

(2003) 04 DEL CK 0042

In the Delhi High Court

Case No : Civil Writ Petition No"s. 4938 and 4945 of 2001

J.K. Impex and Another and Mangali Impex Ltd. and Another	APPELLANT
Vs	
Union of India (UOI) and Others	RESPONDENT

Date of Decision : 10-04-2003

Acts Referred:

Citation : (2003) 105 DLT 605 : (2003) 71 DRJ 709 : (2003) 89 ECC 412 :
(2004) 167 ELT 270 : (2003) 1 ILR Delhi 523

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : G.L. Rawal and Kuljeet Rawal, for the Appellant; Maninder Singh and N.K. Pandey, for the Respondent

Judgement

A.K. Sikri, J.—The petitioners in both the writ petitions are engaged in the activities of import and export. For the purpose of carrying out the activities of import and export, it is required to have IE Code No.(Import and Export Code No.). The petitioner in CWP No.4938/2001 applied for and was granted IE Code No.0598054685. The petitioner in CWP No.4945/2001 was, likewise, given IE Code No.0593065336.

2. In these writ petitions, the petitioners are challenging Advice memo dated 23rd March, 2001 issued by the office of the Joint Director General of Foreign Trade. This Advice memo is issued in respect of four firms including both the petitioners as well and reads as under:

"Subsequent to investigations of fraudulent exports of goods and misdeclaration of the description as well as value of the goods it has been decided to place the following firm/persons on advice memo.

All licensing branches are hereby advised not to all the following firms and persons to avail of CCS/licenses of any category or any other benefit under the EXIM Policy. The IEC section shall also not issue any IEC to the Directors/partners mentioned herein:

----- Name of Firm
Address of the Firm IEC No. Mangli Impex 4-Safeway House 0592005372 & Ltd.
D-Block, Central 059306533 Market, Prashant Vihar Delhi-110085
J.K.Impex 187, Singhal Pur Market, 0598054685 Shalimar Bagh, N.Delhi
Vikas 26 Shivaji Market, Narela 0598052721 Trading Corpn. Delhi-110040
Dadri 4/624, Ashram Road, 3398001491 Inorganics Charkhi Dadri, Distt. (P) Ltd.
Bhiwani, Haryana

The details of CCS/licenses/any other benefits thus not allowed and hence pending disposal on account of this advice memo may be intimated to this branch as expeditiously as possible.

This issues with the approval of the AEC on File."

3. Reading of this Advice Memo would show that there was some investigation regarding alleged fraudulent export of goods and misdeclaration of the description as well as value of goods in respect of the petitioners and others and as a result of this investigation, office of the Joint DGFT had decided to place the petitioners on Advice Memo. The consequences of such Advice memo as stipulated therein are that all the licensing branches are advised not to allow the petitioners or their directors/partners to avail of CCS/licenses of any category or any other benefits under the EXIM Policy. The petitioners made representation against this order vide legal notice dated 30th July, 2001. However, as it did not elicit any favorable response, present writ petitions have been filed challenging the same.

4. The petitioners label this Advice Memo as debarring/blacklisting order and submit that same is in violation of Article 19(1)(g) of the Constitution of India and further that passing such a drastic order, depriving the petitioners to have their earning and trading activities, is vocative of law as it has been done without any cause or reason and without any show cause notice or hearing. It is contended by the petitioners that such action cannot be taken without granting opportunity of being heard as envisaged not only under the Foreign Trade (Development & Regulations) Act, 1992 and the rules framed there under but this is the minimum requirement of the principles of natural justice.

5. In the counter affidavit filed on behalf of the respondents, the respondents have stated in detail the circumstances which led to issuance of such Advice Memo. It is pointed out that a communication was received from the Commissioner Customs (General) that SIIB branch is investigating the case of fraudulent export of goods by some of the exporters including the petitioners who have misdeclared description as well as value of the goods to claim the undue benefits under the DEPB scheme. It is also alleged that the petitioners were exporting 14 consignment from IC/TKD declaring the goods as Calcium Stearate claiming the benefit under Sl.No.362 of the Product Group Chemicals of

the DEPB rate list. However, on investigations, it was revealed that the petitioners had exported Calcium Carbonate instead of Calcium Stearate. On the basis of this investigation Advice Memo dated 23rd March, 2001 was issued to the petitioners placing them on the Denied Entity List with the objective to check any damage to the interest of Government of India and the practice is not only to place a particular firm/company on Denied Entity List but also its partners/Directors so that they cannot get further licenses/CCS/any other benefits under the policy by floating a number of other firms/companies to defraud the Government. The respondents have further stated that keeping in view urgency of the matter the petitioners and their directors were placed under Denied Entity List without granting them opportunity of personal hearing but subsequently vide letter dated 11th September, 2001 respondent No.3 has already replied to the advocates of petitioners about circumstances leading to placing it on Denied Entity List. In this letter dated 11th September, the respondents, inter alia, disclosed as under:

