

DELHI HIGH COURT

Kaptan's Enterprises

Vs.

Union of India, (Delhi)

C. W. No. 1975 of 1984

(Yogeshwar Dayal and S. Ranganathan, JJ.)

19.11.1985

JUDGEMENT

S.RANGANATHAN, J.

1. The first petitioner "Kaptan's Enterprises" is a partnership firm of which the second petitioner is a partner. It carries on business in import and export of various raw materials and their distribution and sale in India. It has filed this writ petition seeking directions to the first two respondents, the Customs authorities in India, to permit the petitioner firm to import 8000 M.T. of "Stearin Fatty Acid" for the purchase of which it is said to have entered into a contract with the third respondent, an English company, on 7-10-1983. To understand the controversy between the parties it is necessary to set out certain relevant publications and notifications of the Government of India which set out the import policy of the Government at the relevant time.
2. The import of goods into India is governed by the provisions of the Imports and Exports (Control) Act, 1947. In terms of this statute, the Government, every financial year, announces its import policy (which is published in what is called the 'red book' for the year) and this is followed up by orders and notifications under the Act to give effect to the said policy. The Government also issues notifications from time to time cancelling, varying or modifying the terms of earlier orders and notifications so as to suit the country's requirements.
3. The Import Policy for 1983-84 was initially issued as a Public Notice (No. 10-ITC/PN 83 dated 15-4-1983) by the Ministry of Commerce of the Government of India. The policy this year, as in other years, permitted certain

articles to be imported by certain categories of importers under "Open General License" (OGL), that is to say, freely and without obtaining a specific import license therefore. Appendix 10 of the red book for 1983-84 sets out the list of articles which can be imported under OGL by the categories of importers referred to therein. Item 1 of this list permits the import of "raw materials, components and consumables (non-iron and steel items other than those included in the Appendices 3,4,5,8,9 and 15" under OGL by actual industrial users (vide page 144 of the red book). Paragraph 20 of conditions subjoined to the above Appendix (page 151) explains:

"In this case of raw materials, components, consumables permissible for import under OGL by actual users (Industrial) vide items 1 and 2 above, the eligible actual users may be allowed to effect shipment up to 30th June, 1984 against firm orders in which irrevocable letters of credit are opened and established on or before 29-2-1984. This facility will also be available in the case of raw materials allowed for import under OGL by all persons, where the importer is actual user (Industrial) and imports and goods for use in his factory with 'Actual User' condition".

However, this facility is extended to other classes of importers also in certain cases. Paragraph 78 in Chapter 12 of the policy (page 23 of the red book) reads:

"Items for stock and sale - Details of the items allowed for import under Open General License, by dealers, individuals and others for stock and sale purpose, i.e., without an actual user condition, are given in Appendix 10. In respect of certain items indicated there in the imports will be governed by the conditions attached thereto."

This extension is reiterated and its purpose explained in condition (19) of the conditions governing import under OGL subjoined to Appendix 10 (page 150) which reads thus:

"19. Import of raw materials, components and consumables, vide items (1) and (2) above, is allowed under OGL to Actual Users (Industrial) in accordance with the conditions laid down. However, in respect of certain items out of these, import under OGL can also be made by others apart from Actual Users. This is with a view to facilitate off-the-shelf supply of the required inputs for small industries through stock and sale (Please see List 18 in this Appendix)."

List 8 in Appendix 10 contains three Parts I, II and III. The last paragraph of Part III which can be conveniently referred to be item 16 of that Part contains a residuary entry in the following words:

"All other items permitted under OGL in terms of the import policy in force, other than those covered by Parts I and II above".

An explanatory note subjoined to Appendix 10 may also be referred to here:

"It is clarified that entries in this list (Part I, Part II and Part III) allow only those items and their specifications, sizes, types, varieties, compositions, categories etc. as are covered under OGL for Actual Users (Industrial) vide items 1 and 2 of Appendix 10, i.e., the items, their specifications etc. which do not appear in Appendices 3 to 9 and 15 Chapter 22 of the book."

The clarifications contained in Chapter 22, inter alia, include rules of interpretation of the entries (paragraph 240) and a provision enabling importers to seek clarifications from the authorities (paragraphs 242, 243 and 245).

4. The above policy was given statutory effect to by the Import Trade Control Order No. 1 of 1983 (also called OGL No. 1/83) issued by the Government on 15-4-1983. By this order the Government, in exercise of the powers conferred by Section 3 of the Act, gave "general permission of import into India..... (of) raw materials, components and consumables by Actual Users (Industrial) subject to the following conditions." It is necessary to refer here to some of the conditions imposed:

(1) The items to be imported should not be covered by Appendices 3,4,5,6, 7,8,9 and 15 of the Import and Export Policy, 1983-84.

