items appearing in Appendix 3 Part A from import by Actual Users (Industrial). Learned counsel urges that if Actual Users (Industrial) are themselves barred from importing that item the holder of an Additional Licence is also barred from doing so because in the final analysis he imports only to supply the item to Actual Users (Industrial). The ban has been imposed, it is pointed out, as part of a policy to protect indigenous industry. Learned counsel urges that when the orders of the High Courts and of this Court directed the grant of the Export House Certificate under the Import Policy 1978-79 to diamond exporters for use during the operation of a subsequent Import Policy, it must be regarded as the grant of an exceptional right to them, because in all the years after 1978-79 diamond exporters were not entitled to any Additional Licence. In the circumstances, it is said, when construing the scope of those orders, regard must be had to the observations of this Court in *Deputy Assistant Iron & Steel Controller v. L. Manikchand, Proprietor, Katrella Metal Corpn.* ((1972) 3 SCR 1 : (1972) 3 SCC 324 : AIR 1972 SC 935)

13. The Union of India has made common cause with the appellant company, and Shri B. Datta, the learned Additional Solicitor-General of India, who appears on its behalf urges that the Export House entitlement under the Import Policy 1978-79 has to be reconciled with the entitlement and facilities available under the Import Policy 1985-88. He urges that the expression "specifically banned" in the order dated April 18, 1985 of this Court must be given a meaning consistent with the changed

Import Policy now prevailing at the time of import, and that what is impermissible for import against Additional Licences under the current Import Policy cannot be allowed to be imported now. In the first place learned counsel pointed out that the High Courts and this Court have already permitted a departure from the current Import Policy in holding the diamond exporters entitled to Export House Certificates. Under paragraph 173 of the Import Policy 1978-79 and Export House Certificate is normally valid for three years only. It would no longer be valid now. In the year 1978-79 due to the need of protecting export trade and providing incentives to diamond exporters they became eligible for a total import licence to the extent of Rs 108 against an export valued at Rs 100. The Replenishment Licences entitled them to import on an average of 75% of the FOB value of exports while Additional Licences entitled them to another 33%. With the development of the national economy and the availability of indigenous products the policy was changed from the year 1979-80 onwards, and for the purpose of calculating the entitlement for an Additional Licence the value of exports if select products carrying an import replenishment rate of more than 50% in Appendix 17 of the Import Policy 1979-80 was not to be taken into account, and the value of such exports was not to be included by an Export House while applying for an Additional Licence. In the result, the year 1978-79 was the only year for which diamond exporters could be granted Additional Licences. Learned counsel emphasises the need, in the circumstances, to ensure that further departure from the current Import Policy should not be permitted. He invites our attention to paragraph 35(1) of the Import Policy 1985-88 which provides that Replenishment Licences and Additional Licences held by Export Houses would cease to be valid for the import of any item which could have been imported under Open General Licence during the preceding financial year or earlier but was no longer so under the Import Policy 1985-88.

14. Shri K.K. Venugopal appearing for the fourth respondent, N. Nayankumar & Company, opposes the confined construction sought to be put by Shri V.M. Tarkunde, learned counsel for the appellant company and Shri B. Datta, Additional Solicitor-General of India on the order dated April 18, 1985 of this Court, and urges that diamond exporters, who were entitled under the orders of the High Courts to the issue of Export House Certificates and consequently Additional Licences were entitled under the terms of those orders to import all items which could be imported under Open General Licence under the Import Policy 1978-79 as well as all items which could be imported under the Import Policy 1985-88, including items in Appendix 3 Part A (List of Limited Permissible items), but not items absolutely banned under the Import Policy 1985-88. He contends that the rights of such diamond exporters must be considered in the context of the Import Policy 1978-79 and not of the Import Policy 1985-88. The applications for Export House Certificates were made under the Import policy 1978-79 and were denied by the Chief Controller of Imports on a wholly untenable ground, and consequently the intent of the orders of the courts was to entitle such diamond exporters to restitution. Such restitution could be effected only if the diamond exporters could, notwithstanding the passage of time occasioned by the pendency of the proceeding in court for relief against the wrongful order, be placed back in the position which they would have occupied had Export House Certificates been granted. As regards the items which such diamond exporters were entitled to import, he has referred to material on the record indicating how respondents 1 to 3 themselves understood the orders of the court. Our attention has been invited to paragraph 5 of the counter-affidavit of Dr R.K. Dhawan, Deputy Chief Controller of Imports and Exports, filed on behalf of Respondents 1 to 3 which states :

5. In terms of the court order the parties can import all the items which were under OGL during 1978-79 except animal tallow and animal rennet which were now banned under Appendix 2-A.

