

(1990) 04 BOM CK 0023

In the Bombay High Court

Case No : Writ Petition No. 3422 of 1986

American Dry Fruit Stores

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 03-04-1990

Acts Referred:

Central Excises and Salt Act, 1944 — Section 38
Civil Procedure Code, 1908 (CPC) — Section 100, 35
Constitution of India, 1950 — Article 226, 73
Customs Act, 1962 — Section 11
Evidence Act, 1872 — Section 115
Imports and Exports (Control) Act, 1947 — Section 3
Monopolies and Restrictive Trade Practices Act, 1969 — Section 13, 55

Citation : AIR 1990 Bom 376 : (1990) 2 BomCR 671 : (1991) 32 ECC 258

Hon'ble Judges : V.S. Kotwal, J

Bench : Single Bench

Advocate : P.H.J. Taleyarkar and J.C. Patel, instructed by C.R. Patel and Co, for the Appellant; M.A. Shringarpure, Govt. Pleader, for the Respondent

Judgement

1. Whether statutory order could be displaced or modified by a public notice; whether such a modification would effect the doctrine of incorporation and whether the representation made to the statutory order, if acted upon, could be withdrawn in the summary manner, are some of the asserted questions that are posed in this proceeding. The compass of controversy is comparatively short and the facts are equally short. To understand the thrust of the controversy only a few aspects serving as land marks, could be mentioned at this stage itself.

2. The petitioners are a firm registered under the Partnership Act and they carry on business of manufacturing, exporting and dealing in food products and importing for their business raw materials and other goods for stock and sale. The second Respondent is the Chief Controller of Imports and Exports at New Delhi, the 3rd Respondent is the Joint Chief Controller of Imports and Exports at Bombay while the 4th Respondent is the Collector of Customs at Bombay and the 1st Respondent is the Union of India.

3. An order of April 1, 1986 is the starting point which ultimately generated the disputes and the controversies. Such an order was passed u/s 3 of the Imports and Exports (Control) Act, 1947 (shortly the Act). and it was issued by the 1st Respondent styled as Import Trade Control Order (the Order) No. 49/85-88 dated April 1, 1986 whereby the 1st Respondent gave general permission to import into India goods of the description specified in the Schedule annexed to the said Order subject to the conditions specified therein. This Order is also designated as Open General Licence No. 15/86 (OGL). Item No. 8 in the said Schedule to that Order is the pivot around which revolves the whole structure of the controversy. Under that item Crude Drugs which were required for Ayurvedic and Unani medicines, as appearing in List No. 4 in Appendix 6 of the Import and Export Policy for 1985-88 (the Policy), were permitted for the import under that Order with certain conditions and what is of more relevance and utmost importance in the wake of the controversy is that the said commodity could be imported by any person for stock and sale purposes. List 4 of Appendix 6 relates to two items at Srl. Nos. 47 and 48 i.e. Darchini (Bark) and Lavang, Laung (Flower bud).

4. In pursuance of the grant of the OGL and the general permission thereunder, as available under the Order, the petitioners, on October 4, 1986 entered into a contract with the Dipak Trading Co. Pvt. Ltd. of Singapore, through their Bombay Agents Messrs Mukesh Gopaldas Dattani for the purchase and import of 10 Metric Tonnes of Lavang or Laung and 13 Metric Tonnes of Darchini referable to these items 47 and 48 respectively. According to the petitioners the said contract was a concluded one as parties have confirmed the transaction and thus allowed themselves to be bound by the said contract. A letter of confirmation has been issued by the other party on the same day i.e. October 4, 1986. As a follow up action and in pursuance of the said contract, two days thereafter i.e. October 6, 1986, the State Bank of India, Bombay, at the instance of the petitioners, established an irrevocable and transferable Letter of Credit No. 86/46/Matunga in favour of the said other party Dipak Trading Co. Pvt. Ltd. of Singapore.

5. However, the petitioner had to face a rough tide thereafter. On October 22, 1986 the petitioner learnt that a Trade Notice No. 251/85-88 dated 14th October, 1986 was issued by the office of the 3rd Respondent in which attention was drawn of the Traders to the public notice No. 121-ITC(PN)/85-88 dated 6th October, 1986 issued by the 2nd Respondent. It is significant that by the said public notice, the import policy for 1985-88 came to be amended by deletion of these two very items Nos. 47 and 48 from List 4 of Appendix 6 with the inevitable result that the said two Crude Drugs i.e. Darchini and Lavang, were sought to be taken out of the OGL. It was further stipulated in that notice and so were the public informed that import of the said two drugs having been banned under the OGL though an exception was carved out to the extent that the ban would be lifted and import would be permitted under the OGL, which is already granted, provided irrevocable letter of credit has already been opened and established before the date of the public notice and provided further that the

shipment of the commodity is effected within 90 days from the date of the said public notice. The petitioners have opened the Letter of Credit on the 6th, which happened to be the date on which, according to the Trade Notice, the public notice was issued. However, it is an accepted position that the shipment was not effected by the petitioners within 90 days and, therefore, since according to the Department, both conditions were not fulfilled or at least one of them was not fulfilled, there cannot be any relaxation of the condition and no lifting of the ban in favour of the petitioners with the further consequence that the petitioners thus came to be prevented or prohibited from importing these two Crude Drugs under the OGL which was already granted, by reason of change in policy.