(22) Items covered under Part III of the Schedule to this licence can be imported under OGL by Actual Users (Industrial) and others, for stock and sale.

(26) Such goods are shipped on thorough consignment to India on or before 31st March, 1984 or, in the case of Actual User (Industrial) on or before 30th June, 1984 against firm orders for which irrevocable letters of credit are opened and established on or before 29-2-1984, without any

grace period whatsoever.

The schedule consists of three Parts I, II and III and all that we need note here is that under entry 16 of Part III, "all other items permitted under OGL in terms of the import policy in force, other than those covered by Parts I and II above" are allowed for import by actual users and others for stock and sale. It will, thus, be seen that OGL No. 1/83 virtually repeats the language of the import policy in all material particulars. Its significance is that it constitutes the clothing of statutory authority to the said policy statement.

5. The substance and effect of the above provisions was that any person could import, under the OGL, any item so long, inter alia, as it did not figure in the entries contained in Appendices 3 to 9 and 15 of the import policy for 1983-84. One question which arises in this writ petition is whether the commodity sought to be imported by the petitioner firm so figures. It is common ground that the only entries, if at all, under which the commodity can be said to figure are four in number:

Appendix No.	Item No.	Description of listed goods.
3	212	Lauric Acid
3	368	Stearic Acid
4	49	Palm Acid Oil
4	50	Palm fatty Acid

According to the respondents the stearin fatty Acid sought to be imported by the petitioner would be covered by entry 212 of Appendix 3 if it is coconut acid oil, (b) by entry 368 of Appendix 3 if it is chemically derived; (c) by entry 49 of Appendix 4 if it is palm kernel acid oil; and (d) by entry 50 of Appendix 4 it is of palm origin and that it was not an item that could be imported by the petitioner under the OGL for 1983-84.

6. The petitioner, however, contends that the commodity in question was not covered by any of the above entries and that its import was, therefore,

permissible under OGL No. 1 of 1983 read with the Import Policy for the year 1983-84. Acting on this understanding of the OGL and the policy, it is said, the petitioner-firm accepted an offer dated 30-9-1983 received by it from the third respondent. By a letter of this date to the first petitioner, the third respondent was "pleased to confirm sale of 8000 MT Stearin Fatty Acid" to the petitioner firm on certain terms and conditions. Some of the relevant terms were:

- (1) The commodity was to be of vegetable origin;
- (2) It was to be of Singapore/Indonesian/ Malaysian origin;
- (3) The quantity was to be of 8000 MT plus or minus 10% at the seller's option;
- (4) The price of the supply was to be \$427 (U.S.) per M.T.; and
- (5) The shipment was to be effected during December/January/February/March in four lots subject to Force Majeure Clause internationally acceptable.

The above offer was accepted by the petitioner firm by its letter dated 7th October, 1983. The last sentence of this letter asked the supplier to "note that all the invoices must state 'Imports under Appendix 10 List 8 Part II (sic)for stock and Sale'".

7. It will be noticed that under the above contract, the goods in question were due for shipment starting December, 1983, However, the contract with the petitioner firm was by a London-based company and presumably it may have started taking steps sometime in advance of this date for purchase of the commodity, in turn, from those who were in a position to supply it. It may be that more than one "back to back" contract had to be executed so as to reach up to parties located in Singapore, Malaysia or Indonesia as the goods were stipulated to have this origin. The full details of these arrangements and the progress on the contract are not available except that the goods had not been shipped by 16th December, 1983, and, as events have subsequently turned out, have not been shipped at all till today.

8. In the meanwhile, on 11-11-1983, the Government of India issued a Public Notice bearing No. 47 ITC (PN)/83. By this public notice, certain amendments were deemed to have been made in the earlier policy announcement of 15-4-

1983. The amendments effected by paragraph 2 of the public notice included, inter alia, the deletion of entries "Nos. 212 and 368 of Appendix 3 as well as of entry Nos. 49 and 50 of Appendix 4. In appendix 9 was added a further paragraph:

"Fatty Acids and Acid Oils

10. In the case of the following items import will be made only by the State Trading Corporation of India (STC) under OGL on the basis of foreign exchange released by the Government in its favour. Imports distribution and pricing will be decided by the Monitoring Committee referred to in paragraph 74 of this Policy.

(i) Lauric Acid (ii) Oleatic Acid (iii) Stearic Acid (iv) Palmitic Acid (v) Palm Fatty Acid (vi) Palm Acid Oil (vii) Palm Kernel Oil (viii) Palm Stearine (ix) Other fatty acids, pure or mixed, including Acids, all types, (x) Soap stocks."