In this connection, reference may also be made to the affidavit of Kanayalal J. Chellani, Deputy Chief Controller of Imports filed before the High Court of Bombay in Writ Petition No. 1686 of 1985 (Reliance Industries Limited v. Union of India), a copy of which has been included as Ex. 19 to the affidavit of N. Nayankumar and Company in reply to Civil Miscellaneous Petitions 43000 and 43001 of 1985 in Civil Appeal No. 3233 of 1984 (Union of India and Others v. N. Nayankumar and Others). Paragraph 9 states :

9. I say that it is significant to note that the subject item has not been banned or restricted (Appendix 2 of 1985-88 Policy). It has only been shifted from OGL to L.P.L. The petitioners after receiving a licence for import of the said item can very well still import the item.

Shri Venugopal has attempted to demonstrate that there is need for importing acrylic ester monomers and that in fact the Government of India envisages such import notwithstanding that the item is no longer on the OGL list but finds place now in Appendix 3 of the Import Policy 1985-88. He invites our attention to the counter-affidavit of Nikhal Premchand Shah filed on behalf of N. Nayankumar and Company to the effect that because of the inability of the Indian Petrochemicals Corporation Limited to run its plant at full capacity the commodity which was being sold to Actual Users at Rs 30 per kilogram was now being sold at Rs 150 per kilogram. There is reference to a new item in the Indian Express dated April 18, 1985 stating that although the official price was about Rs 67 per kilogram, a premium of over 155 per cent was being charged in the open market, and the purchaser was compelled to pay a total of Rs 152 per kilogram. There are several provisions of the Import Policy 1985-88 under which import of acrylic ester monomers is permitted. They can be imported by Actual Users as specified in paragraphs 82(1) and 82(3) of the Import Policy read with Appendix V-D of the Handbook of Import and Export procedures 1985-88. A Registered Exporter holding Replenishment Licences is entitled to import the item under paragraph 195(1) of the Import Policy inasmuch as Ethyl Acrylate Monomer and Butyl Acrylate Monomer appear as item B. 36 in Appendix 17 of the Import Policy. Under paragraph 204(1) of the Import Policy, a special facility has been given to a manufacturer-exporter holding a valid Replenishment Licence issued in his name against exports of select products manufactured by him to import the item specified in Appendix 3. It is contended by Shri Venugopal that the word "banned" in the order dated April 18, 1985 of this Court should be interpreted in a manner consistent with Joint Chief Controller of Imports and Exports v. Aminchand Mutha ((1966) 1 SCR 262 : AIR 1966 SC 478) and Union of India v. Indo-Afghan Agencies Ltd. ((1968) 2 SCR 366 : AIR 1968 SC 718), and it should, therefore, be construed as referring to the import of goods into the country and not in relation to the bar placed on an individual to import goods which can otherwise be imported into the country. Even if the goods covered by the licences issued under the Import Policy 1978-79 were found to be canalised under the Import Policy 1985-88 and, therefore, excluded from import directly by private importers, the licences would still operate in regard to such goods. Learned counsel urges that the word "in accordance with such rules" in the order of the court would govern only the manner and method of import and the procedure for application, the fees to be paid, the duties to be paid and other particulars and does not govern the entitlement to import the goods.

15. Shri S.J. Sorabjee appearing for N. Nayankumar and Company, a respondent in Civil Appeal No. 3233 of 1984 filed by the Union of India against the order of the High Court of Bombay, urges that there is a fundamental qualitative difference between the goods the import of which is prohibited and goods the import of which is restricted or controlled. The goods of which import is prohibited cannot lawfully cross the customs frontiers of India and enter the stream of trade and commerce in the country. The expression "banned goods" or "banned items", he says, as understood