6. The petitioners thus tend to challenge the said public notice and the Trade Notice dated 6th October, 1986 and 14th October, 1986 respectively and claimed further reliefs that the said two drugs, which were originally permitted under the OGL and which have already been not only shipped but reached India, should be allowed to be lifted by the petitioner Company, as being permissible under law. It is for this relief that the petitioners have approached this Court under Art. 226 of the Constitution of India challenging the validity of the said two notices imposing the said ban.

7. When the matter was admitted and Rule was granted, a prayer was made on behalf of the petitioners for grant of interim reliefs, mainly on the ground that the goods have reached Bombay on 16th February, 1987. The learned single Judge was pleased to grant interim reliefs to the effect that the petitioners would be allowed to lift the said consignment, which has already reached Bombay against a Bank Guarantee for the requisite amount and a statement is made at the bar which is accepted by the other side that requisite Bank Guarantee has already been furnished by the petitioners and they have already lifted the said consignment.

8. This gives in short the factual structure which would serve as the background for resolving the controversy in the context of certain settled Principles. To recapitulate, the order under S. 3 of the Act for general permission to import under the OGL was recorded on 1st April, 1986, in pursuance of which the petitioners entered into a contract with the party at Singapore on 4th October, 1986 for the import of Crude Drugs styled as Darchini and Laung; an irrevocable and transferable letter of credit was opened and established at Bombay on 6th October, 1986; in pursuance of which the consignment containing substantial quantity of these two commodities was already transacted by the said party at Singapore and which consignment reached Bombay on 16th February, 1987 and in between a public notice is purported to have been issued on 6th October, 1986 and which was incorporated in the Trade Notice dated 14th October, 1986 , - under which the change of policy was reflected whereby a ban has been imposed for the import of these two commodities under OGL though carved out an execution that it would not be operative in case a Letter of Credit is opened before the date of the public notice that is 6th October, 1986 and that the

shipment is made within 90 days thereafter.

9. Shri Taleyarkhan, the learned Counsel for the petitioners no doubt raised several assorted questions based on certain ratios and settled principles of law. However, about six of those questions that are formulated by the learned Counsel assume much importance in the context of the controversy.:

i) The import policy, any change therein and the public notice effecting such a change informing the public through such a notice, has no force of law and has no statutory effect;

ii) The O.G.L. is a statutory gazetted order issued under S. 3 of the Act and as such it cannot be amended much less displaced by a mere public notice and that too by merely changing the import policy;

iii) On the touchstone of the doctrine of Incorporation, list 4 of the Appendix⁶ containing various items, has been incorporated in the said statutory order and, therefore, it remains unaffected by the subsequent amendment made only to the said List 4;

iv) Alternatively, since the contract in question was concluded and since the petitioners acted upon the representation as reflected from the 1st order and the O.G.L. and reversal rights and obligations have been created under the contract by virtue of the said representation, on the Doctrine of Promissory Estoppel, the rigour of amended policy cannot operate against the petitioners to their detriment;

v) Alternatively, the knowledge of the change of policy as reflected through such public notice, which is claimed to have been issued on 6th October, 1986 and as also reflected in the Trade Notice dated 14th October, 1986, cannot be attributed to the petitioners at the same moment of the issue of the public notice since the publication of the said notice for the purpose of attributing the knowledge within a reasonable span of time is condition precedent and if that be so, then the Letter of Credit opened and established by the petitioners through Bankers in Bombay on 6th October, 1986 though synchronised with the said public notice, cannot be styled as opening of the said Letter of Credit subsequent to the issue of the public notice, but must be deemed to have been so opened before the issuance of the notice;

vi) Under the O.G.L. which has granted under the original or initial statutory order, the shipment of the consignment in question was permissible upto 21st March, 1987 and this period cannot be curtailed or shortened by any such public notice, though an exception for lifting of the ban was made that the shipment must be made within 90 days. These are some of the assorted questions that are posed by the learned Counsel in this proceeding and for which purpose reliance is placed on certain decisions. All these contentions are countered by Shri Shringarpure, the learned Counsel for the respondents. According to him the so-called public notice and the Trade Notice are nothing short of statutory orders

and have all ingredients of such an order and consequentially they have every statutory force of law. According to him the initial order is by the Chief Controller and the public issued notice and the Trade Notice for amending the policy are also issued by the same authority. The learned Counsel then submits that S. 3 of the Act itself envisages authority and permissibility for such an officer i.e. the Chief Controller to amend the policy by issuance of such notice and once such flexibility is incorporated in the Act itself, then the jurisdiction and the authority of the said officer cannot be open to any challenge, meaning thereby that any order subsequent to the initial order would have same and equal binding force as a statutory order. He further submits that in fact the letter of credit was opened in the instant case after the issuance of the public notice and, therefore the first condition of the exception is not satisfied. Similarly since the shipment was not done within 90 days, the second condition of the said exception was also not satisfied and as such the petitioners' case does not fall within the parameters of the said exception carved out under that public notice. He further submits that operation of the Doctrine of Promissory Estoppel has the foundation in equity and the equity cannot be raised in favour of the petitioners in the instant case since the change of policy is for the larger interest and, therefore, the individual interest and the rights of the petitioners cannot override in that behalf.

10. To complete the circuit it may be observed that under the initial order of 1st April, 1986 item 8 of the Schedule reads as :

"Crude Drugs required for making Ayur-vedic and Unani medicines, as appearing in List No. 4 in Appendix 6 of Import and Export Policy for 1985-88".