"In this regard, we have received a report that matter is under investigation with DRI and CBI. As the firm has misdeclared the description of goods of exports. The firms have been kept on Advice Memo, keeping in view the provisions of Foreign Trade (Regulation rules, 1993 7(I) i)."

6. The respondents have also stated that the matter is entrusted to the CBI and the investigation is under way after registration of the case by the CBI against the petitioners u/s 120-B IPC read with Section 420 IPC and Section 13(2) read with 13(1)(d) of Prevention of Corruption Act, 1988.

7. The aforesaid facts as culled out from the petitions and counter affidavit would reveal that allegations against the petitioners are that although the petitioners exported Calcium Carbonate instead of Calcium Stearate, they declared the consignment as Calcium Stearate and claimed benefit of DEBP rate list which led to issue of Advice Memo. The CBI has registered a case and the matter is under investigation by CBI and it has led to issuance of Advice Memo of the nature stated above. The petitioners are denying these allegations and in fact according to them, some of the officials of the respondents are causing harassment to the petitioners. The petitioners have even named one Sh.Sanjeev Gautam, Deputy Commissioner of Customs who in collusion with S/Sh. S.S.Ahuja, Appraiser and Sh.B.K.Bhot, Inspector are trying to damage the interest of the petitioners who had misled the department in getting the Advice Memo issued.

8. The short question, in these circumstances, which arises for consideration is as to whether it was incumbent upon the respondents to issue show cause notice and give opportunity of being heard before issuing such Advice Memo.

9. Before answering this question, it would be necessary to notice the nature and effect of this Advice Memo. For this purpose, one may have to look into relevant provisions of Export and Import Policy as well as Foreign Trade (Development & Regulation) Act, 1992 and Imports and Exports (Control) Act, 1947. The

Parliament has enacted a Foreign Trade (Development & Regulation) Act, 1992 (for short" the Act") for the development and regulation of foreign trade by facilitating imports into, and augmenting exports from, India and for matters connected therewith or incidental thereto. Section 3 of the Act empowers the Central Government to make provisions relating to imports, exports and for this purpose it may make orders and announce export and import policy. EXIM Policy 1997-2002 has been announced by the Central Government in exercise of powers contained in Section 3 of the Act. Section 7 of the Act stipulates that no person shall make any import or export under IE Code No. granted by the DGFT or the officer authorised by the DGFT in this behalf. Section 8 deals with suspension and cancellation of IE Code No. and Section 9 lays down the provision for issuing, suspension and cancellation of licenses. Relevant for our purpose, is Section 9 which is in the following terms:

"Section 9 : Issue, suspension and cancellation of license: (1) The Central Government may levy fees, subject to such exceptions, in respect of such person or class of persons making an application for a license or in respect of any license granted or renewed in such manner as may be prescribed.

(2) The Director General or an officer authorised by him may, on an application and after making such inquiry as he may think fit grant or renew or refuse to grant or renew a license to import or export such class or classes of goods as may be prescribed, after recording in writing his reasons for such refusal.

(3) A license granted or renewed under this section shall-

(a) be in such a form as may be prescribed;

(b) be valid for such period as may be specified therein; and

(c) be subject to such terms, conditions and restrictions as may be prescribed or as specified in the license with reference to the terms, conditions and restrictions so prescribed.

(4) The Director General or the officer authorised under sub-section (2), may, subject to such conditions as may be prescribed, for good and sufficient reasons, to be recorded in writing, suspend or cancel any license granted under this Act:

Provided that no such suspension or cancellation shall be made except after giving the holder of the license a reasonable opportunity of being heard.

(5) An appeal against an order refusing to grant, or renew or suspending or cancelling, a license shall lie in like manner as an appeal against an order would lie u/s 15."