in the discourse of the import and export trade, means prohibited goods. Restricted or controlled goods whose import is permitted into the country subject to the fulfilment of certain conditions, learned counsel submits, cannot be described as banned goods. The feature of non-importability is a characteristic or an attribute of the goods themselves and does not depend upon the person who imports the goods. Our attention is drawn to the distinction between the prohibition or prescription of certain goods, for example, narcotics, counterfeit coins, obscene and seditious literature on the one hand and goods the import of which is qualified by the category of the person entitled to import the goods. Canalised goods are goods of which import is subject to restriction, in that they cannot be imported directly by the private importers and such goods are not considered "banned" goods. It is urged that the import of goods can be validly prohibited only by an order under Section 3 of the Imports and Exports Act, 1947, and learned counsel refers to Aminchand Mutha case ((1966) 1 SCR 262 : AIR 1966 SC 478) and Jagannath Aggarwal v. B.N. Dutta (Civil Appeal No. 801 of 1964, decided on January 10, 1967 (SC) (Not reported). According to the learned counsel, it is the import of only the items mentioned in Appendix 2-A of the Import Policy 1985-88 which is covered by a notified order under the Act. No such notified order has been made in respect of acrylic ester monomers. Learned counsel points out that the ban on the import of goods into India is to be found not only under the Imports and Exports Act, but under other enactments, such as the Customs Act, the Foreign Exchange Regulation Act, the Drugs and Cosmetics Act, and the Insecticides Act. Learned counsel contends that the objective of the orders of the High Courts and of this Court was to effect restitution to aggrieved diamond exporters, who were victims of an unlawful denial of their applications for Export House Certificates. It is urged that they are entitled to full and complete restitution, they have suffered already a diminution of their rights in the additional fetter imposed by the courts in excluding items which were banned under the prevalent Import Policy at the time of import. There is no justification, learned counsel contends, in further reducing the scope of the restitution to which the diamond exporters were entitled and the orders of the courts should be construed against any further reduction of their entitlement. It is asserted that the entitlement of the diamond exporter flows from the Import Policy 1978-79 and not from the Import Policy 1985-88. There are several items which can be imported under the Additional Licences issued under Import Policy 1985-88 but the import of which was not permissible to Additional Licences holders under the Import Policy 1978-79 and, it is said, if the construction sought by the appellant company and the Government of India were accepted and diamond exporters would suffer the worst under both Import Policies and even the partial restitution accorded by the order dated April 18, 1985 of this Court would be nullified. Finally, learned counsel contends that assuming there is an ambiguity in the matter we should choose such a construction as would not subject the party to pains and penalties under various statutes besides the loss and hardship which would be inevitable. That two views are possible, it is pointed out, is evident from the fact that the Import Control authorities have taken the view that the expression "specifically banned" in the orders of the courts does not include items placed on the Limited Permissible List of the Import Policy 1985-88.

16. Shri Ashok Desai, appearing for Rajnikant Brothers, respondent 5, relies on considerations somewhat parallel to those placed before us by Shri Sorabjee and urges in particular that the right of the importer to an Export House Certificate and to a consequential licence does not alter with variations affected in the Import Policy during the passing of time when litigation was pending and is not dependent on the exact point of time at which the benefits were made available. In construing the order dated April 18, 1985 of this Court, learned counsel states that the central objective of effecting restitution should be borne in mind and that the entitlement of the Additional Licence is founded in the Import Policy 1978-79 and not in the Import Policy 1985-88 and, it is, paragraph 265 of the Import Policy 1985-88 cannot be invoked for construing the rights of the holders of

Additional Licences issued under the Import Policy 1978-79. The successive screening of the rights through the two Import Policies of 1978-79 and 1985-88, would result in a construction so severe as to deny the diamond exporters any restitution at all. Learned counsel cites, as an example of the scope which this Court intended in its order dated April 18, 1985, the direction in that order that the canalisation of items under the Import Policy 1985-88, which were open to direct import under the Import Policy 1978-79, cannot operate as a restriction. It is said that the ban against direct import by private importers imposed by canalisation was thus removed, and the intention of the court always was that only the item "specifically banned" fell within the exception to the rights of the diamond exporter, "specifically banned" items being those absolutely banned and appearing in Appendix 2-A of the Import Policy 1985-88.

