

(1989) 04 CAL CK 0076
In the Calcutta High Court
Case No : Writ No. 1838/83

Jain Shudh Vanaspati Ltd.

APPELLANT

Vs

Collector of Customs

RESPONDENT

Date of Decision : 19-04-1989

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 11, 111, 111D, 112, 112
Imports and Exports (Control) Act, 1947 — Section 3(1)

Citation : (1990) 49 ELT 179

Hon'ble Judges : Sachi Kanta Hazari, J

Bench : Single Bench

Judgement

Sachi Kanta Hazari, J.—This is an application under Article 226 of the Constitution of India filed by M/s. Jain Shudh Vanaspati Ltd. and Sri Niranjan Lal Jain against the Collector of Customs and the Union of India, inter alia, praying for an order for the following :

(a) a writ and/or order and/or direction in the nature of Certiorari commanding the respondents to transmit the records relating to the said order dated December 20, 1983 in so far as it imposes the penalty and/or puts conditions on the re-export of the consignment of 10495.408 metric tonnes of beef tallow belonging to the petitioner company and all proceedings relating thereto so that the same may be set aside and/or quashed and conscionable justice might be rendered;

(b) a writ and/or order and/or direction in the nature of Mandamus commanding the respondents to allow the petitioner company:

(i) to re-export 3,000 metric tonnes 1-5% beef tallow per vessel M.T. JULIND in terms of Public Notice dated September 1, 1983 at a price of US \$ 410 F.O.B. Bombay port against Letters of Credit dated 18th November, 1983 and 9th December, 1983 of Belgolaise Brussel to Bank of Baroda for amounts of US \$ 820,000 and US \$ 410,000 respectively and consequently immediately release

revenue deposit in respect thereof.

(ii) to re-export the balance quantity against confirmed Letter of Credit issued in favour of the petitioner company at a price of US \$ 410 F.O.B. Bombay Port and consequently release revenue deposit in respect thereof immediately.

(c) Rule Nisi in terms of prayers (a) and (b) above;

(d) Stay of the operation of the said order dated December 20, 1983 in so far as it imposes penalty and/or puts conditions on the re-export of the consignment of 10945.408 metric tonnes of beef tallow belonging to the petitioner company.

(e) An order be issued and/or direction be made commanding the respondents to forthwith permit the petitioner company;

(i) to re-export 3,000 metric tonnes 1-5% beef tallow per vessel M.T. JULIND or any other vessel in terms of Public Notice dated September 1983 at a price of US \$ 410 F.O.B. Bombay Port against the Letters of Credit dated 18th November 1983 and 9th December 1983 of Belgolaise Brussels to Bank of Baroda for amounts of US \$ 820,000 and US \$ 410,000 respectively and consequently release within 24 hours the revenue deposit in respect thereof;

(ii) to re-export the balance quantity against confirmed Letter of Credit in favour of the petitioner company at the US \$ 410 F.O.B. Bombay Port and consequently release the revenue deposit in respect thereof immediately.

2. The case of the petitioner is that the petitioner entered into a contract on 2nd June, 1981 to import 25 thousand metric tonnes of inedible beef tallow from a Singapore Party. The import of the said inedible beef tallow was governed by open general licence. Inedible beef tallow is a raw material which is used in the manufacture of soap and import of the said inedible beef tallow was governed by the O.G.L. Order by Order No. 1/81 dated 3rd April, 1981. From and after 5th June, 1981 under the import policy for the year 1980-81 inedible beef tallow of animal origin, was covered by appended Item No. 44 Appendix-10 of Import Policy for the year 1980-81 enumerated a list of items the import of which was governed by O.G.L.

