M. J. Export Ltd. and another

Vs

Customs, Excise and Gold (Control) Appellate Tribunal, Bombay and others

Civil Appeal No. 4105 of 1991

(Yogeshwar Dayal, S. Ranganathan, V. Ramaswami-II JJ)

14.05.1992

JUDGEMENT

RANGANATHAN, J.

1. Import Trade Control was introduced in India as a war-time measure in the early stages of the Second World War, initially by a notification issued in exercise of the powers conferred under the Defence of India Rules. The primary object of notification was to conserve foreign tne exchange resources and restrict physical orts so as to reduce the pressure on the 1imited available shipping space. To start with, the import of only 68 commodities, mainly consumer items, were brought under control. Subsequently, as foreign exchange resources came under pressure, import control was extended to cover other commodities as well.

2. Soon after the second world war came to an end, the control of imports and exports was statutorily provided for. The Imports and Exports (Control) Act, 1947 (18 of 1947) came into force with efffect from 25th March, 1947, initially for a period of three years and was extended from time to time. The Act was substantially amended by the Imports and Exports (Control) Amendment Act, 1976. Section 3 of the Act is relevant for our present purposes. It reads:

> "3. Powers to prohibit or restrict imports and exports - (1) The Central Government may, by order published in the Official Gazette, make provisions for prohibiting, restricting or otherwise controlling in all cases or in specified classes of cases and subject to such exceptions, if any, as may be made by or under the order:-
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> (a) the import, export carriage coastwise or shipment as ships stores of goods of any speci 'fled description;
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> (b) the bringing into any port or place in India of goods of any specified description 'ntended to be taken out of India without being removed from the ship or conveyance in which they are being carried.
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> (2) All goods to which any order under subsection (1) applies shall be deemed to be goods of which the import or export has been prohibited under Section 11 of the Customs Act, 1962 (52 of 1962), and all the provisions of that Act shall have effect accordingly.
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> (3) Notwithstanding anything contained in the aforesaid Act, the Central Government may, by order published in the Official Gazette prohibit, restrict or impose conditions

on the clearance whether for home consumption or for shipment abroad of any goods or class of goods imported into India.

3. Several notifications were issued under S.3 of the above Act from time to time setting out the lists of controlled items. At the relevant time with which we are concerned, the notification governing Imports was the Imports (Control) Order, 1955 as amended from time to time and the one governing exports was the Exports (Control) Order, 1988 which came into force on 30th March, 1988. The broad scheme of the Imports Control Order is that the items of goods set out in Schedule 1 to the said order cannot be imported except under a licence or customs clearance permit issued in terms of Schedules 11, 111 and V to the order. Clause 11 (4) of the Order, however, also envisages the issue of an Open General Licence or Special General Licence by the Central Government permitting the import of such goods by such persons and subject to such conditions as may be specified. Clause 3 of the Exports Control Order likewise imposes restrictions on exports from the country in the following terms

> "3. Restrictions on export of certain goods - (1) Save as otherwise provided in this Order no person shall export any goods of the description specified in Schedule I, except under and in accordance with a licence granted by the Central Government or by an officer specified in Schedule II.
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> (2) Notwithstanding anything contained in sub-clause (1) goods specified in Schedule 111 may be exported on fulfilment of the terms and conditions specified therein.
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> (3) If in any case, it is found, that the value, specification, quality and description of the goods to be exported are not in conformity with the declaration of the exporter in those respects or the quality And specification of such goods are not in accordance with the teams of the export contra, the export of such goods shall be deemed to be prohibited".

4. The Government of India periodically announces its import-export policy which remains in force for a specified period subject to such changes or amendments as the Government may make from time to time. The Import-Export Policy of the Government for the period 1988-1991 (hereinafter referred to as 'the policy') is the one with which we are concerned. Appendix 6 to the policy deals with the categories of goods that can be imported under an Open General Licence (OGL) and lists out the categories of importers, the items allowed to be imported by them under OGL and the conditions governing such importation. Item 36 of this Appendix permits the import, under OGLI "by all persons" of "Life-saving equipment as per List 2 of the Appendix and their spares". Item 37 permits the import, under OGL, "by all persons" of "finished drug preparations, life saving and anti-cancer drugs as per List 3 of this Appendix". List 2 which contains the "List of life saving equipment allowed for import under OGL" includes, as item No. 27, "Haemafiltration instrument/ Haemo-dialysers and accessories/ spares thereof".

5. A notification was also issued by the Government of India under S. 25 of the Customs Act, 1962 (hereinafter referred to as 'the Act'). This notification, as it stood at the relevant time, was in these terms:

> "In exercise of the powers conferred by subsection (1) of Section 25 of the Customs Act, 1962 (52 of 1962), and in supersession of the 'ficat'on of the Government of India in the Department of Revenue and Banking No. 182-Customs, dated the 2nd

August, 1976, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts goods specified in the Schedule annexed hereto when imported into India from

(i) the whole of the duty of customs leviable thereon under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975); and

(ii) the whole of . the additional duty leviable thereon under Section 3 of the Customs Tariff Act, 1975 (51 of 1975).