Paragraph 3 of the public notice stated:

"Import of items referred to in paragraph 2 of this public notice shall not be allowed under any import licenses already issued..... or under any other provision of the Import and Export Policy 1983-84, except against shipments from the country of origin already effected before the date of this public notice. This restriction will not, however, apply to the imports by STC of India Ltd."

The effect of this public notice was that, except for goods already shipped before 11-11-1983, no commodity of this description could be imported into India except through the STC. The public notice, it will be seen, did not ban the import of fatty acids and oils even after its date; it only "canalised" the imports through the STC.

9. The petitioner firm states that, when the above public notice was issued it contacted respondent No. 3 and sought cancellation of the contract dated 7-10-1983. However, the petitioner states, respondent No. 3 was not agreeable to the cancellation of the contract and has handed over the papers to its solicitors for filing arbitration proceedings in London on the basis of an arbitration clause contained in the contract. Letters exchanged by the petitioner with respondent No.3 between 14-11-1983 and 1-8-1984 have been annexed to the writ petition

as annexures "B" to "L" and are relied upon in support of this contention. Further correspondence of September, October, 1984 has also been annexed to the rejoinder. Faced with these proceedings, it is said, the petitioner has filed this writ petition seeking appropriate directions to enable the petitioner firm to perform the contract by importing the goods in question.

10. Three questions arise for consideration in the writ petition in the light of the stand taken by the respondents in their replies and at the time of the arguments. These are:

(i) Are the petitioner's right in contending that, before the issue of the public notice dated 11-11-1983, they were entitled to import the goods in question under OGL No. 1/83 without obtaining a valid specific license permitting their import?

(ii) If the above question is answered in the negative, no further question arises. However, if it is answered in the affirmative, does it follow that the petitioners are entitled to import the goods under OGL even after 11-11-1983?

(iii) If the answers to both the above questions are in the affirmative, are the petitioners entitled to the issue of the directions sought for or not?

11. Before proceeding to discuss these questions, it is necessary for us to make two things clear regarding the scope and effect of any directions that we may be able to give even if we answer the above three questions in favor of the petitioner-firm. The first is that we cannot express in this writ petition any conclusion as to whether the petitioner-firm had or had not entered into a firm contract for the import of the goods in question before the date of the second public notice viz. 11-11-1983. Counsel for the petitioner-firm urged that the averment in the petition that it had entered into such a contract has gone uncontradicted by the respondents and that we should, therefore, accept the position that there was a genuine firm contract for import before 11-11-1983, as alleged. We are unable to accept this contention. Whether such a contract had been entered into genuinely and before such date or not is a pure question of fact. This is a question which has to be determined by the appropriate authorities and not by this court. Normally when the goods have been shipped and are sought to be actually imported into this country, the importer will have to place all the relevant documents before the customs authorities who will

scrutinise the documents presented to them, seek such further clarifications as they may need, carry out such investigations as they may find necessary and then determine this issue on which will ultimately depend the petitioners' right to import the goods under OGL. It will, no doubt, be open to the petitioners at that stage to come to this court, if dissatisfied with the decision of the authorities, praying that their decision is wrong and should be set aside. But, here the petitioner has come to the court at a much earlier stage. No goods have been shipped or are expected to arrive and the respondents have been given no occasion or opportunity to scrutinize the documents now relied on by the petitioner firm and to express any conclusion, opinion or criticism one way or another about their genuineness. Without such an opportunity they are not, at this stage, in a position to repudiate the petitioner's allegations in this regard and the Court will not be justified in accepting the petitioners' averments in the writ petition until and unless the relevant documents are before the authorities and they have had an opportunity to consider them. At this stage, therefore, we can only proceed to decide the writ petition on an assumption that the petitioner's allegations are correct, leaving it open to the respondents to examine the documents as and when they are presented to them and arrive at their own findings. In other words, for the purposes of this writ petition, we assume, but do not decide, that the petitioner had entered into a firm contract for import of the goods in question before 11-11-1983. The second clarification to be given pertains to the commodity that is to be imported by the petitioner. The petitioner claims that he is entitled to import 8500 M.T. of "Stearin Fatty Acid" and it is this contention that we proceed to examine and pronounce upon. But any pronouncement by us does not mean that any goods which the petitioner may receive under the shipments pursuant to the contract should be allowed to be imported straightway if we allow the writ petition. The goods sought to be imported will be subject to inspection by the respondents who will be entitled to satisfy themselves whether they correspond to the description of goods contained in the contract on which this writ petition is based and whether, if not, the petitioner firm can be permitted to import, under OGL, the actual goods sought to be imported. With these preliminary clarifications, we proceed to discuss the three main questions posed earlier.