Appendix 6 of the Import Policy of 1985-88 contains list No. 4 which is labelled as "List of items allowed for import as "Crude drugs" under O.G.L.". The list contains several items under different categories. The first category described as a A relates to "Plant origin Drugs". Item No. 47 describes Darchini (bark) which is also described as Cinnamomum Zoylamicum Slume Chinamon Bark. Item No. 48 describes Lavang. Laung (Flower bud) which is also described as Syzygium aromaticum (Linn.) Merr. & L. M. Porry, Cloves. Since we are concerned with only these two items reference to other items may not be necessary. Thus transposition and implanting of the said items in list No. 4 of Appendix 6 containing these two items in the O.G.L. make it very clear that the import of these two items was permissible under the general licence i.e. O.G.L, Second important feature is that condition No. 1 annexed to that O.G.L. reads as :

"Since in the case of "Teaching Aids" covered by serial No. 1, all other items covered by the Schedule annexed to this order, may be imported by any person for stock and sale purpose."

This condition therefore, makes explicit two features. First that these two items could be imported by any person and secondly it could be even exclusively for the purpose of stock and sale and not necessarily for the actual user thereof and thus it is unrestricted and unqualified regarding person who can import the same

and regarding user thereof which can be only for stock and sale. The petitioners claim and maintain that they imported these two items for this very purpose i.e. for stock and sale and thus according to them the O.G.L. was granted in their favour and they were allowed to import these two items for the purpose of stock and sale. Reliance is also placed at the Bar on the Handbook of the Import and Export Procedures for 1985-88. Since the policy normally covers a span of 3 years the Appendix 1A incorporates the Imports and Exports (Control) Act, which includes S. 3. It would not be out of place to reproduce provisions of S. 3 at this juncture to complete the circuit. It reads thus :

"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 :--

a) the import, export carriage coastwise or shipment as ships stores of goods of any specified description;

B) the binding into any port of place in India of goods of any specified description intended to be taken out of India without being removed from the ship or conveyance in which they are being carried.

(2) All goods to which any order under sub-sec. (1) applies shall be deemed to be goods of which the import or export has been prohibited under S. 11 of the Customs Act, 1962 (52 of 1962), all the provisions of that Act shall have effect accordingly.

(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".

11. This discussion gives a clear picture about the factual structure as also the statutory provisions available in that field and it is against the background of these features that the questions formulated by Shri Taleyar-khan and which are no doubt controverted by Shri Shringarpure, will have to be answered. On anxious and careful consideration upon the relevant features available in that field I have no reservation to answer all the said questions in favour of the arguments canvassed by Shri Taleyarkhan, the Counsel for the petitioners as against which the contentions raised by Shri Shringarpure in that behalf hardly carry any conviction and are in complete disharmony with the statutory provisions, legislative intent and judicial pronouncements in that behalf. A short resume of all features can well be taken at this juncture.

12. As regards first point i.e. that as import policy and public notice amending the said policy has no force of law and as such has no statutory effect, the learned Counsel has relied upon certain decisions available in that field. The first is

of the Supreme Court in *East India Commercial Co. Ltd. Calcutta v. Collector of Customs, Calcutta* reported in 1984 ECR 138. Therein a licence was granted to the petitioners for the import of fluorescent tubes and fluorescent fixtures attaching certain conditions by way of which the same should not be sold without permission and there has been a breach of the condition, on account of which a show cause notice was issued by the Collector that the goods were liable to be confiscated. A similar situation had also arisen that the statutory order was sought to be displaced or disturbed by a public notice and the challenge was levelled more or less on the same lines and that the challenge was upheld by the Supreme Court through its majority judgment. A public notice came to be issued on 26th July, 1948 informing the public as regards the procedure to be followed in the matter of filing of application by different categories of applicants. During the course of judgment upholding the said challenge, the Supreme Court observed as :

"The learned Counsel for the respondent asserts that the said public notice is an order made in exercise of the power conferred on the Central Government under S. 3(1) of the Act. On the other hand, Learned Counsel for the appellants contends that public notices are not such orders but only information given to the public for their guidance..... Firstly, the said notice does not purport to have been issued under S.3 (1) of the said Act whereas the orders referred to earlier, that is, notifications and similar others, were issued by the Central Government in exercise of the power conferred on it by S. 3 of the said Act. The Central Government itself makes a clear distinction in the form adopted in issuing the notice. Secondly, while the notifications issued under S. 3 of the Act are described as orders, the notices are described as "public notices", while the notifications under S. 3 of the Act regulate the rights of parties, the public notices give information to the public regarding the principles governing the issue of import licences for specified periods. It is also clear that the orders issued under S. 3 of the Act, having statutory force, have to be repealed, if the new order is in any manner modification or supersedes the provisions of an earlier order; public notices are issued periodically without repealing or modifying the earlier notices or notifications..... To put it differently, orders made under S. 3 of the Act have statutory force whereas public notices are policy statements administratively made by the Government for public information. The foreword to the import Trade Control Handbook of Rules and Procedure, 1952, under the signature of the Secretary to the Government of India, in the Ministry of Commerce and Industry brings out this distinction..... It is true the Chief Controller made an affidavit in the High Court that the policy-statements are issued under S. 3 of the Act, But, as we have said, that is only on information which has no support either in the form adopted or the practice followed or the matter incorporated in the notifications..... We have no hesitation in holding that public notices are not orders issued under S. 3 of the Act".