The Schedule annexed was in three parts. Part A set out a list of life-saving drugs or medicines, item 8 in which is "Haemodialysers and accessories/ spare parts thereof'. Part B gave a list of "life-saving equipmerits". Part C enabled the exemption to be availed of even in case of other "life-saving drugs, medicine or equipment" not specified in Parts A and B if the Director General of Health Services certified that the goods fell under the above category and recommended exemption from customs duty.

6. The import Policy read with the Customs notification made it possible for any person to import, inter alia, haemodialysers free of import duty. This is what may be called the importside of the picture we have to consider.

7. Now, we turn to the export angle. We have already referred to clause 3 of the Exports (Control) Order, 1988. It prohibits or restricts the exports of the items of goods specified in Schedules 1 and 111 thereto. It is common ground that Haemodialysers do not figure in either of these two Schedules. The wide liberty granted for exports (particularly to hard currency areas) of all goods other than a few specified in the above two Schedules is easily understood in the context of the country's imperative need to boost up its exports and augment its foreign exchange reserves. Simultaneously, India had also entered into rupee-trade agreements with U.S.S.R. and certain other countries with view to improving mutual trade between India and these countries. These agreements permitted, subject to certain monetary limits and other restrictions, exports of various types of goods from India to these countries.

8. The appellant, which is a "recognised trading house", carrying on business as exporters, saw in these provisions an opportunity to make quick money. It imported Haemodialysers from West Germany and exported them to Russia at a profit. We are told that sometime in 1987 he imported several sets of such Haemod'alysers through Bombay customs and, within a short interval, exported them to the U.S.S.R. through Bombay customs without any objection being taken thereto by the customs authorities. This, apparently, emboldened the appellant to repeat the attempt with some variation and it is with this second transaction that we are here concerned. In May, 1988, the appellant obtained from the Trade Representative of the U.S.S.R. in India another order for the supply of 53 Haemodialysing machines (along with spare parts and accessories) manufactured by the renowned West German company M/s. Fresenins A. G. bearing the trade name "A-2000 C". In pursuance of the above order, the appellant, in turn, placed an order with the West German manufacturers for the import of 3 Haemodialysers into India through the port of Bombay. The Bombay Customs House allowed the clearance of the goods on 19-10-88 under OGL and without payment of customs duty. After clearing the goods, the appellant took the goods to its Ankleshwar factory at Gujarat where the goods are claimed to have been subjected to "moisture proof packing, pelletisation, fabrication of necessary stand etc." but arguments before us have proceeded on the footing - as was also found by the authorities - that nothing special had been done to the imported

goods and that, in India, they were merely repacked for the purposes of export. The goods were then taken to Kandla Port for shipment to the U.S.S.R. and shipping bills were presented to the Customs Department at Kandla on 2-12-88. The C.I.F. value of the imports to the appellant was Rs. 2,33,91,288 whereas the F.O.B. value of the exports was Rs. 3,31,27,600. The appellant thus earned a profit of Rs. 97,36,312 on the transaction.

9. Eleven shipping bills were presented to the Kandla customs authorities on 2-12-88. The pro forma of the bills contained three alternative descriptions for the goods sought to be exported viz. "free goods/ India Produce to be exported/India Produce", none of which were struck off. On examination it was found that the goods were of foreign origin in original packing and that they had been cleared in October, 1988 through Bombay Customs House "for home consumption" but got repacked at Ankleshwar and presented for export at Kandla. As the Customs authority was of opinion that re-export of goods imported under OGL was not permissible except with the specific approval of the Import-Export Control authorities - he subsequently also got this clarified by the Chief Controller of Imports and Exports -he detained the goods for further examination. The appellant, however, represented that the immediate export of the goods was an imperative necessity to cater to the victims of the earthquake in Armenia and persuaded the authorities to clear the goods for export, subject to the outcome of the proceedings, on payment of a cash deposit of Rs. 6 lakhs, furnishing a bank guarantee of Rs. 10 lakhs and a bond for the full value of the goods.