12. So far as the first question is concerned, as earlier stated, the case of the respondents is that "Stearin Fatty Acid" is covered by entry 212 or 368 of Appendix 3 or of entry 49 or 50 of Appendix 4 and was, therefore, not available

for import under OGL even before 11-11-1983. Dr. Singhvi, for the petitioners, disputes this. He points out that if one were to go merely by the nomenclature of the goods, none of the entries referred to, cover "Stearin Fatty Acid". But, even if one were to go not by the mere name but on a consideration of the substance of the matter, he says that none of the entries cover the goods in question. In support of this contention, he submits for our consideration the following material:

(a) An instance where, in October, 1983, the Customs authorities at Bombay cleared "Stearin Fatty Acid" imported under OGL (Page 104 of the file).

(b) A communication dated 23-7-1983 from the Collector of Customs, Cochin to the Collector of Customs, Calcutta, explaining that regular import of Industrial Stearin Fatty Acid was being allowed to be imported through Cochin Port (page 105 of the file). The letter explains that this was done only after a detailed examination and laboratory tests conducted in consultation with the chemical examiner. It had been found that the samples of "Stearin Fatty Acids" were found to have iodine values running from 35 to 48 and contained only a maximum of 5.6% of Stearic Acid whereas industrial stearic acid was generally known to contain iodine value of less than 10 and most commercial stearic acid contained about 45% Palmitic acid, 50% Stearic Acid and 5% Oelic Acid. Therefore, the goods imported through Cochin were held to be not merely another form of Stearic acid.

(c) An instance where the customs authorities, after issuing a show cause notice and calling for the importer's explanation, were satisfied that "Stearin Fatty Acid" was covered by OGL and allowed their import (pages 169 to 182 of the file). Here the customs authorities, after a full consideration of all aspects involved, were satisfied that, in trade, Palm Fatty Acid and Palm Stearin Fatty Acid were different items for various reasons. While the former was derived from Palm Oil, the latter was derived from Palm Stearin which is one of the constituents of Palm Oil. They, also agreed that while Palm Oil contained 37 to 40% of Oelic Acid and 41 to 47% of Palmitic Acid, the Oelic Acid content in Palm Stearin was between 15 to 37% and the Palmitic Acid content, between 46 to 74%. The Iodine value of Palm Oil was 51 to 55 whereas that of Palm

Stearin was 21 to 49. It was also considered that the description of the item 'Palm Oil' mentioned in Appendix 9, which was very wide and included Palm Kernel Oil, Palm Olari and Palm Stearin, could not be translated to Appendix 4 which only talked of "Palm Fatty Acid" without any qualification or addition.

(d) The terms of the notification dated 11-11-1983 : If "Stearin Fatty Acid" clearly fell under the entries "Lauric Acid", "Stearic Acid" "Palm Fatty Acid" or "Palm Acid Oil", the goods in question will fall in the earlier Appendix 3 or 4. The very fact that the authorities rely not on these entries which also find a place in the public notice of 11-11-1983 but on the entry : "Other fatty acidsall types" newly included therein as item (ix) of Entry 10 in Appendix 9 shows that they concede that they do not fall under the above entries.

(e) An expert opinion dated 23-10-1984 obtained by the petitioner from the Shriram Institute for Industrial Relations (Pages 108 to 124 of the file): This states that "Stearin Fatty Acids" are chemically different from Palm fatty acids, Stearic acid, Lauric acid and Palm acid. It is also accompanied by a comprehensive note on the subject. It is pointed out that the respondents were given an opportunity, by the interim order dated 14-11-1984, to counter this and they filed a counter affidavit on 22-11-1984 relying on a report of the Director-General of Technical Development, which, according to the petitioners, does not at all meet the points made by the report filed on their behalf.

(f) Certain letters from dealers in sales and purchases of commodities of this type (Pages 125 to 129) : These letters are filed to show that, in the relevant trade circles, Stearin fatty acid, Palm fatty acid, Palm kernel acid, Palm acid oil, Static acid and Lauric acid are all descriptions of items different from one another and that goods of any one of these descriptions will not be supplied if asked for by any of the other names. One of these letters (page 127) refers to the fact that even the State Trading Corporation is selling Palm Fatty Acid, Palm Stearine Fatty Acid, Stearine Fatty Acid and Split Stearin Palm Fatty Acid as different products and at different prices.