3. As per contract dated 2nd June, 1981 the petitioners were required to pay to the foreign supplier for supply of inedible beef tallow @ US \$ 485/- per metric tonne (C.I.F.). Pursuant to the said contract, the petitioner company requested New Bank of India to open a Letter of Credit for US \$ 122,46,250/- for import of 25 thousand metric tonnes inedible beef tallow by letter dated 3rd June, 1981. New Bank of India on the said date, i.e., 3rd June, 1981 wrote back to the petitioner company that the Letter of Credit cannot be opened until a copy of the contract is submitted to them. On 6th June, 1983 the petitioner company received the contract in writing from the foreign supplier and got the same duly notarised from a Notary Public, Delhi and forwarded a copy of the same to the bank on 8th June, 1981. The said bank wrote back to the petitioner company on 11th June, 1981 stating that since the item has been canalized, Letter of Credit

could not be opened. On 5th August, 1981 the petitioner company received a letter dated 28th July, 1981 reminding the petitioner company of the said contract and asking the petitioner company to open the Letter of Credit. Thereafter, the foreign supplier sent a letter dated 10th February, 1982 informing that the foreign buyer is liable to pay damages to his supplier, the same would be the responsibility of the petitioner company. Ultimately, the foreign supplier wrote a letter dated 2nd July, 1982 to the petitioner company mentioning therein that as a special case he was giving time upto 31st October, 1982 to the petitioner company to open the Letter of Credit failing which the foreign supplier would refer the matter to the Federation of Oilseeds and Fats Association, London as Arbitrator. By letter dated 6th January, 1982 the petitioner company tried to persuade the foreign supplier to drop the matter to Federation of Oilseeds and Fats Association and treat the contract as cancelled due to the Government restrictions. The petitioner company received a notice dated 3rd February, 1983 from the Advocates and Solicitors of the foreign supplier.

4. The petitioner company along with the Managing Director filed a Writ petition being Civil Writ Petition No. 313 of 1983 in the High Court of Delhi for appropriate Writs, Direction and Order including the writ against the said bank to open the Letter of Credit and for other reliefs. In the said writ petition the Union of India, the Chief Controller of Imports and Exports, the Collector of Customs, Bombay, the State Trading Corporation of India and the said Bank and the Punjab National Bank were made respondents. On 25th February, 1983 the Delhi High Court passed the following order :-

"Liberty to the petitioners to move an application to a Banker for issue of a L/C which may be processed but no final order on that application may be passed till the next date of hearing."

5. On 16th March, 1983 the Division Bench of the Delhi High Court passed an order permitting the petitioner to place their application dated 3rd June, 1983 to move the bank which may open the L/C asked for on the basis of that application and liberty was given to the petitioners to move the High Court for direction as to the clearance as and when the goods either reach a port in India or were about to reach in India. Thereafter, the goods arrived in India at the Port of Bombay. On arrival of the goods, the Customs at Bombay did not permit the clearance of the goods. The Delhi High Court on 22nd April, 1985 clarified that the pendency of the writ petition will not come in the way of the Customs Authorities to deal with the applications that may be moved by the petitioners in accordance with law. On 3rd May, 1983 a show-cause notice u/s 124 of the Customs Act of 1982 was issued to the petitioner bank calling upon the petitioner company to show-cause as to why the goods should not be confiscated u/s 111(d) of the Customs Act and why a personal penalty u/s 112 of the said Act should not be imposed on the petitioner company on the ground that the import of the said goods were canalised through the State Trading Corporation and as such the import of the goods by the petitioner company was unauthorised and consequently the goods

were not covered by the licence in question. The petitioner company appeared before the Collector of Customs at Bombay for personal hearing on 18th May 1983. By " Order dated 24th May 1983 the Collector of Customs, the respondent No. 1 of this writ petition, confiscated the goods as the goods have been imported in contravention of Clause (3) of Import Control Order read with Section 3(1) of the Imports and Exports Control Act. However, u/s 125 of the Customs Act of 1962 the petitioner was given an option to pay a fine of aggregate amount of Rs. 109.6 lacs in lieu of confiscation. The petitioner company paid the said amount of redemption fine and cleared the goods. Thereafter the petitioner preferred an appeal to the Tribunal against the Collector of Customs dated 24th May, 1983 by the Memorandum of Appeal dated 30th August, 1983 which is pending. Thereafter, other two consignments of 10373 metric tonnes covered by the said contract into the Port of Bombay by vessels. The Customs of Bombay did not permit the clearance of the goods and once again issued a show cause notice dated 15th July, 1983 u/s 124 of the Customs Act. The Collector of Customs given a personal hearing on 3rd August, 1983. The Collector of Customs intimated the petitioner company on 23rd August, 1983 about the amount of redemption fine against which the petitioner company and cleared the goods.