10. On looking further into the matter ' the Customs authorities were of opinion "that the appellant had contravened the conditions of the customs notification and so not entitled to its benefit and had also contravened the provisions of the OGL" and "that they (the goods) appeared to be liable to confiscation under S. 113(d) of the Customs Act and to have rendered themselves liable to a penalty under S. 114 of the Customs Act". A "showcause" notice was, therefore, issued on 25-389 and, after considering the appellant' s reply dated 31-7-1989, the Collector of Customs passed an order on 22-10-1990. He agreed with the appellant that the goods were not liable to import duty and that, in any event, the Kandla Collector of Customs had no jurisdiction to demand customs duty on goods imported through Bombay. But, he concluded:

> "The goods under export were liable to confiscation under Section 113(d) of the Customs Act. Since the goods have already been exported, they are not available for confiscation. By rendering the goods liable to confiscation, M/ s. M. J. Exports have rendered themselves liable to a penalty under Section 114 of the Customs Act. Considering the fact that the goods have already been exported, 11 proceed to take action in terms of the bond, Bank Guarantee and cash deposit furnished by the exporter. 1 therefore impose a penalty of Rs. 50 lakhs on M/ s. M. J. Exports. In order to realise. this amount 1 order the appropriation of the cash deposit furnished by them towards penalty and direct the Department to invoke the Bank Guarantee furnished by them immediately. The balance amount shall be paid by M/ s. M. J. Exports separately in terms of the bond furnished by them."

11. The appellant preferred an appeal to the Central Excise & Gold Control Appellate Tribunal ('the Tribunal') which, by an order dated 14-6-91, dismissed the appeal. The present appeal by Special Leave is from the Tribunal's order.

12. Sri Habbu, learned Counsel for the appellant, contended that, under S. 113(d) read with S. 114, the confiscation or the penalty can be justified only if the subject goods fall,under the following description in cl. (d) of S. 1 1 3 viz.

> "any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force."

13.He submits that the appellant was entitled, as a matter of right, to export the subject goods as they were not included in Schedule I or Schedule III to the Exports Control Order. According to him, far from prohibiting the export of the goods in question, the provisions of the Customs Act actually permit their export. He invited our attention, in particular, to S6ctions 51, 54, 69 and 74. He submitted that trade agreement with the U.S.S.R. also encouraged exports to that country.. According to learned Counsel, the export is also not "prohibited or under any other law for the time being in force". He, therefore, submits that the orders of confiscation and penalty deserve to be set aside.

14. On the other hand, learned Counsel for the Revenue submits that S. 51 of the Act disentitles a person from exporting "prohibited goods", an expression 'defined by S. 2(33) of the Act thus:

> "prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time bieng in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with."

15.According to him, the goods now in question fall within the scope of this definition for various reasons to be elaborated upon later. In,this view, he says, Ss. 54, 69 and 74 do not help the assessee's case in any manner. It is, therefore, submitted that the provisions of Ss. 113(d) and 114 were rightly invoked in the present case.

16. Leaving out of consideration the issue whether the appellant was entitled to excmption from customs duty on the import of the goods in question - an issue which was decided in favour of the assessee by the Collector of Customs and has not been pursued further and is not in issue before us - the basic and only controversy before us is whether the export of the subject goods is barred, expressly or by necessary implication, by the provisions of the Customs Act or any other law in force. The Revenue bases its case of prohibition on the export of the goods on two grounds. It is submitted firstly, that the terms of the OGL under which the goods were permitted to be imported by any person made it clear beyond doubt that they were intended to be used in India and not to be exported. Secondly, it is pointed out, the import clearance of the goods had been granted "for home consumption" and not for export. It is urged that the provisions of the Customs Act make it clear that clearance of imported goods can be only for "home consumption" or warehousing"; the import of goods just for the purpose of export is not envisaged or permitted under its provisions. Reference was also made to certain provisions of the Foreign Exchange Regulation Act, 1973 (FERA).

17. The second point may be considered first, S. 45 of the Act provides the, all imported goods unloaded in a customs area shall remain in the custody of such person as may be approved by the Collector of Customs until they are cleared for home consumption or are warehoused or are transhipped in accordance with the provisions of Chapter VIII. The third of these cases is dealt with in Chapter VIII. lt,is one in which there is, in substance, no import of the goods into India for, though technically the goods enter Indian territory, such entry is only by way of transit through this country to their real destination. Such goods are mentioned by the transporter in his "import manifest'and may be transitted in the same vessel or aircraft or transhipped by a different vessel or aircraft to their actual destination: (vide, Sections 53 and 54). Except in the above case, the goods

are actually imported into India and have to be cleared from the customs area for home consumption or warehousing and this is done by presenting a bill of entry under Section 46. The terms of this section read with Regulation 3 and Form I, II or III appended to the Bill of Entry (Forms) Regulations, 1976, make it clear that there are three forms of the bill of entry: for home-consumption, for warehousing and for ex-Bond clearance for home consumption. Imported goods can, therefore, be cleared only for home-consumption or warehousing and, in this case, there is no dispute that they were cleared by the appellant under a bill of entry for home consumption. The argument for the Revenue is that the enactment, understandably, does not envisage the entry of goods into India for the mere purpose of being exported again from India in the same. form and without any change. The appellant had purchased the goods from Germany admittedly for their sale to Russia. It could have effected the transaction by asking its vendors to consign the goods to some Russian destination directly or, if it considered it necessary, via an Indian port and, in the latter case, it could have had them transitted or transhipped (without atual clearance in India) under the provisions of Chapter VIII. The law, however, does not permit, says State Counsel, an import just for the purposes of export. Even otherwise, the appellant has cleared the goods for home consumption and so they are to be used or utilised in India; it is not permissible for the appellant to export goods cleared for home consumption.