13. We are of opinion that the petitioner's contention that the import of "Stearin

Fatty Acid" under OGL was permissible prior to 11-11-1983 has to be accepted. The principles of interpretation of entries and terms such as the one under consideration employed for description of goods and commodities in taxing statutes are well settled and have been enunciated in a number of decisions of the Supreme Court: *Ramavatar Budhaiprasad v. Asst. Sales Tax Officer, Akola* ¹ *Union of India v. Delhi Cloth and General Mills Co. Ltd.* ² *Commr. of Sales Tax v. M/s Jaswant Singh Charan Singh*, ³ *South Bihar Sugar Mills Ltd. v. Union of India* ⁴ *Ram Tahal v. State of U.P.* ⁵ *State of Tamil Nadu v. M/s Pyare Lal Malhotra* ⁶ *Dunlop India Ltd. v. Union of India*, ⁸ and *Union of India v. Gujarat Woollen Felt Mills* ⁷ It is sufficient here to quote the observations in *Dunlop India Ltd. v. Union of India AIR 1977 Supreme Court 597* :

"It is clear that meanings given to articles in a fiscal statute must be as people in trade and commerce, conversant with the subject, generally treat and understand them in the usual course. But once an article is classified and put under a distinct entry, the basis of the classification is not open to question. Technical and scientific tests offer guidance only within limits. Once the articles are in circulation and come to be described and known in common parlance, we then see no difficulty for statutory classification under a particular entry."

Applying the above principle, we have to decide the question before us not by trying to find out the literal or derivative meaning of the various terms such as Stearin and Stearic, acid and oil and so on or by engaging ourselves in a discussion of the chemical composition of the various descriptions of goods but by considering what the expression "Stearin Fatty Acids" connotes in trade circles and whether this item as an identifiable commercial commodity is different from others known by the other names. Looked at from this point of view, the letters placed on record at pages 125 to 129 of the file support the petitioner's case and their correctness has not been controverted on behalf of the respondents. The departmental communications at page 104 and at pages 169-182 of the file also show that certain departmental authorities, after investigation or careful consideration, were inclined to the view that "Stearin Fatty Acid" was different from commercial "Stearic Acid" and from what was known as "Palm Fatty Acids" and that their chemical compositions were also different. Though this cannot be conclusive, it certainly helps us, in the absence of any cogent reason, to hold that the view so taken was not incorrect. Apart

from a reference to the various places in the several lists where "acids" are referred to and to dictionary meanings, the only real material placed before us on behalf of the respondents in support of their stand is an extract from an opinion of the Directorate General of Technical Development of the Government of India. This extract very briefly expresses the opinion that "Steering Fatty Acids" will come within entry 368 of Appendix 3 of vegetable origin or entry 50 of Appendix 4 of palm origin. It does not meet the points made in the expert opinion produced by the assessee and in the decisions of the Cochin and Calcutta authorities that "Stearin" and "Stearic" are commercially different and that 'Palm fatty acids' refers to fatty acids derived from palm oil and not palm olein or stearin. It is perhaps to plug the lacuna that was discovered that the notice of 11-11-1983, in addition to naming specific commodities, also added a residuary sub-entry (ix) in entry 10 in Appendix 9 to cover "all other fatty acids, however, derived". For the above reasons, we are of opinion that "Stearin Fatty Acid" could have been imported, by the petitioner under OGL 1/83 as it stood before the public notice dated 11-11-1983.

14. The second question that arises is regarding the effect of the public notice dated 11-11-1983. On behalf of the petitioners, two points are made. One, relying on the decision of the Supreme Court in *East India Commercial Co. v. Collector of Customs*,⁹ and of this Court in *Bansal Exports P. Ltd. v. Union of India*¹⁰ is that the public notice of 11-11-1983 being only an administrative circular or instruction has no statutory force (vide, paragraphs 31 to 33 of the above Supreme Court judgment) and cannot override or obliterate the right of import available to traders under OGL 1/83. The second is that, even if it has the same effect as a law or statutory notification it will be applicable only in respect of imports made into India after 11-11-1983 otherwise than in pursuance of a firm commitment or contract entered into by the importer before that date. It is urged that the announcement of the import policy coupled with OGL No. 1/1983 in respect of the financial year 1983-84 amounts to a promise or representation to the public in general that imports will be permitted subject only to the terms, restrictions and conditions thus announced; and, though these terms, restrictions and conditions could be changed by the Government, that could be done only with prospective effect and without affecting any previously acquired right. It cannot deprive an importer of the valuable right of importing certain goods under OGL that was available to him till then and in exercise of which he has, before the date of the change of policy, entered into contracts or

other commitments which he can avoid only at great peril, risk or loss. In other words, the petitioners seek to invoke the doctrine of promissory estoppel enunciated by the Supreme Court in the Indo-Afghan case AIR 1968 Supreme Court 718 and elaborated in the M.P. Sugar Mills case AIR 1979 Supreme Court 621. Our attention is also invited to the recent decision of a Full Bench of this Court in *Bansal Exports P. Ltd. v. Union of India*¹¹ explaining the scope of the application of this doctrine in matters of import-export policy and law.