6. Ultimately the permission was granted to the petitioner for export of the said goods by 17th November, 1983. The first respondent imposed a personal penalty of Rs. 5 crores u/s 112 of the Customs Act while allowing the petitioner to re-export the goods. The petitioner's further case is that the Collector of Customs has exercised his jurisdiction with patent illegality in imposing a penalty of Rs. 5 crores u/s 11(d) of the Customs Act of 1962. It is further stated that the petitioner company has a branch office at Calcutta and the petitioner no. 2 is in Calcutta and the effect of the impugned order of the first respondent was felt at Calcutta and as such this Court has jurisdiction to entertain, try and dispose of the present writ application.

7. The respondent filed their affidavit-in-opposition stating that no part of the cause of action arose within the jurisdiction of this Court. The goods were imported at Bombay. All the adjudication orders including the impugned order dated 20th December, 1983 has been passed by the Collector of Customs, Bombay and the appeal from the said order is pending before the Tribunal at New Delhi. The writ petitioners have preferred an appeal against the order dated 20th December, 1983 before the Customs, Excise and Gold (Control) Appellate Tribunal at New Delhi and the said proceeding is pending and as such the present writ application is wholly misconceived and not maintainable.

8. The petitioners have challenged the legality of the Order No. S/10 175/83-A dated 20th December, 1983 passed by the respondent No. 1 by virtue of which the respondent No. 1 ordered for confiscation of 10495.468 metric tonnes of inedible beef tallow and also imposed a personal penalty of Rs. 5 crores and so permitted to re-export the goods. It is submitted by the learned Advocate

appearing on behalf of the petitioners that the petitioner entered into the said contract on 2nd June, 1981. Under the item in question was placed under O.G.L. and the contract of the petitioner is to be governed by the policy as was in force on 2nd June, 1981.

9. The present writ application was filed and/or placed before this Court on 30th December, 1983. Rule was issued in terms of prayer (a) and (b) and interim relief was granted in terms of prayer (d) and (e). The respondent did not file Affidavit-in-opposition. On 1st March, 1984 the respondent prayed for time to file Affidavit-in-opposition, but did not file Affidavit-in-Opposition. Ultimately, the matter appeared before this Court on 22nd December, 1988.

10. The argument of the Ld. Advocate appearing for the petitioner was completed. The respondent prayed for time to file Affidavit-in-opposition. To meet the interest of Justice, time was granted to the respondent to file Affidavit-in-opposition on or before 21st January, 1989 and the matter was placed for further hearing on 30th January, 1989.

11. The respondent did not file Affidavit-in-opposition. However, by order dated 31st January, 1989 time was granted to the respondent to file Affidavit-in-opposition. Thereafter, the Affidavit-in-opposition was filed.

12. It is submitted by the Ld. Advocate appearing for the petitioners that the petitioners have challenged the legality of the Order No. S/10/175/83-A dated 20th December, 1983 passed by the respondent No. 1 by virtue of which the respondent No. 1 ordered for confiscation of 10495.468 metric tonnes of inedible beef tallow and also imposed a personal penalty of Rs. 5 crores and permitted to re-export the goods. It is submitted by the learned Advocate appearing on behalf of the petitioners that the petitioner entered into the said contract on 2nd June, 1981. The Item in question was placed under O.G.L. and the contract of the petitioner is to be governed by the policy as was in force on 2nd June, 1981. Public Notice dated 5th June, 1981 being administrative in nature cannot in any manner delete any item from O.G.L. or which is statutory in character. It is submitted by the Advocate appearing for the petitioner that no administrative order can affect or change or amend an O.G.L. Order. It is further submitted that the petitioner is an actual user and could have imported the goods without any licence. The item in question was placed under O.G.L. and any Actual User could have imported the same. The petitioner was holding licence dated 29th June, 1981 valid for import of such item. One of the importers, namely M/s. Oswal Woollen Mills Limited imported the same item and was discharged at Bombay Port. On account of the order made by the Central Government dated 24th August, 1983; and because of the subsequent Public Notice dated 1st September 1983, the said importer filed a writ petition in the Hon"ble High Court at Bombay seeking the direction that the item be permitted to be re-exported without any adverse order against the importer. The matter was heard by His Lordship Mr. Justice Pendse of the High Court of Bombay. The respondent No. 1 through its counsel conceded before the Hon"ble Bombay High Court that the goods in