18. We do not think that this contention of the Revenue is sound. The contrast that finds emphasis in the sections as well as the forms above referred to is of clearance for home consumption as opposed to clearance for warehousing. The presentation of a bill of entry for home consumption only means that the importer does not intend to warehouse the goods; in the latter case, he is not required to pay the import duties, if any, immediately (Ss. 59 and 59A). The form of the Bill of Entry prescribed under the Act does not require any declaration from the importer as to the purpose for which the imported goods are required or that they will be used or sold only in India. The expression 'home consumption' has also, in the context, no clear or definite meaning and raises a lot of conundrums if literally interpreted to mean that imported goods should always be consumed in India. Is it home consumption if the importer does not use the goods himself but sells them? At what point of time should the importer make up his mind whether he proposes to sell the imported goods in India or wishes to export them outside? Is the condition infringed if a purchaser of goods from the importer sells it to a buyer in a foreign country? Will it be permissible for the importer to use the imported goods in the manufacture of other goods which he proposes to export? All these uncertainties in the connotation of the expression 'home consumption' preclude one from gving an interpretation to this expression that the imported goods cannot be at all exported and incline one to hold that, in the context, it is only used in contrast to the expression 'for warehousing'.

19. The above general consideration apart, there are other indications in the statute which show that the Act does not prohibit the export of imported goods. The Act provides that that goods which are cleared from the customs area for warehousing can be cleared from the warehouse for home consumption (S. 68) or exportation (S. 69). At first blush, this may seem to support the Revenue's interpretation that clearance for exportation and clearance for home consumption are two different things. It is indeed suggested by State counsel that, if an importer intends to export the imported goods, he. should clear them for warehousing and then proceed in terms of S. 69. But a little thought would show this interpretation cannot be correct. In the first place, where an importer, even at the time of the import purchase has decided to sell the goods in another country (as in the present case),,he may, as pointed out earlier, easily ask,the goods to be transitted or transhipped to the country of sale and thus avoid any necessity for their being at all cleared in India. But where, for one reason or other, he wants to import the goods into India and then sell them to the foreign country or where the importer decides on an export sale only after he has arranged for the import of

the goods into India, the Act prescribes no form of a Bill of Entry under which he can clear such goods intended for re-export. It would not be correct to insist that he must clear them for warehousing and then export them by clearing from the warehouse. Whether to deposit the goods in a warehouse or not is an option given to the importer. If he is able to pay the import duties and has his own place to stock the goods, he is entitled to take them away. But, where he has either some difficulty in payment of the duties or where he has no ready place to stock the goods before use or sale, he cannot clear the goods from the customs area. The warehouse is only a place which the importer, on payment of prescribed charges, is permitted to utilise for keeping the goods where he is not able to take the goods straightway outside the customs area. There is nothing in the provisions of the Act to compel an importer even before or when importing the goods, to make up his mind whether he is going to use or sell them in India or whether he proposes to re-export them. Again, there may be cases where he has imported the goods for use or sale in India but subsequently receives an attractive offer which necessitates an export. It would make export trade difficult to say that he cannot accept the export offer as the goods, when imported, had been cleared for home consumption. Section 69, therefore, should be only read as a provision setting out the procedure for export of warehoused goods and not as a provision which makes warehousing an imperative precondition for exporting the imported goods. The second reason for not reading Ss. 68 and 69 as supporting the Revenue's interpretation is even more weighty. That interpretation would mean that imported goods can be reexported after being warehoused for sometime (even a day or a few hours) but that they cannot be exported otherwise. Such an interpretation has no basis in logic or sense and makes mincemeat of the broader principle contended for by the Revenue that imports are intended for use in the country and not for export. Incidentally, we may observe that even this principle contended for by Revenue may itself be of doubtful validity as it is based on an erroneous assumption that a re-export of imported goods will always be detrimental to the country. It is true that, in the present case, the appellant has been criticised for having utilised valuable hard currency for the purchases and reselling the goods only for rupee consideration. But, conceivably, there may be cases where an importer is able to import goods from a softcurrency area and sell them in a hardcurrency area earning foreign exchange for the country. It is also possible to think of cases where, though economically unremunerative, the re-exports can be justified on considerations of international amity and goodwill such as for example, where the goods are exported to a country which is in dire need of help and assistance. The principle is also nonacceptable on the ground of vagueness as to the extent of its application to exports made after an interval or after changing several hands inside the country by way of sale. We are, therefore, unable to read Ss. 68 and 69 as supporting the Revenue's contention.