15. We are of opinion that the petitioner's right to import the goods in question under OGL did not cease on 11-11-1983. If, as we have held, the original import policy announced for 1983-84 coupled with OGL 1/83 entitled the petitioner to import "Stearin Fatty Acid" under OGL and, again, as we assume, if the petitioner firm had placed firm contracts with the third respondent for the import of these goods on 7-10-83 itself that right of import is no doubt liable to statutory changes but cannot be taken away to the petitioner's detriment except by another statutory instrument. In this case that has not been done, for on 11-11-1983 only a public notice has been issued. We do not see how a public notice such as one issued on 11-11-1983 which has no statutory force by itself and which is inconsistent with OGL 1/83 which has been issued under Section 3 of the Act can be given effect to. If it is suggested that the change is sought to be effected only as a modification of the earlier policy and nothing more, such change, unwarranted by a statutory instrument, unless justified on grounds of public interest, will be hit by the doctrine of promissory estoppel. No doubt the public notice seeks to prevent hardship by exempting shipments actually made before 11-11-1983. But as we shall see later the original notification permitted shipments up to 31-3-1984 in pursuance of letters of credit opened up to 28-2-1984 and so the new policy, in so far as it gives no relief to what may be described as "firm commitments" prior to 11-11-1983 can be impugned on the ground of promissory estoppel. We have, therefore, come to the conclusion that, if the petitioner had entered into a firm contract on 7-10-1983 as alleged, it should be permitted to import the "Stearin Fatty Acid" contracted for, under OGL but subject to the other terms and conditions of the said notification.

16. This brings us to the third question as to the relief which the petitioners are entitled to in this writ petition. On this question, Sri Y. K. Sabharwal, learned counsel for the respondents put forward a contention which, we think, merits acceptance. He points out that both the policy and the OGL permitted open

imports of goods only subject to certain terms and conditions. He draws our attention to paragraph 20 of the conditions subjoined to Appendix 10 which is also reflected as condition 26 in the Import Trade Control Order No. 1 of 1983, which has been extracted earlier in this judgment. He contends, and it appears to us with force, that, even keeping aside the public notice of 11-11-1983 as having no effect vis-a-vis the petitioner's right to import pursuant to a contract dated 7-10-1983, the petitioners can be permitted to import the goods only if they fulfilled all the terms and conditions of the OGL. The petitioners, not being actual users, would be entitled to import any goods under OGL only if they fulfilled two conditions:

- (a) Such goods must be shipped on through consignment to India on or before 31-3-1984; and
- (b) Such shipment must be against firm orders for which irrevocable letters of credit are opened or established on or before 29-2-1984, without any grace period whatsoever.

The petitioners here did not open irrevocable letters of credit before 29-2- 1984. Nor were any goods shipped to them against firm orders prior to 31-3- 1984. This being so, he says, there can be no direction to the respondents to permit the import, by the petitioners, of goods which may be shipped and for which letters of credit may be opened now or hereafter, long after the prescribed dates, particularly when such import is banned under the policy in force at the actual time of import. The petitioners' argument, at best, is that the public notice of 11-11-1983 is ineffective and cannot affect its rights and so, he says, the petitioners cannot be placed in a better position than they would have been, if there had been no change of policy at all and no public notice of 11-11-1983.

17. There can be no doubt that, had there been no change of policy, as envisaged by the public notice dated 11-11-1983, no importer would have been allowed the import of goods permitted under the OGL unless there had been firm orders placed by him and these had been implemented, on his part by the opening of letters of credit by 29-2-1984 and by the shipment, on the part of the seller, by 31-3-1984. Counsel for the petitioners, however, contends that this condition should not be held against him because the fulfillment of this condition was made impossible by an act of the respondents, viz., the issue of the public notice of 11-11-1983. Had not the respondents created doubt and

confusion in the minds of the petitioners, he says, they would have gone ahead with the contract and fulfilled those conditions. It was the issue of the public notice that created genuine doubts in the minds of the petitioners regarding the actual legal position. In the face of the public notice, the petitioners could not risk huge investment, and almost certain loss, by opening letters of credit and asking the sellers, who were only too anxious to do so, to ship the goods, as the respondents were certain to deny entry to the goods not shipped before 11-11-1983. Placed in this difficult situation, the petitioners did their best to persuade the sellers to cancel the contract but they were unwilling to do so. The conduct of the petitioners was *bona fide* and it was really the respondents who had rendered impossible the fulfillment of the conditions. Having done so, he argues, it is not open to them now to contend that they cannot permit the import because the petitioners had not complied with this condition of the contract. He also raised a preliminary objection that this contention, put forward for the first time at the time of arguments, should not be permitted to be raised.