question be permitted to be re-exported without any condition. It is submitted by the Ld. Advocate appearing for the petitioner that the respondent No. 1 held that the import of the item in question is in violation of the Policy and directed for confiscation of the goods, but granted permission to re-export the same within 15 days from the date of the order. A personal penalty of Rs. 5 crores u/s 112 of the Act was imposed and further directed the petitioner to re-export the goods without payment of personal penalty subject to the condition that the Letter of Credit would be opened by the foreign buyer showing the beneficiary as Collector of Customs, Bombay a/c. Jain Shudh Vanaspati Limited.

13. The Ld. Advocate for the petitioner submitted that it is too late for the respondent to agitate that this Court has no jurisdiction to try this matter. The Ld. Advocate for the petitioner contended that if the respondent was aggrieved by the fact that this Court has no jurisdiction to entertain this petition, the respondent should have applied for discharge of the Rule immediately by filing Affidavit-in-opposition. After a lapse of 5 years Affidavit-in-opposition has been filed. Now it is not open for the respondents to submit to this Court to throw the petition. The other contention which is raised by the learned Advocate for the respondent is that because of the filing of the appeal u/s 129A of Customs Act, the writ petition should be dismissed. It is submitted by the Ld. Advocate for the respondent that as alternate remedy is available, the petition under Article 226 of the Constitution of India is not maintainable.

14. It is submitted by the Counsel for the petitioner that prior to 15th Amendment of 1963 under Article 226 of the Constitution of India, the relief in respect of writ jurisdiction could have been granted by High Court against governmental authority or a person who is available and otherwise functioning within the territorial jurisdiction of the High Court. By 15th Amendment of 1963 Clause 1(a) was added to Article 226 of the Constitution of India, now it is Clause (2) of Article 226. After the amendment of the Constitution of India, every High Court can exercise power under Article 226 of the Constitution of India if, in addition to the availability of the respondents within its territorial jurisdiction, if cause of action wholly or part of cause of action have arisen within its territorial jurisdiction. Cause of action means every fact or bundle of facts which otherwise lead to causing injury to the right of a citizen would constitute cause of action. It is submitted by the learned advocate for the petitioner that the cause of action has arisen within the territorial jurisdiction of this Court as the business activity of petitioner is situated within the jurisdiction of this Court and its office is also situated at 29, Strand Road, Calcutta. The impact of the impugned order is "felt" at Calcutta, and the injury and loss of its business activities would fall on the petitioner No. 1 at its office at 29 Strand Road, Calcutta. The impugned order has affected the right to trade of the petitioner No. 1 at Calcutta. The "pinch" of the impugned order is also felt by the petitioner No. 1 at Calcutta. So, a part of the cause of action is within the jurisdiction of this Court. The learned advocate for the petitioner seeks such relief on a decision reported in *Damomal Kausomal Raisinghani Vs. Union of India and Others*, and submitted that wherever the

effect of the impugned order falls, part of cause of action arises within the territorial jurisdiction of that Court. It is further submitted by the Ld. Advocate for the petitioner that the said proposition is followed by this Court which is reported in *Serajuddin and Co. Vs. The State of Orissa and Others*, . So part of action in this case has definitely accrued within the territorial jurisdiction of this Court. Further reliance was placed upon AIR 1971 Mad 155 and 1981 E.L.T. 440. The Ld. Advocate for the petitioner further submitted that the plea of jurisdiction cannot be raised at so belated stage, and this plea has been raised for the first time after a lapse of 5 years.