17. Shri Anil Dewan, who appears for Messrs Hiralal Chaganlal and Shrijee Sales Corporation, Interveners in this civil appeal, has also been heard by us. He contends that the expressions used by the courts in their orders must be understood in the sense in which those involved in the import of goods and in import licensing understand such expressions, and that if the construction suggested by the appellant company and the Union of India is accepted the diamond exporters would be wholly prohibited from obtaining an Additional Licence under the Import Policy 1985-88. The expression "specifically banned" must, according to learned counsel, refer to items the import of which is banned not by reference to the person importing, but because they are prohibited from any import whatsoever. Reference was made to the change in the headings of the appendices in successive Import Policies and, it is urged, the change of the heading "List of Banned Items" in Appendix 3 to the heading "List of Limited Permissible Items" must be given due significance. In other words, items which were banned are now regarded as open to restricted import. Besides this, learned counsel has adverted to the particular facts of his case, and asserts that while his case was not one of those in appeal before this Court and therefore not directly covered by its order dated April 18, 1985, no appeal had been filed by government against the grant of licence in the case of these two diamond exporters, and that the said diamond exporters had opened irrevocable letters of credit before the writ petition filed by the appellant company, full payment had been made and foreign exchange had left the country, and shipments had been effected in June, 1985, and the customs authorities had interpreted the order in their case to mean that the goods imported were not "banned". It is pointed out that only a small quantity of 32 tonnes had been detained at the port, that the insurance cover of the shipper or seller no longer covered the goods, that the goods were of hazardous nature and were lying uninsured, and he prayed that the goods should be allowed to be cleared.

18. We think it necessary to keep in the forefront the limits of the enquiry before us. We are not concerned with the question of what order should be made on the controversy arising between the parties in the appeals. The appeals have already been disposed of. They were disposed of by the order dated April 18, 1985. It is not our function to redetermine the issues arising in those appeals, and this is not a rehearing of those appeals. We are charged with a more limited and pedestrian task. And that is merely to construe the meaning and scope of the order dated April 18, 1985. The submissions of learned counsel have been thoughtful and elaborate, and having regard to the range covered by them they would have done justice to a full hearing of the appeals themselves. We can take assistance from them, but only for the purpose of discovering what has been said by the court in its order of April 18, 1985. That defines the scope of the present proceeding.

19. The terms in which the order has been made appear simple on the surface, and yet as the range and depth of the contentions at the Bar have demonstrated, they embody a certain complexity. At the outset, it is necessary to examine the context in which the order was made. Diamond exporters, who

had been denied Export House Certificates under the Import Policy 1978-79, filed writ petitions in the High Court of Bombay and the High Court of Delhi. The High Courts ruled that the ground on which the Export House Certificates had been refused was wholly untenable. They directed the issue of such certificates as well as the consequent Additional Licences, but while defining the right of the diamond exporters to import items under the Additional Licences they also took into account the Import Policy prevailing at the time of import in regard to the items which could not be imported. The pendency of the litigation had inevitably occupied time, and meanwhile events had not remained stationary. The contextual framework determining the import structure had altered. Considerations pertaining to current economic and fiscal needs had led to the periodic reorientation of the country's Import Policy. Indigenous industry had put in appearance over the years, and it was necessary to protect its growth and encourage its development. Many items which could formerly be imported with comparative freedom under Open General Licence were no longer so permissible. And, therefore, items were moved from one list to another. There was a change in the nomenclature of the headings of different lists, but that change was effected merely by way of clarification in order to promote a clearer comprehension among foreign countries of India's import policy. It was a change essentially in nomenclature, and for the most part effected no alteration in the basis governing the classification reflected in the lists. The basis of the classification was supplied by the principle which determined the constitution of each group. That principle bound the group together. It was a principle which along with others formed the network of principles constituting the current Import Policy. It is in this light that we must understand the order dated April 18, 1985. The courts were confronted with the problem that items which were open to import under Open General Licence to an Export House holding an Additional Licence were no longer included in the list and had meanwhile been transferred to a list not accessible to the holders of Additional Licences. The dictates of reality situation, and this they attempted to do by framing their respective orders in appropriate terms. They took into account not only the rights of the diamond exporters under the Import Policy 1978-79 but also the effect and impact on those rights of the Import Policy operating at the time of import.