18. In our opinion, this contention of the petitioners is not acceptable. The contention sought to be raised by the respondents is one, based on admitted facts - that no letters of credit have been opened and no shipments effected in pursuance of the contract of September 1983 - and turns on an interpretation of condition 26 of OGL 1/83. Sri Singhvi wanted to rely on certain correspondence to show his conduct between November, 1983 to the date of the filing of the petition and we have allowed him to do so. We, therefore, see no grounds on which we can refuse permission to the respondent to urge this ground.

19. On the merits also, we do not find the petitioners' contentions acceptable. What the petitioners pray for is a declaration that the public notice of 11-11-1983 does not affect their right of importing the goods in question under OGL 1/83 and a mandamus to direct that the respondents do permit them to import the goods as envisaged therein. This being so, all that this Court can do is to consider the petitioners' import entitlement before the public notice of 11-11-1983 and the validity and effect of the public notice vis-a-vis that entitlement and to declare whether or not the latter, in any way, derogates from the former. If we come to the conclusion that it does not, all that we can do is to say so and to declare that the petitioners should be permitted to import the goods under OGL 1/83. But this can be directed to be done only in accordance with the terms and conditions of the notification. This Court has no power to exempt the

petitioner firm from complying with or to relax any of the conditions subject to which the import could have been done and to direct the respondents to permit the import of goods by the petitioner firm even without fulfillment of any or all of the conditions of the OGL. In this view of the nature of a writ of mandamus which the petitioners are seeking, we do not see how a direction as sought for by the petitioners can be given on the admitted position that a material condition of OGL 1/83 remains unfulfilled.

20. Nor are we persuaded that the petitioners are on solid ground in their attempt to throw the responsibility for non-fulfillment of the above condition on the respondents. The argument that the condition should be relaxed because the petitioners could not be expected to expose themselves to huge risk and loss by having the goods shipped against letters of credit because of the issue of the public notice of 11-11-1983 by the respondents creating chaos and confusion in a clear and placid situation does not impress us. In the very nature of the business of imports, an importer is forced to act on his own interpretation of the list of goods permitted to be imported from time to time and, in this process, he has necessarily to take certain risks. An uncertainty regarding the interpretation which the customs authorities may ultimately give to an entry cannot constitute a valid ground to permit the import of an item which does not fall in an entry or the import of an item without the due fulfillment of the terms and conditions subject to which the import is permitted. In order to make it easy for the importer and reasonably limit the exposure of importers to undue risk, the policy itself contains enabling provisions whereby an importer, when in doubt, can seek clarification regarding the department's interpretation on any particular topic. It is also open to the importer, without seeking such interpretation or when he does not accept the interpretation put by the department in any matter, to approach the courts in the exercise of their writ jurisdiction and seek an authoritative ruling but this he must do expeditiously and in such a way as to ensure that at least interim, if not final, directions are obtained from the court, sufficiently in time to safeguard against the possibility of one or more the conditions of import becoming impossible of fulfillment due to delay in this regard. The Court cannot help a petitioner who does not do this and approaches the court after letting one of the conditions go unfulfilled.

21. The petitioners say that the delay occurred because they attempted to persuade the sellers to cancel the contract. This plea, however, is not of much

avail. In the first place, on the issue of the public notice, an importer placed in this situation, as a prudent businessman could have acted, after obtaining such legal advice as he deemed fit in one of several ways:

(i) He could have accepted the public notice as valid and as curtailing his right to import the goods in question into India on or after 11-11-1983. In such a case, his only recourse would have been (a) to persuade the sellers to cancel the contract; or (b) to repudiate the contract on grounds of impossibility of performance or otherwise with attendant consequences; or (c) to request the respondents to relax the policy in favor of persons such as he who had already entered into commitments.

(ii) He could have taken the stand that the public notice did not affect him and that he was entitled to an OGL for the import despite the public notice. In this event, he could have gone ahead with the performance of the contract notwithstanding the notice of 11-11-1983. For this he would have had to risk possible loss and to instruct the sellers to ship the goods against letters of credit as envisaged in the terms of the notification. In the event of the import being denied entry he could have come to the court and sought to have his stand upheld.