15. So far as the point for alternate remedy is concerned it is submitted by the learned Advocate for the petitioner that merely availability of alternate remedy is no bar in entertaining the petition, and after all these 5 years the respondents have raised this plea. The Ld. Advocate referred to a decision reported in *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, . The Ld. Advocate submitted that alternate remedy is not a bar to exercise jurisdiction to meet the interest of justice. The Ld. Advocate relied on *Ram and Shyam Company Vs. State of Haryana and Others*, .

16. I have considered the submissions of both the parties and I have also gone through the decisions referred to by the Ld. Counsels and I find that there is force in the argument of the Ld. Advocate for the petitioner. In this connection, reference may be made to the Division Bench decision of this Court in the case of *Union of India v. Hindustan Aluminium Corporation* wherein the Division Bench of this Court had the occasion to consider the validity of the Aluminium Control Order, 1970 which was passed for availability of aluminium and its products at a fair price and for regulating production, supply and distribution thereof and in the context of that control order which has resulted loss to the Hindustan Aluminium Corporation Ltd. and such loss was suffered by the said Corporation at Calcutta. The writ petition was entertained by this Court on the ground that the effect of that Central Order was felt within the jurisdiction of this Court. It is too late for the respondents to raise such technical plea. It is quite clear that where the effect of an order is felt, part of cause of action arises within the jurisdiction of that Court. Since the petitioner functions at Calcutta and the consequence of the impugned order will effect the petitioner's business at Calcutta also, a part of the cause of action has accrued within the territorial jurisdiction of this Court. Accordingly, relying upon the Division Bench judgment of this Court in the case of *Hindustan Aluminium Corporation (supra)*, which is binding on this Court, I hold that this Court has jurisdiction to try this writ petition. I further hold that since an appeal has been filed the right of the petitioner to proceed with this matter has not been taken away. I further hold that the said plea cannot be taken at this stage. Reliance may be had from the observations by the Hon'ble Supreme Court of India in *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, . Furthermore, the alternate remedy itself is no bar to entertain a petition. It is self-imposed restriction and there is no absolute bar to exercise jurisdiction under Article 226 of the Constitution of India. Accordingly, I hold that the petition

cannot be thrown out on the plea of alternate remedy.

17. So far as the import of the goods is concerned, the petitioner contended that irrespective of the fact that a Public Notice dated 5th June 1981 was issued from the office of the Chief Controller of Imports & Exports, the said Notice cannot affect either on OGL order or the right of the petitioner which have already accrued on account of having entered into a contract on 2nd June 1981. The item for import is raw material and is used in industrial activity, engaged in manufacturing soap, shampoo etc. and the same appear in serial No. 1 of Appendix 10 of the Policy of 1981-82. The said item was placed under OGL on account of having issued OGL Order No. 1 of 1981 on 15th April, 1981 by the Central Government in exercise of powers u/s 3 of the said Act of 1947. Therefore, the OGL order by virtue of which the item in question have been placed under OGL is statutory in character. The Public Notice dated 5th June 1981 is issued by the authorities under its executive powers and as such the same is administrative in character. It is submitted by the Ld. Advocate for the petitioner that statutory order can only be changed amended or anything deleted therefrom by means of another statutory order and not by administrative or executive order. The item in question continues to be under OGL during the tenure of OGL Order No. 1/81 i.e. during the entire policy period of 1981-82. The petitioner No. 1 is an Actual User and is entitled to clearance of the goods without any licence as Actual User. Actual User is entitled for the import of the said item placed at Serial 1 No. 1 of Appendix 10. It is further submitted by the Ld. Advocate for the petitioner that the petitioner is the holder of an Import licence which covers the goods in question and is dated 29th June 1981 as the Letter of Authority issued in the name of M/s. B. Arun Kumar & Company. The Ld. Advocate for the petitioner relied on a decision reported in East India Commercial Co. Ltd., Calcutta and Another Vs. The Collector of Customs, Calcutta, ; and he also relied upon a decision reported in Kaptan's Enterprises and Another Vs. Union of India, , where it has been held that OGL order cannot be varied, changed or anything deleted therefrom by means of Public Notice.