10. Para 4.7 of the EXIM Policy stipulates that grant of license is not a matter of right and reads as under:

"4.7 license not a Right : No person can claim a license as a right and the Director General of Foreign Trade or the licensing authority shall have the power

to refuse to grant or renew a license in accordance with the provisions of the Act and the Rules made there under.":

11. Para 4.9 of this Policy provides that no export or import shall be made by any person without an Importer-Exporter Code unless specifically exempted.

12. In exercise of powers conferred by Section 19 of the Act, the Central Government has framed Foreign Trade (Regulations) Rules 1993 (for short 'the Rules'). These Rules state in detail the procedure for grant of license. Relevant Rule would be Rule 7 and a portion thereof which is required for our purpose is extracted below:

"7. Refusal of license-

(1) (a) The applicant has contravened any law relating to customs or foreign exchange;

(1) (c) The application or any document used in support thereof contains any false or fraudulent or misleading statement.

(1) (i) The applicant or any agent or employee of the application with his consent has been a party to any corrupt or fraudulent practice for the purposes of obtaining any other license.

(1) (j) The applicant is not eligible for a license in accordance with any provisions of the policy.

(1) (n) The applicant has attempted to obtain or has obtained cash compensatory support, duty drawback, cash assistance benefits allowed to Registered Exporters or any other similar benefits from the Central Government or any agency authorised by the Central Government in relation to exports made by him on the basis of any false, fraudulent or misleading statement or any document which is false or fabricated or tampered with."

13. The position which emerges from the aforesaid provisions of the Act, EXIM Policy as well as Rules can be summed up in the following manner:

(a) Before a person can undertake import or export, he is to obtain IE Code Number.

(b) Likewise he is to get import license as prescribed u/s 9 of the Act.

(c) Grant of such a license is not a right as stipulated para 4.7 of the EXIM Policy 1997-2002 and the DGFT is given power to refuse to grant or renew a license but in accordance with the provisions of the Act and the Rules.

(d) Since a person cannot import/export without such a license and the conduct of business in import and export depends thereon, the DGFT or the licensing authority can reject the application for issue or renewal of license. But this refusal cannot be in an arbitrary manner. That is why sub-section (2) of Section 9 provides that if the licensing authority or the Director General has to refuse grant

or renewal of license, it has to record in writing his reasons for such refusal. Further in order to ensure that power is exercised objectively, Rule 7 of the Rules stipulates the circumstances under which license can be refused.

(e) Likewise after the grant of license if it is to be suspended or cancelled, the Director General or the licensing authority has to do so for good and sufficient reasons to be recorded in writing.

(f) Not only this, sub-section (5) of Section 9 of the Act provides for remedy of appeal against an order refusing to grant, or renew or suspending or cancelling a license.

14. Coming to the nature of Advice Memo, it would be seen from the language used therein that all licensing authorities are advised not to allow the petitioners or their directors/partners to avail of CCS-licenses of any category or any other benefit under the EXIM Policy. Thus the effect of this Advice Memo is to debar the petitioners from even applying for such licenses.

15. Whether, before taking such a step, it was incumbent upon the respondents to comply with the principles of natural justice, is the question?

16. It is not a case where a person has applied for license and license is refused to him by stating certain reasons. It is also not a case where license already granted is suspended or cancelled. It is a case where a person is precluded from applying for license or availing Cash Compensatory Support (CCS) or any other benefit under the EXIM Policy. Directors/partners of the firms mentioned in the Advice Memo (in the instant petitioner No.2, who is the proprietor) cannot apply for or get IEC implying thereby they are precluded from carrying out import and export business as obtaining IEC is pre-condition for import and export business. Thus effect of the Advice Memo is not to allow the petitioners to move any such application and even if they preferred such an application, it would not be issued any such IEC or CCS/licenses. Such kind of debarment would clearly amount to blacklisting of the petitioners.

17. Mr.G.L.Rawal, learned counsel for the petitioners had argued that if such a license is to be suspended or cancelled as per provisions of Section 9(4) of the Act, principles of natural justice have to be complied with. Respondents may be right in refuting this submission by contending that Section 9(4) of the Act, had no application in the instant case as it was not a case of suspension or cancellation of the license deed as the matter related to `grant of license". However, as noted above, the effect of Advice Memo is that petitioners are precluded from making application for grant of license and it would be a case of blacklisting/debarment and for such an action, dehors the provision of Section 9(4) of the Act, provisions of principles of natural justice would be attracted before such an action and law on this point is well settled.