20. It is desirable at this point to keep in mind that the appeals filed in this Court against the orders of the High Courts were appeals filed by the Union of India. There were no appeals by the diamond exporters. The complaint by the Union of India before this Court was that the High Courts had granted too much to the diamond exporters or even that no grant was called for at all. There was no complaint by the diamond exporters before the court that the grant was insufficient and that more should have been granted. This Court was required to consider only whether the relief granted by the High Courts should have been granted at all, not whether it should be enhanced. In other words, the terms of the High Court orders determined the outer limit of the rights of the diamond exporters. As this Court dismissed the appeals and affirmed those orders, the meaning and scope of this Courts' order dated April 18, 1985 must be discovered from the terms of the High Court orders. And that would plainly be so because the language in which the order of this Court is couched bears close comparison with one or other of the High Court orders.

21. In construing the order dated April 18, 1985 of this Court, it is necessary to note that the real controversy between the parties centres on the meaning of the words "specifically banned". They are the key words, and indeed the principal submissions made by the array of learned counsel before us have been devoted to ascertaining the significance of those words. They are words which were used by Pendse, J. and Bharucha, J. in the orders made by them, and our task is to find out what they were intended to mean. Now, all the appeals before this Court were disposed of by the order dated April 18, 1985. It was a single order in respect of the different appeals, and what it intended to say in one appeal it did in another. The Court proceeded on the assumption that the judges of the High

Court of Bombay should be considered to have spoken with one voice and meaning, although in different language. And that Pendse, J., Bharucha, J. and Sawant, J. were all in agreement as to the extent of relief to be granted to the diamond exporters. To appreciate then what is intended by the words "specifically banned" it is necessary to have recourse also to the order made by Sawant, J. He directed that the Additional Licences were valid for the import of items permissible to Export Houses under such licence according to paragraph 176 of the Import Policy 1978-79, "excluding those items which are banned for the period 1978-79 and which have been banned during the Import Policy for the period 1984-85," and then explained that "banned items referred to above mean items which are 'banned' and 'absolutely banned'". The word "banned" in the order has been used for the period 1978-79, and it has also been used in relation to the period 1984-85. It is obvious that in the light of the explanation appended by the learned Judge when he spoke of items which were banned for the period 1978-79, he had in mind items which were "banned" and items which were "absolutely banned", and he was clearly referring to Appendix 3 (List of Banned Items) and Appendix 4 (List of Absolutely Banned Items). Appendix 3, it will be recalled, is the list of items which could not be imported by an Export House on an Additional Licence. It was a ban with reference to the category of importer. Appendix 4 is the list of items which could not be imported by anyone whosoever. When regard is had to the Import Policy 1984-85, reference must necessarily be made to the corresponding Appendix 3, formerly described as the List of Banned Items, and now described as the List of Limited Permissible Items, and Appendix 2 Part A which is now the List of Banned Items replacing Appendix 4 (List of Absolutely Banned Items). In other words, the Additional Licences to be issued to diamond exporters entitled them to import items permissible to Export Houses under such licence under the Import Policy 1978-79 excluding those items which fell within Appendices 3 and 4 of the Import Policy 1978-79 and also excluding items which fell in Appendix 3 and Appendix 2 Part A of the Import Policy 1984-85. Upon what we have said earlier, that is the meaning which we think must also be given to the terms of the order dated April 18, 1985 of this Court. Where the Import Policy prevailing at the time of import is the Import Policy 1985-88, the items excluded are those enumerated in the corresponding Appendix 3 and Appendix 2 Part A of that Import Policy. That conclusion follows irresistibly on the analysis attempted by us and in the context in which the order was made.

22. We are mindful of the submissions made before us by learned counsel for the different diamond exporters that the word "banned" in the import trade should mean items which are absolutely banned and cannot be imported under any circumstance whatever, and that an import of items subject to restrictions respecting the category of importer should not fall within the expression "banned". Reliance has been placed on *Aminchand Mutha case* ((1966) 1 SCR 262 : AIR 1966 SC 478) as well as *Indo-Afghan Agencies Ltd. case* ((1968) 2 SCR 366 : AIR 1968 SC 718). Goods can be banned, it is urged, only by an order under Section 3 of the Imports and Exports Act, 1947, and we are referred to *Jagannath Aggarwal v. B.N. Dutta* (Civil Appeal No. 801 of 1964, decided on January 10, 1967 (SC) (Not reported)). It seems to us that when the word "banned" was used, it was intended to take in items which were banned altogether as well as items which were banned for import by the holder of an Additional Licence. The court was concerned with the right to import of the holder of an Additional Licence. The holder of an Additional Licence was prohibited from importing items which were banned altogether and also items which he, as the holder of an Additional Licence, was banned from importing. If the more liberal interpretation suggested by learned counsel for the diamond exporters was given to the words "specifically banned", we would be enlarging the scope of relief granted by Sawant, J., and such a construction is clearly impermissible when no diamond exporter had appealed against that order before this Court. It may be of some relevance to note that when this Court made the order dated April 18, 1985, when the

Import Policy 1985-88 was in force, there were only two items which were absolutely banned, and they were animal tallow and animal rennet. That was also substantially the position under the Import Policy 1984-85.