20. On the other hand, there are provisions which indicate that export of imported goods is very much envisaged under the statute. The provisions contained in S. 74 fully re-inforce this interpretation. Indeed Gold (Control) Appellate Tribunal, S. 74 would be redundant if the Department's stand that imported goods cannot be exported were to be accepted as correct. As pointed out by counsel for the appellant, para 174(1) of the Policy which reads:

> "No REP benefits are admissible in the case of imported goods which are re-exported in he same State without undergoing any recessing or manufacturing operations in India."
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> "also impliedly recognises that imported goods can be re-exported as such; only the exporter thereof cannot claim REP benefits."

21. This brings us to the consideration of the second issue in this case as to whether the attempted

export of the goods contravenes any condition under which the import of the g . oods was permitted. The Revenue submits that the object and purpose of putting the goods in question on the OGL and making it available for import by any person is writ large in the very heading of the list in which it is included. The import is permitted so that life saving equipment and medicines are available for use in the country and not to enable a private party to make profit by their export either directly or through someone else. To permit such a thing will result in frustrating the very intent of the Government in placing the item on the OGL and, indeed, going further, and exempting them from import duty. It is pointed out that, when a doubt regarding the scope of the OGL was raised, the customs authorities had, with the appellant's concurrence, made a reference to the Chief Controller of Imports and Exports (CCIE) under para 24.1 of the policy who had "clarified" that the imports under the OGL and certain other licences "are entirely meant for use within the country and therefore cannot be allowed for re-exports as such". The policy no doubt refers to the goods imported under OGL being meant for "stock and sale" but this also means only that it is for home consumption and not export purposes. It is said that the appellant having agreed to the reference to the CCIE is bound by the latter's opinion.

22. On the other hand, the learned Counsel for the appellant stresses the point that Appendix 6 imposes no specific condition that the life-saving equipment should be used in India and should not be exported. The words'stock and sale'are very wide and there is no justification to restrict them to mean only sales within the country. In support of this interpretation, reliance is placed on the decision of the Delhi High Court in the case of Janak Photo Entrprises, (1990) 49 ELT 339.

23. We have considered this aspect of the matter carefully. The relevant OGL is the one dated 20-5-88 covered by Order No. 15/ 88-91 which refers in its Schedule to "life-saving equipment appearing in List No. 2 of Appendix-6 of Import and Export Policy, 1988-91 (Vol. 1) and their spares". It also set out a number of conditions of grant of the OGL, the very first of which is that, except in the case of "teaching aids" covered by serial. No. 1, "all other items covered by the Schedule annexed to it may be imported by any person for stock ani-sale purposes". Prima facie, there appears to be no reason to confine this only to sales in India and as prohibiting the re-export of the imported goods from India. The interpretation of a condition in these terms came up for consideration, though not finally decided, in the case of Janak Photo Enterprises (1990 (49) ELT 339) (Delhi), relied upon by the appellant. In that case, the assessee had'imported photographic colour films from Japan, cleared them for home consumption, and then presented them for export to Singapore. The customs authorities, relying upon a certificate of the CCIE .analogous the one in the present case, confiscated the goods under S. 1 1 3(d) but allowed them to be re-exported on payment o huge redemption fine, a penalty and payment of appropriate duty for ex-bond clearance. The assessee filed a writ petition challenging this order. Pending disposal of the writ, the High Court permitted the export of the goods subject to certain conditions. In doing s6, the Court made certain observations which, learned Counsel for the appellant says, are equally apposite in the present case:

> "5. The goods in question, being the photographic ' s (color). fall under App. 7, List 8, Part 11, Serial No. 41 of the Import and Export Policy, 1988-9 1, and their import is allowed by all persons for actual use/stock and sale. The contention of Mr. Aggarwal is that since the goods were imported for stock and sale, these could not be re-exported. We are unable to agree with the contention of Mr. Aggarwal or with the view taken by the Respondents. Again, to us, the goods do not 4ppear to be prohibited goods. We may usefully refer to para 4 of Section 1, dealing with Export Control, in Import and Export Policy, 1988-91, Vol. 11, in respect of Export Control and Procedures, which is as follows :-

> "Only item included in Schedule 1 to the Exports (Control) Order, 1988 are under control. No such item can be exported unless it is covered by a valid licence issued by a licensing authority competent to grant an export licence for that Item. Goods which are not included in this Schedule can be shipped without any export licence unless their export is controlled under any other law for the time being in force."

Thus, the Export (Control) Order, 1988 is not applicable to photographic film (colour).