18. One may refer to the judgment of the Supreme Court in the case of Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another, . In that

case the court observed:

"Para 12: Under Article 298 of the Constitution the Executive power of the Union and the State shall extend to the carrying on of any trade and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of black-listing has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of black-listing. A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest of expectation. When the State acts to the prejudice of a person it has to be supported by legality.

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15. The blacklisting order does not pertain to any particular contract. The blacklisting order involves civil consequences. It casts a slur. It creates a barrier between the persons blacklisted and the Government in the matter of transactions. The blacklists are "instruments of coercion".

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20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist."

19. No doubt, aforesaid observations were made by the Supreme Court in the context of Government contracts. However, it cannot be denied that unless IEC or license is granted, a person cannot do import and export business and his right to do business is Therefore affected which is otherwise a fundamental right guaranteed under Article 19(1)(g) of the Constitution of India. A person, Therefore, cannot be deprived of such a right without observing the principles of natural justice. It is trite law that before taking any such action which has civil and evil consequences, authorities are bound to strictly observe the principles of natural justice. A Full Bench of this Court in the case of M/s J.T. (India) Exports Vs. Union of India & Anr. reported in 2001 (78) ECC 677 (Del.) recapitulated the legal position on this aspect after scanning important case law, Indian as well as English. Arijit Pasayat, CJ (as he then was) speaking for the court formulated the legal position in the following manner:

"Para 4: The expression `natural justice and legal justice" do not present a water-tight classification. It is the substance of justice which is to be secured by both, and whenever legal justice fails to achieve this solemn purpose, natural justice is called in aid of legal justice. Natural justice relieves legal justice from unnecessary technicality, grammatical pedantry or logical prevarication. It supplies the omissions of a formulated law.

Para 5: The adherence to principle of natural justice as recognised by all civilised States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties. These principles are well-settled. The first and foremost principle is what is commonly known as audi alteram partem rule. It says that none should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should appraise the party determinatively the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed against the person in absentia becomes wholly vitiated. Thus it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. It is after all an approval rule of fair play.

Para 6: Principles of natural justice are those rules which have been laid down by the Courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial quasi-judicial authority while making an order affecting those rights. These rules are intended to prevent such authority from doing in justice."

20. The court, thereafter, concluded from some leading judgments of court in England including Board of Education Vs. Rice , 1911 AC 179 and Earl of Solbourne, LO in Spackman v.Plumstead District Board of Works, 1985 (10) AC 229 and expressed in the following manner as to how concept of principles of natural justice had shaped over a period of time:

"Para 11: Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed there under. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the fact and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. Expression `civil consequences" encompasses in fraction of not merely property or personal rights but of civil liberties, material deprivations, and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life.

Para 12: Natural justice has been variously defined by different Judges. A few instances will suffice. In *Drew v. Drew and Leburu*, 1855 (2) Macg. 18, Lord Cranworth defined it as 'universal justice'. In *James Dunbar Smith v. Her Majesty the Queen*, 1877 (3) App.Cas 614r Robert P. Collier, speaking for the judicial committee of Privy Council, used the phrase 'the requirements of substantial justice', while in *Arthur John Specman v. Plumstead District Board of Works*, 9188 (10) App.Cas 229, Earl of Salbourne, S.C. Preferred the phrase "the substantial requirement of justice". In *Vionet v. Barrett*, 1885 (55) LJRD 39, 41, Lord Fasher, M.R. defined natural justice as 'the natural sense of what is right and wrong'. While, however, deciding *Hookings v. Smethwick Local Board of Health*, 1890 (24) QBD 712, Lord Fasher, M.R. instead of using the definition given earlier by him in *Vionet v. Barret* (supra) chose to define natural justice as 'fundamental justice'. In *Ridge v. Baldwin*, 1963 (1) WB 569 Harman LJ, in the Court of Appeal described natural justice as 'fairplay in action'. This was noted in *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, . In *re R.N. (An Infant)* 1967 (2) B 617 Lord Parker, CJ, preferred to describe natural justice as 'a duty to act fairly'. In *Fairmount Investments Ltd. v. Secretary to State for Environment*, 1976 WLR 1255 Lord Russell of Willow somewhat picturesquely described natural justice as 'a fair crack of the whip' while Geoffrey Lane, LJ in *Regina v. Secretary of State for Home Affairs Ex parte Hosenball*, 1977 (1) WLR 766, preferred the homely phrase 'common fairness'.