13. The ratio in *Raymond Woollen Mills Ltd. v. The Joint Chief Controller of Imports* enunciated by the learned single Judge of this Court in 76 Bom LR 26 in

the context lends support to this proposition wherein it is observed that : the provisions of Import Trade Policy contained in the Red Book and the Hand Book were not laws nor had they the force of law. The learned single Judge took a survey of the authorities then available in the field and after an exhaustive discussion ultimately concluded that such public notices relating to the change of policy as contained in Red Book, would have no force of law. Yet another learned single Judge of this Court took similar view in *Lokesh Chemical Works v. M. S. Mehta, Collector of Customs (Preventive) Bombay*, reported in 1981 ELT 235 (Bom) wherein it is observed as :

"It is well settled that the policy statement and the public notices cannot confer or create any right enforceable in law. Therefore, the executive instructions or directions issued under Art. 73 of the Constitution, can apply operate in a field which is not covered by any legislation. Since the prohibitions, restrictions, use and distribution of imported goods is already covered by the Import (Control) Order, 1955 and Export (Control) Act, 1947 any instructions or directions in the public notice which has the effect of cancellation or making ineffective the licence already granted will be inoperative..... The prohibition or regulation put as a condition in licence must necessarily mean prohibition or regulation imposed by law or having the force of law, but it cannot mean something done by mere change in policy by public notice which may or may not be published or brought to the notice of public."

14. This pronouncement would make it expressly clear that a mere public notice and that too qua change of policy regarding import of goods, in respect of their user, restrictions or prohibition etc., cannot have the force of law and obviously cannot substitute or displace an order which is a statutory order passed under S. 3 of the Act. Such an order is always styled as an order which label cannot be annexed to any such public notice under which there is a change in the policy, Displacement or modification of the order must be by a similar order and not by a public notice.

15. The extended analogy of these contentions i.e. that when the O.G.L. flows out of a statutory Gazetted Order under S. 3 of the Act, it cannot be amended much less displaced by a public notice and that too which makes a change of policy. Actually this result is inevitable once the concept of statutory order issued under S. 3 of the Act is explicitly in contradiction with mere public notice or trade notice. Shri Taleyarkhan, the learned Counsel has also relied in that respect on certain decisions. Similar view has been taken by the Delhi High Court in *Kaptan's Enterprises and Another Vs. Union of India*, . Therein the petitioners had entered into a firm contract for import of Sterin Fatty Acid with a Foreign Company which was permissible under the O.G.L. granted earlier and in the meanwhile the Government of India issued a public notice, the effect of which was that except for goods already shipped before the said date of public notice, no commodity of that description would be imported into India except through the S.T.C. The challenge was more or less on the same lines that such drastic

change in the statutory order cannot be effected by mere public notice and the said challenge was upheld. Therein also the doctrine of promissory estoppel was invoked and which also upheld (sic). The Delhi High Court while laying that dictum observed as :

"We are of opinion that the petitioner's right to import the goods in question under O.G.L. did not cease on 11-11-1983, (which is the date of the public notice). If, as we have held, the original import policy announced for 1983-84 coupled with O.G.L. 1 / 83 entitled the petitioner to import the said commodity under O.G.L. and again, as we assume, if the petitioner firm had placed firm contracts with the third respondent for the import of these goods on 7-10-1983 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 O.G.L. 1/83 which has been issued under S. 3 of the Act can be given effect to".

Ultimately the said High Court held that it was reasonable to hold or at least assume that a firm contract or a concluded contract was entered into by the firm with the foreign party prior to the issuance of the public notice. Consequently the petitioner had acted on the representation made through the said O.G.L. under which import of that commodity was permissible and, therefore, even doctrine of promissory estoppel was made available to the petitioners in that behalf. Therein also Letters of Credit have been opened and established. A similar situation has also arisen that under the O.G.L. shipment was permissible after 31st March, 1984, which period also could not be curtailed and on the main point it was positively held that the statutory order under S. 3 under which O.G.L. was granted could not be amended or modified by mere public notice which has no force of law.

16. It is interesting to note that a similar view was taken by the 1988 (38) ELT 105 wherein it was expressly held that the ITC order is issued by the Central Government under S. 3 of the Act while the public notice is administrative order issued by the Chief Controller of Import and Exports and consequentially non-statutory cannot override the statutory ITC order and as such the amendment made to the import policy by any such public notice can have no effect on the initial statutory order as the import policy is incorporated by reference in the ITC order and once the incorporation is made, the provision incorporated becomes an integral part of the statute in which it is transposed and thereafter there is no need to refer to the statute from which the incorporation is made and any subsequent amendment made in it has no effect on the incorporating statute. No doubt it is true that this is an order recorded by the Tribunal and may not have binding force on this Court and, therefore, Shri Taleyarkhan, the learned Counsel also incidentally refers to, with a rider, that the highest authority in that department itself has taken a similar view. This however, is incidental since this

judgment is not binding on this forum, but is more reinforced by the dictum of the Supreme Court and other High Courts already discussed.

17. It is unnecessary to have multiplication of these authorities. The second question thus formulated by Shri Taleyarkhan, therefore also deserves to be upheld, where, it could safely be held that the order dated 1st April, 1986 under which the commodity in question was permitted to be imported under the O.G.L., as provided by any person even for stock and sale and the shipment was permissible upto 31st March, 1987, would be statutory gazetted order issued under S. 3 of the Act and cannot be modified much less replaced by a mere public notice and further it cannot be taken away also merely by change of import policy under such public notice. Such a replacement must be by another statutory order and even otherwise such a public notice has no statutory force of law at all and remain exclusively in the realm of administrative order and, therefore, cannot over-shadow or override the initial statutory order passed under S. 3 of the Act.