18. The Ld. Advocate for the respondents submitted that on account of the Public Notice date 5th June 1981 the item in question stands deleted from the list of OGL items, and immediately on issuance of Public Notice, it became canalised item. I have given my anxious consideration on the submissions of the Ld. Counsels of the parties and I find that there is force on the contention of the Ld. Counsel for the petitioner, and I accordingly hold that the Public Notice dated 5th June, 1981 being administrative in character, cannot affect the OGL Order, and as such no item as was placed under OGL because of the issuance of OGL Order No. 1 of 1981 can be deleted therefrom. I hold that the item in question continued to be under OGL and finds its place at Serial No. 1 of Appendix 10, during the entire policy period of AM-81-82. I further hold that the Public Notice dated 5th June 1981 cannot effect or take away the right of the petitioner which have accrued to it on account of the contract having been entered into by the petitioner with the foreign seller.

19. The learned Advocate for the petitioner submitted that the licence was issued on 29th June 1981 and the item in question was placed under OGL on 29th June, 1981. So the licence was valid for the import of the item in question. It is submitted that a combined reading of Para 183(v) and (vii) of the Import Policy 1981 will clearly show that the licence is valid for the import of the raw material as were placed under OGL during the said policy period.

20. The Ld. Advocate for the respondent No. 1 submitted that since revalidation was granted for a period of 6 months on 10th September, 1982 i.e. during the policy period of 1982-83, subject to the conditions attached therewith, the licence was to be governed by the Policy of 1982-83. He further submitted that there it is stated that in case validity of the licence has expired, the licensing authority will revalidate the licence immediately so as to give the licence holder of six months for the purpose of importing OGL items.

21. It is submitted by the Advocate for the petitioner that import licences are issued by the authorities concerned for the purpose of earning foreign exchange and given incentive to importer/exporter of this country to act upon the licence and to earn more foreign exchange. A prudent businessman must clearly know what are his entitlements and on this very concept provisions were made under para 185(4) wherein a mandate has been issued to the licensing authorities that by the time connected export obligations have been discharged, if the validity period of the licence has expired, it will give revalidation for a period of six months. It is not provided under the sub-para that the revalidation can be made on such condition as the licensing authorities may deem fit and proper. It is submitted by the learned Advocate for the petitioner that it was not within the jurisdiction of the licensing authorities to lay any condition except to grant revalidation for a period of six months. The Ld. Advocate appearing for the petitioner referred to the endorsement made on the licence at the time of granting revalidation wherein it is stated that the licence will also be valid for the import of OGL item under para 185 of the Import Policy 1982-83, subject to the condition laid down and shall be non-transferable.

22. It is submitted by the Ld. Advocate appearing for the petitioner that it was not within the jurisdiction of the respondent No. 1 to lay any condition except to grant revalidation.

23. It is submitted by the Ld. Advocate appearing for the petitioner that even the revalidation condition have conferred extra right on the petitioner. The word "also" has its own significance. It confers additional right on the petitioner and if the petitioner intended, he could have imported OGL item as placed during the policy period of 1982-83. The right of licence will be governed by the Policy during which it was issued. The Ld. Advocate relied upon a decision reported in *Bharat Barrel and Drum Mfg. Co. (P) Ltd. Vs. The Collector of Customs, Bombay and Another*, .

24. The Ld. Counsel for the respondents contended that the submissions of the

Ld. Advocate for the petitioner are not correct. The word "also" does not in any manner confer any additional right, but it suggests that the petitioner can also import item of OGL of Policy period 1982-83, along with those items which were otherwise permissible to be imported during the policy period 1982-83.

25. It is further submitted by the Ld. Advocate for the respondents that unless connected export obligations are not discharged, the licence cannot be acted upon.