23. It has been urged on behalf of the respondent diamond exporters that if the order dated April 18, 1985 is construed in the manner suggested by the appellants it will result in nullifying the relief envisaged by the court in making the order. We are unable to subscribe to that view. In the Import Policies of 1984-85 and 1985-88 the items open to import under Open General Licence are now set forth in Appendix 6. A perusal of Part II of List 8 in Appendix 6 shows that it enumerates in fairly long detail the items allowed to be imported by Export Houses holding Additional Licences for the sale of those items to eligible Actual Users (Industrial) subject to Actual User condition. That is the entitlement of the holder of an Additional Licence under paragraph 265(4) of the Import Policy 1985-88.

24. We are conscious that the right of a diamond exporter to an Additional Licence does not issue from paragraph 265 of the Import Policy 1985-88. Paragraph 265 enables the grant of Additional Licences to other Export Houses, and diamond exporters are not entitled to Additional Licences under the Import Policy. There can be no dispute that the Export House Certificates granted to the diamond exporters pursuant to the orders of the High Courts and of this Court are those envisaged under the Import Policy 1978-79. But for the purpose of granting relief in their favour the courts took into account the conditions prevailing at the time of import, and therefore the provisions of the Import Policy 1985-88 become relevant. They are relevant for the purpose of construing the terms in which relief has been granted by the courts. They do not constitute the source of those rights.

25. Great emphasis has been laid by learned counsel on the overriding consideration that the intent of the High Courts and of this Court was to effect restitution to the diamond exporters, who had been denied Export House Certificates to which they were clearly entitled, and there is no justification, it is said, for so construing the order dated April 18, 1985 that the extent of restitution stands attenuated. We think it necessary to point out that the diamond exporters cannot, upon our construction of the order, be regarded as denied restitution. But the restitution available to them has been reduced by the express direction of the court that they are not entitled to import items excluded under the Import Policy prevailing at the time of import in addition to those excluded under the Import Policy 1978-79. We may, in this connection, refer to the observations of this Court in Manikchand case ((1972) 3 SCR 1 : (1972) 3 SCC 324 : AIR 1972 SC 935) where it was pointed out : (SCC pp. 336-337, para 11)

In granting licences for imports, the authority concerned has to keep in view various factors which may have impact on imports of other items of relatively greater priority in the larger interest of the overall economy of the country which has to be the supreme consideration, and an applicant has no absolute vested right to an import licence in terms of the policy in force at the time of his application....

26. It seems to us that the construction placed by us on the order dated April 18, 1985 is consistent with the principle that the court must be presumed to have given effect to the law. That presumption can be rebutted only upon evidence showing a clear intention to the contrary, either expressly or by necessary implication. We see no such evidence before us. En passant, we may refer to paragraph 35(1) of the Import Policy 1985-88, which declares :

35(1) REP licences and Additional Licences held by Export Houses/Trading Houses

will cease to be valid for import of any items which could be imported under Open General Licence during the preceding licencing year or earlier but is no longer so in this Import-Export Policy.