18. Shri Taleyarkhan, the learned Counsel also stands on equally strong footing when he placed in his service the doctrine of Incorporation. It is contended, and in my opinion with utmost justification, that list No. 4 of Appendix 6 which is already referred to and which contains these two items at Srl. Nos. 47 and 48, was incorporated in the statutory order and, therefore, it remains unaffected by a subsequent amendment only of that list No. 4. These two items at srl Nos. 47 and 48 are purported to have been excluded. Such a process of incorporation is well settled and well recognised process of convenience so that full printed items of list 4 in Appendix 6 need not be verbatim reproducing order, but it is bodily lifted and transposed in the order itself meaning thereby that by such transposition entire list of all items covered under that list becomes an integral part and parcel of the order itself. The inevitable result is that any amendment to the list subsequent to this incorporation would not affect the initial order in which all items in the list have already been incorporated and thus the said order, said list, and the said items, which have been already incorporated, remain unaffected. This proposition is fully covered and very exhasutively enunciated by the Supreme Court in Mahindra and Mahindra Ltd. Vs. Union of India (UOI) and Another, . It is a fact that an appeal was provided under S. 55 of the Monopolies and Restrictive Trade Practices Act against the order of the Commissioner made under S. 13 and the appeal would lie to the Court on any one or more grounds as specified in S. 100 of the Code of Civil Procedure. On the date when S. 55 was enacted three grounds available under S. 100 of the CPC were enumerated, on which second appeals were brought to the High Court and one of them was that the order was contrary to law. However, by a subsequent enactment of S. 35, S. 100 of the CPC was substituted by a new section in the year 1977, under which a second appeal could lie only if the High Court is satisfied that the case involved substantial questions of law and those three grounds under the previous provision were abrogated and were replaced by only one ground which was comparatively stringent, as relating not only to the question of law but involving

substantial questions of law. Consequentially this new provision of the CPC was in force on the date when the appeal was preferred and, therefore, it was argued that the appeal itself was not maintainable. The Supreme Court negated the said contention holding that the grounds specified in the then existing S. 100 of the C.P.C. were incorporated in S. 55 and the substitution of new S. 100 did not affect or restrict the grounds as incorporated. During the course of the discussion and the judgment, upholding the doctrine of Incorporation, the Supreme Court observed as :

".....It ignores the distinction between a mere reference to or citation of one statute in another and an incorporation which in effect means bodily lifting a provision of one enactment and making it a part of another. Where there is mere reference to or citation of one enactment in another without incorporation, S. 8(1) applies and the repeal and reenactment of the provision referred to or cited has the effect set out in that section and the reference to the provision repealed is required to be construed as reference to the provisions as re-enacted..... But where a provision of the statute is incorporated in another, the repeal or amendment of the former does not affect the latter. The effect of incorporation is as if the provision incorporated were written out in the incorporating statute and were a part of it. Legislation by incorporation is a common legislative device employed by the legislature, where the legislature for convenience of drafting incorporates provisions from an existing statute by reference to that statute instead of setting out for itself at length the provisions which it desires to adopt. Once the incorporation is made, the provision incorporated becomes an integral part of the statute in which it is transposed and thereafter there is no need to refer to the statute from which the incorporation is made and any subsequent amendment made in it has no effect on the incorporating statute".

Referring to a passage of Lord Esher M.R. while dealing with legislation by incorporation in *In re. Wood's Estate*. (1886) 31 Ch D 607, it was quoted as :

"If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act just as if they had been actually written in it with the pen, or printed in it, and, the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at all".

A passage of Lord Justice Brett, in *Clarke v. Bradlaugh* (1881) 8 QBD 63, was also quoted as:

"There is a rule of construction that, where a statute is incorporated by reference into a second statute, the repeal of the first statute by a third statute does not affect the second".

19. The Supreme Court therefore held that any such repeal in the subsequent Act would not affect the initial Act only by reason of incorporation of the provisions of the said Act have been included. This decision, therefore, concludes the issue about the doctrine of Incorporation and justifies the contention raised

by Shri Taleyarkhan, the learned Counsel, formulating third point that the list No. 4 containing all items including item Nos. 47 and 48, which are relevant in this case, was bodily lifted and incorporated in the statutory order in question and once that process was complete then the said order remains unaffected by a subsequent amendment only of the said list No. 4, under which these 2 items at Srl. Nos. 47 and 48 are sought to be deleted. In other words deletion of these two items from the list No. 4 does not ipso-facto tantamount to deletion of two items from the original order in which these items have been transposed by the doctrine of Incorporation and thus the said initial statutory order remains unaffected even in respect of these two items. This however would be incidental and even secondary because the main plank of the foundation is that the first order being statutory order, cannot be revised or amended by mere public notice which has no statutory force, and therefore, on that fundamental terms endeavour to delete items 47 and 48 from the field of the statutory order by a mere public notice, under which the policy was sought to be amended, cannot have the force of law at all and thus would be inconsequential because such amendment to the statutory order would necessarily be done by enacting yet another statutory order in that behalf, which admittedly in this case has not been done.