> 6. If reference is made to S. 74 of the Act, it appears that when any goods capable of being easily identified which have been imported into India upon which any duty has been paid on importation are to be re-exported and the goods are not prohibited goods, then clearance for exportation can be given by the proper offices (S. 5 1) and on such exportation 98% of the duty paid on importation is to be re-paid as drawback. We have not been shown which are those goods which can thus be re-exported and where import duty already paid is to be claimed as drawback. We have also not been shown any provision of law stating that the goods which have been imported could be sold only in the country itself. The clarification given by the CCI and E does not appear to be appropriate. We may also note that under S. 18 of the Foreign Exchange Regulation Act, 1973 and various other provisions thereof, there are sufficient safeguards to see that proper sale price on export of goods is realised. It is not the case of the respondents that there is dearth of photographic film(colour) in the country, and export of the goods in question would certainly result in earning of some foreign exchange for the country.

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> 8. We would like to add that the view which we have taken above is only a prima facie view and is subject to final determination in the petition. All the CMs stand disposed of"

24. We have no information as to whether the said writ petition has since been disposed of by the High Court and become final. We are inclined to agree with the prima facie view expressed by the High Court that the words "stock and sale" may be, generally speaking, wide enough to comprehend sales inside as well as outside the country and that their scope should not be restricted unless such a restriction can be read into the terms of the OGL itself. That, we think, is where the present case essentially differs from the one before the Delhi High Court. We are clearly of opinion that whatever may be the position in regard to the other lists in Appendix 6, the items of goods enumerated in List No. 2 of that Appendix stand in a class of their own. There is sufficient indication in the heading given to the List to show that the import of these items into India is permitted only because such life-saving equipment is required for use in the country. The use of the words "stock and sale" shows only that the items are not restricted to use by the importer but can be transferred by him to another. But we do not think it proper to read them as permitting a sale of the goods outside the country. Note (44) in Appendix 6 reads thus:

> "Import of Life-Saving Equipment appearing in List 2 of this Appendix shall be eligible to import spares of such equipment either along with the machines separately."

25.This also carries a mild indication that the equipment permitted to be imported is only for purposes of use in the country. The circumstance that these items are also exempted from customs duty at the time of import - although the list of such exempted items is not identical with List No. 2 of Appendix 6 - also lends support to the conclusion that the goods so permitted are not meant for re-export. An indication to a similar effect is also seen in the foreword issued by the Government while publishing Vol. 1 of the Import -Export Policy (1988-91), Vol. 1. Para 3 of the foreword says:

> "The Open General Licence lists have been expanded by inclusion of more items. In particular, the lists of life-saving equipment and drugs have been substantially enlarged to facilitate easy access to imported equipment and drugs which are not available in the country."

26. We are, therefore, of the opinion that, although, there is no express prohibition, the re-export as such of items of goods specified in List 2 and imported into India is prohibited by necessary implication by the language of, and the scheme underlying, the grant of OGL in regard to them. It is difficult to agree that the import-export policy envisages the re-export of goods belonging to this category .The opinion of the CCIE is also to the same' effect. This opinion also derives some binding effect from para 24(1) of the Import Policy read with paras 22 and 23 of the Export Policy, which say:

> Para 2l: The interpretation given by the Chief Controller of Imports and Exports, New Delhi in the matter of interpretation of Import Policy and procedures shall be final and will prevail over any clarification given by any other authority and person in the same matter.
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> Para 22: Cases for relaxation of existing policy and procedures where it creates genuine hardship or where a strict application of the existing policy is likely to affect exports adversely may be considered by the Chief Controller of Imports and Exports.
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> Para 23: In matters relating to export, as well as the interpretation of export policy and procedures, the person concerned may address the Chief Controller of Imports and Exports, New Delhi for necessary advice. Any interpretation of the export policy given in any other manner or by any other person will not be binding on the Chief Controller of Imports and Exports, or in law.

27. Sri Habbu contended that we should construe the OGL strictly on its terms and should not be guided by "extraneous" considerations as to the possible object or intention of the Government in inserting List 2 in Appendix 6. In this context, he referred to the decisions of this Court in. Hansraj Gordhandas v. H. H. Dave, Assistant Collector of Central Excise & Customs, Surat, (1969) 2 SCR 253: (AIR 1970 SC 755) (followed and applied in State of M.P. v. G. S. Dall and Flour Mills, (1991) 187 ITR 478: (AIR 1991 SC 772) and Union of India v. Deoki Nandan Aggarwal, (1991) 3 JT (SC) 608: (AIR 1992 SC 96)). The principle enunciated in the said decisions is that the Court should construe the terms of the statutory provision or instrument before it and should not supply or introduce words which are not found therein to give effect to a possible intention behind the provision or instrument which is not Bome out by the language used. But, as pointed out by this Court in Surjit Singh Kalra v. Union of India, (1991) 2 SCC 87, "though it is not permissible to read words in a statute which are not there, where the alternative lies between either supplying by implication words which appear to have been accidentally omitted, or adopting a construction which deprives certain existing words of all meaning, it is permissible to supply the words". The Court

should construe a provision in a harmonious way to make it meaningful having regard to the context in which it appears. Here, we are only interpreting the language used and giving content and meaning to the classification and heading used in the order permitting imports under OGL in certain cases in the context of the provisions of the Imports and Exports Control Act, 1947, as well as the orders and notifications issued thereunder. We, therefore, do norfind any force in the contention of Sri Habbu.