27. But while the construction suggested by the appellant company and the Union of India of the order dated April 18, 1985 of this Court has found favour with us, the scope of the relief to be granted remains to be considered. The interim orders passed by the court in this appeal were made on the basis that they operate in respect of all diamond exporters seeking to import acrylic ester monomers pursuant to the Additional Licences issued to them and this case has been heard on the assumption that the orders made on the appeal will govern all such diamond exporters. In drawing up those orders, a few facts need to be carefully considered. As mentioned earlier, consequent upon the rejection of their applications for Export House Certificates under the Import Policy 1978-79 a number of diamond exporters approached the High Court of Bombay and the High Court of Delhi and were granted relief. The directions made by the High Courts issued in a steady and continuous stream from the year 1980 onwards, and the High Court of Bombay in particular detailed the facilities to which the petitioner diamond exporter would be entitled on the issue of an Export House Certificate. The orders continued all the way up to January, 1985. Appeals filed by the Union of India in the High Court of Bombay against the orders of the respective learned Single Judges were dismissed by a Division Bench of the High Court and those orders were affirmed. In the writ petition filed by Messrs Vijay Trading Company in the High Court of Delhi, the High Court had directed that although the petitioner was entitled to an Export House Certificate for the year 1978-79 it would be entitled to import those items only which were not banned in the year 1980-81, the writ petition having been taken up for hearing during the year. A special leave petition by the Union of India against the order was dismissed by this Court on April 18, 1983. An application by the Union of India for review of that order was dismissed by this Court on May 4, 1984. Meanwhile, the Union of India appealed to this Court against the orders of the High Court of Bombay and of the High Court of Delhi made in favour of the diamond exporters in the writ petitions filed by them and it has not been shown that any stay order was granted by this Court in those appeals. The appeals were heard along with several special leave petitions by this Court, and were dismissed by the order dated April 18, 1985 in terms which, as has been mentioned earlier, affirmed the High Court orders. The appellant company in this case filed a writ petition in the High Court of Bombay and that writ petition was dismissed on August 12, 1985. Meanwhile, Additional Licences had been issued to some of the diamond exporters by the Import Control Authorities, and it appears clearly from the affidavit of Dr R.K. Dhawan, Deputy Chief Controller of Imports and Exports and the affidavit of Shri Kanayalal J. Chellani, Deputy Chief Controller of Imports and Exports that the Import Control authorities themselves considered that the diamond exporters holding Additional Licences were entitled to import all the items accessible to them under Open General Licence under the Import Policy 1978-79 except those placed in Appendix 2 Part A of the Banned List under the Import Policy 1985-88. It also appears that some of those diamond exporters who had been granted Additional Licences pursuant to the orders of the High Courts have already fully utilised those licences and in some cases have partly utilised them. Throughout this period any diamond exporter granted an Additional Licence under the Import Policy 1978-79 could bona fide believe, having regard to the consistent orders made by the courts and the equally consistent manner in which the Import Control authorities had construed those orders, that he was entitled to effect imports accordingly. Many of them opened irrevocable letters of credit on orders placed with foreign suppliers convinced that they were fully entitled to import the items ordered by them. This popular impression continued unabated until October 18, 1985, when for the first time since it all began this Court made an order, on the special leave petition giving rise to the present appeal (special leave

was granted on November 5, 1985), imposing a restraint on the clearing of acrylic ester monomers by the customs authorities. The date, October 18, 1985, is a critical date, because for the first time diamond exporters can be said to have been warned that the court could possibly take a different view from that prevailing hitherto. Meanwhile, as we have said, some of the diamond exporters had already irretrievably committed themselves by opening and establishing irrevocable letters of credit. We think it appropriate that those diamond exporters who were granted Additional Licences under the Import Policy 1978-79 and had opened and established irrevocable letters of credit before October 18, 1985 should be permitted, notwithstanding the construction we have placed on the order dated April 18, 1985 of this Court, to clear the goods imported, or to be imported, by them pursuant to such irrevocable letters of credit. In other words, all imports effected pursuant to such letters of credit should be deemed to have been legally and properly made, and should entail no adverse consequences whatsoever. In taking this view we are impressed by the board principles of justice, equity and fair play and by the need to avoid undeserved hardship, and we are not persuaded to the contrary by legal technicalities. We may point out that the validity of this principle has been recognised in paragraph 35(3) of the Import Policy 1985-88 itself, where while declaring that Additional Licences issued to Export Houses in the preceding licencing year or earlier shall cease to be valid for the import of items of spares appearing in certain appendices, including Appendix 3, of the Import Policy for the licencing year an exception has been carved out insofar that "these restrictions will not apply to the extent the licence holders have made firm commitments by irrevocable letters of credit opened and established..... before April 1, 1985", the date when the Import Policy 1985-88 came into force.

28. At the same time we make it clear that diamond exporters who pursuant to the issue of Additional Licences under the Import Policy 1978-79 have opened and established irrevocable letters of credit on or after October 18, 1985 will not be entitled to the benefit of this order.

29. The appeal, and therefore the writ petition filed by the appellants, are disposed of accordingly. There is no order as to costs.

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