20. The contention of Shri Taleyarkhan, the learned counsel on this third point, therefore, must, be upheld and if that be so then really speaking that covers the fate of the proceedings in favour of the petitioner. All these ratios, which are already discussed expressly answer the counter contentions raised by Shri Shringarpure, the learned counsel appearing for the Respondents that the public notice has been issued by the Chief Controller while the initial order was also issued by the Chief Controller and vesting of authority and flexibility and permissibility of amendment as included in para 2 of the import policy, would make the said amendment by a public notice having a statutory force of law. The said contention in the teeth of these ratios obviously would not stand. It is also manifest that the initial order is passed under S. 3 of the Act and thus have all the instances of the statutory order and in fact it is styled as an order and the public notice issued on 6th October, 1986 can hardly be styled as an order and in any event it cannot have statutory force because it is not issued under the statute or provisions of S. 3 of the Act and merely because the order and the public notice having been issued practically by the same authority, would really be inconsequential and thereby not affecting the very core about the different concepts of these two i.e. one being an order under the statute whilst the other being merely a notice for the public and that too for the crucial change of the policy.

21. Shri Shringarpure, the learned counsel, in support of this contention no doubt sought to place reliance on an unreported decision of the Delhi High Court in one C.M.P. No. 955 of 1987, which according to him tends or purports to support that the statutory order can be amended by a mere public notice. An ordinary copy of the said order is placed for perusal. As regards this order it is

first to be noted that it is not clarified as to whether the copy that is tendered contains the full text of the matter. However, assuming in favour of the department, it becomes clear that this order was passed at the admission stage with reference to the interim relief that was to be granted or refused and that is why it was mentioned as C.M.P. and it was certainly not a final order in the main petition. The learned Judge no doubt took a view that it is possible to argue, as suggested by Shri Shringarpure and, therefore, interim relief was refused. However, it would thus be clear that that is not the final order much less in any final proceedings but only a tentative view and that too at the admission stage with reference to the grant or refusal of interim relief and, therefore, cannot be treated as an authority in that behalf. Further a very curious feature has arisen which clarifies the position in a better manner in the context of ratio in *S.S. International and Another Vs. Union of India and Others*, wherein the facts as indicated in the said unreported decision appear to be identical and essentially regarding dates of the initial order and the subsequent order. The said judgment, however, makes a clear reading that the initial order no doubt was passed under S. 3 but it was sought to be modified or repealed not by merely public notice but by yet another statutory order also issued under S. 3 and it is in this context that it was indicated that such an amendment is permissible because both initial and the amendment order were under the statute under S. 3. This is made clear in para 4 of the order stating that on 26th September, 1986 an order under S. 3 of the Act was made deleting entries relating to cloves and cinnamons from the schedule appended to the O.G.L. and it is only on the 6th October, 1986 another public notice was issued deleting the said items from the list 4. It is further observed as :

"The issuance of the order under S. 3 on 26th September, 1986 was necessitated because the amendment was to be made in the schedule appended to OGL 15/86, which order also was under S. 3 of the Act."

It was a public notice relating to Appendix 5 and 6 regarding the said items. These two ratios read together do not go to the rescue of the department as contended by Shri Shringarpure, the learned counsel that the statutory order can be amended or repealed by a public notice because on the facts and the ratios on which he has placed reliance, that were available before the Delhi High Court, the glaring foundation was, however, confirmed that the initial order issued under S. 3 was sought to be amended not merely by virtue of public notice but by passing yet another equally statutory order under S. 3. This ratio, on the contrary, firmly supports the proposition canvassed by Shri Taleyarkhan and which is already discussed. There is thus no substance in the counter contention raised on behalf of the Respondents.

22. As regards 5th point, Shri Taleyarkhan, the learned counsel submitted that the public notice is purported to have been issued on 6th October, 1986 and this was reflected for the first time in the Trade Notice dated 14th October, 1986 and the same is placed on record. The Trade Notice states that the public notice

dated 6th October, 1986 issued by the Chief Controller is reproduced below for the information and guidance of the trade and below it is reproduced such a public notice dated 6th October, 1986. Para 2 of the said notice suggests amendment in the policy and which gives chart that items Nos. 1 and 2 relating to entries 47 and 48 and commenced amendment that these 2 items shall be deleted. As stated earlier it carves out an exception that the ban would not affect the traders who have opened an irrevocable and transferable letter of credit prior to this date of notice and that the shipment is made within 90 days thereafter. The facts in the instant case are quite interesting. The order under S. 3 was issued on 1st April, 1986 under which OGL was granted and therefore the petitioners were permitted to import these two items under that OGL and that too even for the purpose of stock and sale. The licence permitted the petitioners to make shipment before or up to 31st March, 1986 (sic). It so happened that irrevocable and transferable letter of credit was opened and established through the bankers at Bombay on 6th October, 1986 that is on the same day when the public notice is supposed to have been issued. Shri Shringarpure the learned Counsel doubts the veracity of this question as to how these two dates do synchronise. This has to be read in the context of admitted position that the contract by the petitioners with the Singapore firm was entered on the 4th October, 1986 and it was obviously a concluded contract because there has been a confirmation by the parties of the same date. As a follow up action a letter of credit was also opened and established by the Bombay bankers on the 6th October, 1986 in favour of the Singapore party. Shri Taleyarkhan, the learned counsel, therefore has rightly posed a question that this public notice is supposed to have been issued in Delhi on 6th October, 1986 and if that be so then it is impossible for the public and essentially those in Bombay, to have any knowledge of this notice on the 6th itself. Some reasonable time is bound to intervene before a trader would get knowledge of issuance of such notice. It is also submitted that a letter of credit was opened during banking hours and which was before 1 or 2 p.m. on the 6th October, 1986, and that would further cut short the time marked between the issuance of the notice and the knowledge to be attributed to the petitioners. Consequentially therefore this submission cannot be said to be without any justification. It is obviously reasonable to hold, as a rationale feature, that in spite of the public notice some allowance and discount has got to be made regarding the margin of time in which the traders could be posted with the knowledge of any such notice. It cannot be so rigidly accepted that the knowledge could be imputed at the same moment when the notice was issued. The learned single Judge of this Court in GTC Industries Limited, Bombay and another Vs. Union of India and another, has observed as:

"The publication in the Gazette is a requirement of Rule K and Section 38 of the Excise and the Excise Rules. That publication cannot be equated with the mere printing. It is the availability of the printed material to the general public that constitutes the publication required by the statute and the rules of natural justice".

With respect 1 am in agreement with this observation which is based on sound foundation and a very rationale basis that at least reasonable margin of lime will have to be given for imputing the knowledge of any such publication to the traders. Consequentially therefore the opening of the letter of credit on the fun of October, 1986 will have to be held as being done prior to the issuance of the notice in peculiar facts and circumstances of the case. Consequentially the first condition of the exception as carved out in the amendment has been fulfilled.

23. Shri Taleyarkhan, the learned Counsel. also rightly submitted that if the regular shipment was permissible up to 31st March, 1987, the said period cannot be shortened by including in the except ion that the ban would he lifted if the shipment is done within 90 days from the date of the publication of the public notice. For the same reasons which are. assigned in respect of the earlier main points that if the amendment cannot be so done by a mere public notice and if a right accrues in favour of the petitioners, even to the extenl of time limit for shipment of the consignment up to 31st March, 1987, by a mere public notice that valuable right cannot be short-circuited or atleast shortened by proclaiming that the shipment must be done within 90 days. In the instant case shipment was obviously not done within 90 days from the date of publication of the notice, since the consignment arrived in Bombay on 16th February, 1987. However, if the foundation of arguments canvassed by Shri Taleyarkhan arc being upheld, then the further corollary about the scaling down this time limit would be the factor detriment to the interest and the rights accrued in favour of the petitioner under the statutory order which cannot be taken away. The second condition in the exception therefore deserves, to be examined in this context. Consequentially the contention raised by Shri Shringarpure, the learned counsel that the shipment having not been done within 90 days, forfeits any rights of the petitioner to claim protection under the initial order cannot be upheld. This, however, is incidental because petitioners would succeed on the main points which are already discussed and this aspect is merely a rider on the main points.

24. The last point which was numbered as 4 in the earlier table relates to the question of promissory estoppel. In effect Shri Taleyarkhan, the learned Counsel submits that initially the 1st Respondent issued the order under S. 3 of the Act which was within his full competence. Under it. anyone was allowed to import these two commodities even for the purpose of stock and sale. The shipment was to be made on or before 31st of March, 1987. In pursuance thereof OGL was granted. Therefore the order was issued with full competence and jurisdiction and contained an unqualified licence that was being conveyed to the public that any person can import these two items under the OGL. If the OGL is granted and accepted that the OGL was granted, petitioner did not keep the document just in vaccum but actually acted on that representation and utilised the said licence and thereafter entered into a contract with the said firm at Singapore on 4th October, 1984. The said contract came to be confirmed by both parties as there is a letter of confirmation of 4th October, 1986 signed by both parties with the preamble as "we hereby confirm the following transaction concluded on behalf of

and for account and risk of the undermentioned buyers and sellers as per terms and conditions given under : These two items are the said commodities in question. Price is also mentioned in respect of these two items. Mode of shipment is also mentioned as from any port in origin country or any European port or Singapore or Hongkong as sellers to any Indian port. Mode of payment is by irrevocable and transferable letter of credit at sight in favour of the sellers. Consequentially therefore there is much substance at least in the prima facie view that the contract was concluded and was confirmed by both the sides on the 4th October, 1986. This is further reinforced by the fact that on 6th October, 1986 an irrevocable and transferable letter of credit No. 86/46/Matunga was opened and established with the State Bank of India, Matunga Branch, Bombay for a certain amount. Therein also there is a reference to the purchase of those two very items with the amounts mentioned against these items and the credit was irrevocably valid in Singapore till 30th March, 1987, which fits in the last date of shipment. Opening of such a letter of credit is not seriously controverted on behalf of the Respondents. This would therefore be a pointer in favour of holding that it was a contract concluded between the parties in all respects and a further pointer in favour of an inference that all this was on the petitioners very much acting on the representation made through the said order and OGL. In fact, in pursuance thereof the consignment arrived at Bombay on 16th February, 1987 and under the interim orders of this Court those have been lifted by the petitioners against a requisite bank guarantee. Shri Taleyarkhan, therefore submits with justification that once having made this representation and once the petitioners having acted upon them and once the rights and obligations are created between the parties on account of that action, it may not be open and or permissible for the department to withdraw and go back from that assurance because the representation contains even an assurance that the petitioners can legitimately import these two commodities upto a particular date. It is also submitted by Shri Taleyarkhan with equal justification that for non-operation of this, doctrine of promissory estoppel, the Government have not come forward in any manner whatsoever informing the Court as to what was the reason which ultimately prompted them to back out from the assurance nor any indication made even on this forum as to what necessitated such an action and as to whether it was really in the larger interest of the society and according to him to put forth such material is absolutely necessary and essential, so that the Court can assess the merits of the same and come to its individual conclusion and if satisfied then only make amends in favour of not invoking of this principle. In view of the inaction on the part of the department, the Court is deprived of this valuable right and as such there is no question of not invoking this principle, which otherwise on merits itself is available straightway. This answers the contention raised by Shri Shringarpure, the learned counsel on behalf of the department that this is an equitable relief which should not be invoked and according to him the purported amendment is in the public interest. In the absence of any material worth the name, it is difficult to uphold this contention.