26. I have given anxious consideration to the submissions of the Ld. Counsels of the parties.

27. Following the decisions referred to hereinabove I hold that the licence will be governed by the policy during which the same has been issued. I further hold that the restrictions which has been held in terms of para 183(VII) of the Import Policy, 1981-82 that it only postpone the utilisation of entitlement till the time connected export obligations have been discharged. But such entitlement does not stand vanished on account of lapse of time. The business of import and export cannot be treated like a man walks into a shop and purchases a particular item. It is submitted by the petitioner that there are series of acts which constitute, while conducting the import and export. The transactions consist of series of acts spread over a period of years commencing from the contract of purchase/sale with a foreign buyer/foreign seller and ending with the movement of goods into the country or to the exporting country. The learned advocate appearing on behalf of the petitioner relied upon the decision reported in Universal Imports Agency and Another Vs. The Chief Controller of Imports and Exports and Others, , and submitted that the export activity commenced during the policy period 1981-1982, though the entire connected export obligations were discharged in the policy period 1982-83. In the present case, the licence in question was issued on 29th June 1981 is subject to the policy of 1981-82. The postponement of utilisation of the licence is a procedural matter and under the administrative directions as contained in para 183(vii) will not take away the right conferred on the petitioner being the holder of the import licence. I further hold that by merely laying conditions at the time of re-validation will not take away the right of the petitioner. The word "Also" has its own importance and gives additional right to the petitioner to make import of the items against the said licence as were placed under OGL during the policy period 1982-83. I hold that the petitioner's contract dated 2nd June 1981 is subject to the policy as were prevalent on the date of the contract and the petitioners are entitled to import the item in question against the said import licence dated 29th June 1981. Para 185(4) issues the mandate to the licencing authorities that in case at the time of connected export obligations are discharged and if the validity of the licence has expired, the authority will give re-validation. Extending the validity period of the import licence cannot take away the rights which otherwise stood fastened on the date of issuance of licence.

28. One cannot give two colours to the same licence and cannot hold that the

licence in one situation is valid for the import of OGL items of the policy period 1981-82 and ceases to be valid for the subsequent policy period. Once a right as accrued to the citizen under the licence, the same cannot be taken away simply by making certain endorsements in the licence. The learned advocate appearing on behalf of the petitioners challenged the legality of the order being violative of Article 14 of the Constitution of India. The learned advocate submitted that the addenda show-cause notice and the finding given thereupon is not only illegal but is without jurisdiction. It is submitted by the learned advocate for the petitioner that the order was communicated on 23rd August 1983 and the order of adjudication u/s 47 of the Act of 1962 and the said order can only be amended or changed in appeal and not otherwise. After passing of the order the respondent No. 1 became functus officio. His duty was only to consider the request of the petitioner for grant of permission to re-export. The learned advocate for the petitioner further submitted that the earlier show cause notice dated 15th July 1983 was also to show cause as to why personal penalty be not levied. In the adjudication order, operative part of which was communicated to the petitioner on 23rd August 1983, no personal penalty was levied and the respondent No. 1 cannot re-open his own order and sit on his own judgment. The learned advocate for the petitioner relied on decision reported in 1987 E.L.T. 63, (Union of India and Anr. v. Popular Dyechem), Industrial Cables (India) Ltd. and Another Vs. Union of India (UOI) and Others, , 1987 (13) ECC 218 and 1986 (9) ECR 623 . Learned Advocate for the petitioner submitted that the addenda show cause notice is without jurisdiction as the order of adjudication was already made and it is not open for the respondent to enter into further controversy relating to the initial import or issue additional show cause notice for imposing personal penalty. The learned advocate for the petitioner has submitted that the addenda show cause notice and the order passed thereon levying personal penalty of Rs. 8 crores is without jurisdiction. I find substance in the argument of the learned advocate for the petitioner and I hold that on account of the adjudication order, the operative part of which was communicated to the petitioner No. 1 on 23rd August 1983, it is not open to the respondent No. 1 to go ahead again for another adjudication order and re-open the earlier order. I further hold that the additional show cause notice and imposing of personal penalty in consequence thereof are illegal and the same has been passed without jurisdiction.