28. Taking into account all the above considerations, we hold that the goods in question were "prohibited" goods within the meaning of S. 2(33) and that their confiscation under S. 1 1 3(d) and the penalty under S. 114 were fully justified.

29. Before we conclude, we may refer to certain other aspects which were touched upon by one side or the other in the course of the arguments before us:

(1) Much emphasis has been laid by the counsel for the Revenue on the circumstance that the appellant had obtained the import of the goods free of duty by relying on the notification granting exemption from customs duty. It is obvious that it could not have been the intention of the legislature to grant exemption from customs duty in respect of vital goods of the nature in question in order that an importer may make profit by selling them abroad. The notification is, therefore, relevant for the issue before us to the limited extent that it lends supports to the construction of List 2 of Appendix 6 in the manner we have interpreted it. This apart, we are not concerned here with the questions whether the attempt of the assessee to export the goods (which has, in the event, been successful) would amount to an infringement of the conditions permitting the import so as to render either the import itself (vide S. 1 1 1(o) of the Act) or the exemption from import duty or both illegal and invalid and, if so, the consequences thereof.

(2) Reference has been made on behalf of the Revenue to the foreign exchange loss incurred to the country by the import from a hard currency area and the export to a country which will pay for the goods only in rupees. We do not, however, think this argument or the foreign exchange regulations, to which some casual reference was made, have any relevance to the present issue. It is not the suggestion of the Revenue that there has been any infringement of the FERA in this case. Even if there had been, the consequences flowing from such infringement have to be worked out elsewhere. The issue before us is only that of the permissibility of the export, the destination of export being immaterial. As pointed out for the appellant - and as indeed happened in Janak Photo Enterprises (1990 (49) ELT 339) (Delhi) (supra) - the export could well have been to a hard currency area in which event this objection of the Revenue would have had no force. But, on the ratio of our decision, an attempted export to such a country would have been equally objectionable. The goods were for use in this country, not in another.

(3) During the pendency of the proceedings before the Collector, the appellants are S . aid to have secured a no-objection certificate of the RBI to the export "on humanitarian grounds" in view of the appellant's representation that the goods were needed for the succour of the victims of the Armenian earthquake in Russia. There is no material before us regarding the date of the earthquake or to indicate that the purchase orders had been placed thereafter. We do not even know whether the

earthquake was only a subsequent development taken advantage of by the assessee to have the goods cleared pending adjudication of issue by the Customs authorities. It is true that the goods, being in the nature of life-saving equipment, may have been eventually used only for that purpose in the country of export. But, if as we have held, the imports of the goods were intended for their use in India, this circumstance is of no assistance.

30.Learned Counsel has, however, contended that the exports have been made in pursuance of a mutual trade agreement between the Government of India and U.S.S.R. considered beneficial to both countries and hedged in with conditions ensuring the interests of both the countries and that this should be considered sufficient to justify the export. In our opinion, the mere fact that mutual trade was allowed between the two countries is not enough to hold that even goods of this type - which had been allowed to be imported with a specific end in view - could be ex-ported. Learned Counsel did not place the trade agreement or any material to show that it specifically provided for the export of goods of this nature to U.S.S.R. We have no doubt that the export of such goods may also enure to the benefit of India indirectly but, in the absence of anything to show that the goods in question constituted one of the categories of goods specifically envisaged by the mutual trade agreement, it is not possible to override the prohibition implicit, as held by us, in the Import Regulations.

(4) The show-cause notice referred to clause 15(g) of the Export Control Order, 1988. The said clause 15 is headed "savings" and it enumerates situations in which the Export Control Order does not apply; in other words, it provides that, in certain circumstances, exports can be permitted even where such export might otherwise contravene the provisions of the order. It is, in this context, that it provides that goods cleared under a bond for re-export to countries other than Nepal and Bhutan (sub-cl. (g) or goods imported in transit or transhipment to destinations outside India (sub-cls. (c) and (f)) or even goods imported without a valid licence if permitted to be re-exported (sub-cl. (i)) could be re-exported irrespective of any restrictions under Export Control Orders issued from time to time. We agree with learned Counsel for the appellant that sub-clause (g) cannot be interpreted to mean that imported goods cannot be exported unless they are cleared, at the time of import, under a bond for re-export.