(iii) In case he thought that the above course was too great a risk for him to take in view of his financial position, he could have sought clarification from the customs authorities regarding their stand. This step he should have taken within the time frame provided by the terms of the OGL; and

(iv) In case (a) he approached the authorities and they did not give him a reply within a reasonable time or (b) the reply given by them was unsatisfactory or incorrect from his point of view or (c) he thought that no useful purpose would be served by approaching the departmental authorities, he could have approached the courts. He should have done this also sufficiently in time to be able to have the performance of the contract enforced within the time frame fixed by the OGL and to obtain such interim orders as may be necessary to safeguard his position.

22. The petitioners did none of these things. The public notice was issued in November, 1983 and there was plenty of time to follow any of the courses suggested above. In fact, from the very instances given in the correspondence

(if correct), it does appear that other importers went ahead with their contract, approached this court for redress when the goods were intercepted in customs and were able to obtain interim orders enabling them to clear the goods pending disposal of their writ petitions. Even granting that a petitioner cannot be expected to rush to the court and that an attempt on the part of the petitioner to persuade the sellers to cancel the contract before resorting to the other courses is reasonable, it is seen that when the petitioners did so on 14th November, the sellers refused to oblige them as early as the 22nd November, 1983. The pursuit of the matter by indulging in more and more correspondence when the attitude of the sellers was known cannot provide a reasonable cause for not adopting the other courses open to the petitioner to have the imports made well within the time schedule contemplated by the OGL. Suppose, in this very case, there had been no public notice on 11-11-1983 but the petitioner had come to know in November that, in some cases, the department had taken the stand that the import of Stearin Fatty Acid was not permissible even under the OGL as it originally stood. If the petitioners had come to court long after 31-3-1984, claiming that they did not implement the contract as they were in doubt and should be permitted to do so even though the time frame indicated in the OGL was over, we do not think the court would or could have granted relief to the petitioners. The present situation is not materially different. The public notice of 11-11-1983 had to be taken note of and appropriate relief sought within such time and in such manner that compliance with the OGL was still possible. We are unable to see how a direction that the petitioner should be permitted to import can be issued notwithstanding that the terms of condition 26 of the OGL has not been fulfilled.

23. Dr. Singhvi relies upon the decision of this Court in a batch of petitions decided by this Court (C.W.605/82 and others : 22-7-1983) and the order of the Supreme Court in one of them (C.A. 1423/84 : 18-4-1985) for two points. Firstly, he contended that the Court will refuse a direction permitting import of the goods only in cases where there is a ban on the import of the goods in question according to the prevalent import policy at the time when the goods are actually sought to be imported and not where, as here, import is still permitted, only canalized. It is true that, even in cases where the petitioner is otherwise entitled to a license of import, the Court will not give a direction permitting import of goods the import of which, under the policy prevalent at the time of import, is banned but this is not the only circumstance in which a mandamus

will be denied. We agree with Dr. Singhvi that this is not a case where the policy at the time of import bans the import of the goods in question and so a direction may not be refused on that ground. But we are not denying relief to the petitioner on that ground and this aspect is not relevant for the purposes of this case. What we are saying is that, according to us, the petitioner is entitled to import the goods under OGL 1/83 but that he cannot be given relief because he has not complied with the terms and conditions of that OGL. Dr. Singhvi points out that, in the decisions relied upon by him, the Courts directed the authorities in 1982 and 1985, to issue an Export House Certificate in respect of the financial year 1978-79. But those were cases in which the assessee had filed applications for the issue of Export House Certificates within the financial year 1978-79 as required by the rules and also complied with all the requirements necessary for the issue of such certificate for the financial year 1978-79 but certificates had been refused to them on some irrelevant grounds. The writ petitioners having done all that was required on their part to obtain the relief in question (viz., the issue to them of Export House Certificates), there was nothing to stop the Court from issuing a writ of mandamus for the purpose. But, here, the controversy between the parties is only whether the goods in question could be imported by the petitioners under the OGL and all that we can say, in the light of our discussion, is that the answer to the question is in the affirmative. But we have no jurisdiction, power or justification, to dispense with the fulfillment of one of the conditions of that OGL.

24. For the reasons discussed above, we are of opinion that the petitioner is not entitled to any directions or relief as prayed for and that the writ petition should be dismissed. We order accordingly but would direct the parties to bear their own costs.

AAA Petition dismissed.

Cases Referred.

1. AIR 1961 Supreme Court 1325;
2. AIR 1963 Supreme Court 791 :
3. AIR 1967 Supreme Court 1454;
4. AIR 1968 Supreme Court 922;

5. AIR 1972 Supreme Court 254 ;
6. AIR 1976 Supreme Court 800;
7. AIR 1977 Supreme Court 1548.
8. AIR 1977 Supreme Court 597;
9. AIR 1962 Supreme Court 1893
10. AIR 1983 Delhi 445
11. AIR 1983 Delhi 445