25. This position is well settled by a catena of cases. Thus in *Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others*, , there has been a detailed discussion on the doctrine of promissory estoppel and all the facets are considered in detail. It is thus observed that :--

"It is a principle evolved by equity to avoid injustice and though commonly named "promissory estoppel", it is neither in the realm of contract nor in the realm of estoppel. The true principle of promissory estoppel seems to be that where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or effect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties."

The Supreme Court also further observed that this doctrine need not be inhibited by the same limitation as estoppel in the strict sense of the term and it is an equitable principle evolved by the courts for doing justice and there is no reason why it should be given only a limited application by way of defence, and there is equally no reason in logic as to why it should not be available as a cause of action in order to satisfy itself. It further observed indicating that for application of the principle it is not necessary that the promisee, acting in reliance on the promise, should suffer any detriment though what is necessary is only that the promisee should have altered his position in reliance on the promise, and the detriment suggested is prejudice which would be caused to the promisee if the promisor is allowed to go back from the promise. The Supreme Court has also laid down that this doctrine can equally be applicable against the Government and further clarified that when the Government makes a promise knowing that it shall be acted upon and, in fact acts on it and thus alters its position, the Government is bound by its promise and the promise would be enforceable against the Government at the instance of the promisee, which can be even notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract and as such the Government cannot claim immunity from the applicability of this principle. However, no doubt the Supreme Court has enunciated and clarified in favour of the promisor such as when the Government can establish that having regard to the subsequent events it would be unequitable to bind the Government by the promise, the Court may not raise an equity in favour of the promisee and enforce the promise and such a situation would arise when the Government establishes that the public interest would be prejudiced if the Government is bound by the promise. However, there is a rider that for this purpose Government must place all the relevant materials as the onus is rigorous on the Government and they cannot get away from the liability on some indefinite and undisclosed ground of necessity, nor can the Government decide on its own that such an action is necessary. The

Government, therefore, must disclose to the Court all the necessary material for all these subsequent conduct on account of which this exemption is sought for and mere claim of change of policy would not be sufficient because it is for the Court to decide whether public interest lies and what the equity of the case demands and it is only in such cases where overriding i public interest requires that the Government should not be bound when the Court can decide upon it, though the Court would not act on the mere ipse dixit of the Government, because it is the privilege of the Court to decide whether the Government would get exemption.

26. A Division Bench of this Court in *Bharat Commerce and Industries Ltd. and another Vs. Union of India and others*, , have reenunciated this principle on taking a survey of the ratios available in that field, and also the exception that be granted in favour of the Government exempting from the rigour of this principle has been reiterated and it was once again emphasised that the Government is under no obligation to make a representation, but if it does it is bound by it, and to act contrary to the said representation upon which citizens had based themselves was not permissible even if the Government was acting in pursuance of statute or subordinate legislation. Necessity for the Government to place the entire material before the Court for nonavailability of this principle, has also been emphasised.

27. The principle is thus well settled and requires no further discussion. The application of this principle to the facts and circumstances of the instant case on alternate plank, as agrued by Shri Taleyarkhan, the learned counsel for the petitioners, based on the promissory estoppel, also deserves to be upheld. Since the petitioners would succeed on the main promise, this alternate plank would be only incidental.

28. In view of this discussions on all these facets, a conclusion would become inevitable that the impugned public notice dated 6th October 1986. cannot override the rights that have accrued in favour of the petitioners under the OGL which was grained under the statutory order under S. 3 of the said Act. which was acted upon and the consignment was received in pursuance of the concluded contract and as such the amendment as proposed through the public notice would not cause any dent to the said right of the petitioner, available under that OGL. It would, therefore, follow as a corollary that the petitioners would also be entitled to get reliefs of unconditional clearance from the customs of the said two Crude Drugs imported under the order in question and in pursuance of the contract dated 4th October. 1986 and the letter of credit dated 6th October, 1986. It would consequentially follow that since the commodities have already reached, lifted and released in favour of the petitioners against the bank guarantee of the requisite amount, as per the interim orders, the petitioners would be entitled to a further relief of discharge of the said bank guarantee.

29. The petition, therefore, succeeds.

30. Rule made absolute in terms of prayer (c). With the result and is consequence thereof, that there would be in favour of the petitioners, unconditional clearance from the Customs to the said two Grude Drugs Darchini (bark) and Lavang, Laung (flower bud), which are imported by the petitioners under the said Import Control Order dated 1st April, 1986, pursuant to the contract dated 4th October, 1986, and the letter of credit dated 6th October, 1986, and the bank guarantee furnished by the petitioners against lifting of the consignment in question as per the interim orders of (his court, would obviously stand discharged.

31. There would, however, no order as to costs.

32. On the oral motion made by Shri Shringarpure the learned Counsel appearing for the Respondents, the said bank guarantee shall stand discharged after a period of four weeks.

33. Order accordingly.