(5) Two clauses of the Import Control Order, 1955 have also been relied upon by the Revenue. The first of these is sub-clause (d) of clause 1 1(1). This clause, like clause 15 of the Export Control Order, is headed "savings" and, by virtue of sub-clause (d), nothing in the order was to apply to the import of the goods "by transhipment, as imported and bonded on arrival for re-export as ships stores to any country outside India except Nepal, Tibet and Bhutan or imported and bonded on arrival for re-export as aforesaid but subsequently released for use of diplomatic personnel duty..... This sub-clause was amended in 1985 to add the words "or otherwise" after the words "ships stores". The CEGAT has relied upon the amendment to draw an inference against the appellant that, since the goods do not fall under this clause, their export was not permitted. We think that this is not correct for the reasons we have pointed out in respect of Cl. 15(g) of the Export Control Order, 1988. To say that goods bonded for re-export as above will not be affected by the provisions of the order does not mean that goods, not so bonded, cannot be exported at all. Their export can be interdicted only if there is some other express or implicit prohibition in

clause 3 of the Export Control Order or otherwise.

(6) Reliance has also been placed by the Tribunal on clause 10 C of the Imports Control Order for rejecting the assess.' contentions. It is sufficient to extract subclause (1) of this clause which reads:

> "10 C. Power to make directions for the sale of imported goods in certain cases - (1) Where, on the importation of any goods or at any time thereafter, the Chief Controller of Imports and Exports is satisfied after giving a reasonable opportunity to the licensee of being heard in the matter, that such 'goods cannot or should not be utilised for the purpose for which they were imported he may by order direct the importer of the goods (in case the goods were imported under Open General Licence or Special General Licence) or the licensee or any other persons having possession or control of such goods to sell such goods to such person within such time, a t such price and in such manner as may be specified in the direction."

31.The Tribunal agrees that the opinions or clarifications given by the CCIE in the present case are not directions, under S. 10C. But, apparently, their suggestion is that, if the appellant felt that the imported goods could not be utilized "for home consumption" or "for stock and sale in India" and there were sound reasons for exporting it to U.S.S.R. they could and should have obtained the directions of the CCIE permitting such sale. It is difficult to approve of this line of reasoning. The provision relied upon is one enabling the Import-Export Control authorities to interfere in any individual case where they find that the purpose of the import is not being achieved. It does not impose an obligation on an importer to seek the directions or the permission of the CCIE before exporting the goods if otherwise permissible. Moreover, as pointed out by learned Counsel for the appellant, while clause 11(4) of the Order which reads:

> "Nothing in this order, except paragraph (iii) of sub-clause (3) of clause (5), clause 8, clause 8A, clause 8C and clause 10 C, shall apply to the import of any goods covered by Open General Licence or Special General Licence issued by the Central Government."

makes clause IOC applicable to the subject imports it releases them from the application of the other restrictions and conditions on imports imposed by the Import Control Order.

32.We think, however, that para 10C is of some indirect assistance in the present case. We may put it this way. The interpretation of the OGL that has commanded itself to us (viz. that the import of the goods is permitted only for use in India) was also the one which the CCIE had formed and this opinion he had formulated in his two letters dated 10- 10- 1988 and 27-1-1989. As we have already pointed out, the CCIE's opinion on the Import and Export Control Order is final and binding. In view of this, when the CCIE came to know that the appellant was seeking to export the goods, he could have intervened and issued directions under clause 10C either permitting the export of the goods to the USSR or directing them to be sold to needy hospitals or other parties in India. He could have effeetively stopped the export of the goods. This shows that the export of the goods is not free or unrestricted as made out by the learned Counsel for the appellant.

33. Learned Counsel for the Revenue also pointed out that the shipping bills called for a mention as

to whether the goods of which export was s ought were "free goods or India produce to be exported or India Produce'. The appellant did not strike off any of these descriptions as inappropriate. The Customs authorities were given the impression that these were Indian goods that were being exported. Indeed, the appellant itself well knew that goods imported could not be exported as such without the performance of some operation of processing or manufacture in regard to them. That is why it put up a facade of taking the goods to Ankleshwar after their import allegedly for being subjected to some processes. The Customs officers, on verification, found that all this was untrue and that the appellant was surreptitiously trying to export imported goods, after just repacking them as goods of Indian manufacture. The appellant had adopted a similar subterfuge on the earlier occasion in December, 1987 and succeeded in exporting like goods by not striking out the appropriate columns of a shipping bill o forma which required the exporter to specify whether the goods were "Indian produce or foreign produce to be re-exported". It is, therefore, urged that the goods sought to be exported do not conform to the description in the bill of entry for export, attracting the provisions of clause 3(3) of the Export Control Order and, in turn, S. 113(d) of the Act. There is some force in this contention but we express no opinion thereon as this was not the ground on which action was taken and it is a 'new ground, involving investigation of facts, taken for the first time before us.

34. For the reasons discussed above, we uphold the order of the Tribunal and dismiss the appeal.

We, however, direct the parties to bear their own costs.

Appeal dismissed.

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