29. The learned advocate for the petitioner submitted that the order of laying conditions for re-export and imposing personal penalty as a result of granting permission is violative of Article 14 of the Constitution of India and the said order is illegal. The learned advocate also submitted that the order made by the Collectorate Authorities are binding upon them and the Customs Authorities cannot be permitted to vary the order against different parties though they are placed in the same situation. The learned advocate for the petitioner referred to the proceeding as was held on 14th September 1983 in the Hon'ble High Court at Bombay wherein the respondent No. 1 considered himself for grant of permission to M/s. Oswal Woollen Mills Ltd. for re-export of the goods which

were confiscated and cannot be cleared for home consumption on account of notification dated 24th August 1983 issued by the Central Government without laying any condition for personal penalty. The learned advocate for the petitioner also submitted that the goods were not permitted to be cleared by the petitioner in similar circumstances on account of the notification dated 24th August 1983 and as such the respondent No. 1 cannot adopt different yard-stick for granting permission for re-export of the goods of different importers who are similarly placed. The learned advocate for the petitioner relied upon a decision reported in *Mercantile Express Co. Ltd. Vs. Assistant Collector of Customs and Others*, wherein this Hon'ble Court had held that the decision made by the Collectorate Authorities are binding upon them. Otherwise, if the Collectorate Authorities are permitted to pass order at their whims and fancy and in disregard to the stand taken by them, it will create chaos and will lead to arbitrariness. The learned Advocate for the petitioner relied upon a decision reported in *Tapti Oil Industries and Another etc. Vs. State of Maharashtra and Others*, , wherein it has been held that the act of discrimination cannot only be used as shields but can also be used as sword. The learned advocate for the petitioner submitted that the protection which has been conferred by the Constitution against the State to deal with citizens equally, cannot be violative and if such protection is defeated by Act of State, the same can be challenged under Article 226 of the Constitution of India.

30. On careful consideration of this case, I hold that the personal penalty is an independent ground to the ground of permission for re-export. In the instant case, the situation for re-export arose on account of the issuance of notification dated 24th August 1983 by the Chief Collector of Imports and Exports, which has nothing to do with Section 112 of the Act of 1962. The respondent No. 1 permitted re-export of similar item in similar circumstances in respect of the goods which stood confiscated without any condition before the Hon'ble Bombay High Court. It is strange as to why such permission was not given to the petitioner. Both the petitioners and M/s. Oswal Woollen Mills Ltd. were on the same footing and laying conditions by means of the impugned order for grant of permission to re-export is not only illegal but arc violative to Article 14 of the Constitution of India and misuse of powers.

31. I hold that the petitioner's import was valid and lawful and I further hold that the contract was legally entered into on 3rd June 1981 and the petitioner was entitled to import the said item against the said contract. The licence which was issued to the petitioner is also valid. The goods have been also lawfully imported against a valid licence. The Rule is made absolute. Let a writ of certiorari be issued quashing the order of the Collector of Customs communicated to the petitioner on 23rd August 1983 by virtue of which the beef tallow weighing 10485.400 M.T. was directed to be confiscated u/s 111(D) of the Customs Act of 1962 with option to redeem the goods on payment of redemption fine of Rs. 1.72 crores u/s 125 of the Act of 1962 since the goods have been lawfully imported.

32. Hence it is ordered that a writ of Certiorari be issued quashing the order of the Collector of Customs dated 20th December 1983 imposing personal penalty of Rs. 5 crores u/s 112 of the Customs Act of 1962. Let a consequential writ of Mandamus be issued commanding the respondent not to give effect to the same or to act upon the same. In view of the facts and circumstances of the case, the parties will bear their respective costs.

33. At this stage Mr. Roy Chowdhury, Advocate on behalf of the respondent submits that he only argued on the point of jurisdiction and maintainability of the application and he was under the impression that the matter was heard only on preliminary point and not on merit. Mr. Roy Chowdhury prays for recalling of the order as he submits that there is substantial point of law and he wants to argue. At no stage there was any prayer for hearing the matter on preliminary point nor any order was passed.

34. Mr. Roy Chowdhury may file an application if so advised. Mr. Roy Chowdhury prays for stay of operation of the order.

35. There will be a stay of operation of the order for a period of four weeks from date in respect of the interim orders passed in this proceedings.

36. All parties are to act on a signed copy of the minutes of this operative portion of the judgment on usual undertaking.