Para 14: Even if grant of an opportunity is not specifically provided for it has to be read into the unoccupied interstices and unless specifically excluded principles of natural justice have to be applied. Even if a statute is silent and there are no positive words in the Act or Rules spelling out the need to hear the party whose rights and interests are likely to be affected, the requirement to follow the fair procedure before taking a decision must be read into the statute, unless the statute provides otherwise. Reference is accordingly disposed of.

21. As pointed out above, because of the impugned Advice memo the petitioners are even precluded from making application for grant of IEC/license and thus their right to approach the concerned authorities is shut down. Before such an action could be taken, the petitioners were entitled to show cause notice and opportunity of being heard. (Refer: *S.L. Kapoor Vs. Jagmohan and Others*, and *Swadeshi Cotton Mills Vs. Union of India (UOI)*,).

22. It may further be pointed out that the impugned Advice Memo does not state any reasons. It only refers to some investigation of alleged fraudulent export of goods and misdeclaration of the descriptions and even no particulars thereof are mentioned. It is only when legal notice dated 30th July, 2001 was sent that in reply dated 11th September, 2001 the respondents mentioned that it had received report that matter was under investigation with DRI and the CBI as the petitioners had misdeclared the description of goods and exports. Even here no details or particulars of the exports were given nor any details of such investigation were furnished.

23. Learned counsel for the respondents tried to argue that principles of natural justice would not apply to a case of this nature. In support of this proposition, he referred to the judgment of the Supreme Court in the case of *Liberty Oil Mills and Others Vs. Union of India (UOI) and Others*, . This judgment would rather advance the case of the petitioners as it answers the question posed against the respondents. That was a case under Imports and Exports (Control) Act, 1947 and the court was dealing with provisions of Imports (Control) Order 1955 framed there under. Clause 8 of this Control Order empowers the Central Government or the Chief Controller of Imports and Exports to debar a person from importing goods or from receiving licenses or allotment of imported goods for a specified period if such person is guilty of any of the acts of commission or omission enumerated in the clause. This power thus was almost akin to the powers to issue/cancel/suspend the license under the Foreign Trade (Development & Regulations) Act, 1992. Dealing with this power under clause 8 and requirement of observance of principles of natural justice, the court observed:

" As we have seen, both Clauses 8-A and 8-B contemplate action of an interim nature pending investigation into allegations under Clause 8. Ordinarily, in the absence of anything more, it would not be necessary to give an opportunity to the person concerned before proceeding to take action under Clause 8-A or Clause 8-B. But while Clause 8-B deals with the right to obtain licenses and the right to obtain allotments, Clause 8-A deals with rights which have flowered into licenses and allotments. A person to whom licenses have been granted or allotments made may have arranged his affairs on that basis and entered into transactions with others, and, to him the consequences of action under Clause 8-A may be truly disastrous whereas the consequences of action under Clause 8-B may not be so imminently harmful. It is presumably because of this lively difference between Clauses 8-A and 8-B that Clause 10 provides for a pre-decisional opportunity in the case of action under Clause 8-A and does not so provided in the case of action under Clause 8-B. Again, it is presumably because of this difference that Clause 10 while providing for an appeal against a decision under Clause 8-A does not provide for an appeal against a decision under Clause 8-B. Not that it makes any difference because Sections 4-M and 4-N of the Imports and Exports (Control) Act provide for an appeal and a revision against any decision or order made under the Act, which naturally include any decision or order made under any subordinate legislation made under the Act, and this right of appeal and revision cannot be whittled down by the subordinate legislation. As we mentioned earlier, it does not mean that the requirements of natural justice are not be met at all in the case of action under Clause 8-B. The requirements of natural justice will be met in the case of action under Clause 8-B by considering, bona fide, any representation that may be made in that behalf by the person aggrieved. Clause 8-B itself gives an indication that such a post-decisional opportunity on the request of the person concerned is contemplated. We have seen that action under Clause 8-B is to be taken if the authority is satisfied in the public interest that such action may be taken without ascertaining further details

in regard to the allegations. It clearly implies that when further facts are ascertained by the authority or brought to the notice of the authority, such action may be reviewed. As we have earlier pointed out while ex parte interim orders may always be made without a pre-decisional opportunity, the principles of natural justice which are never excluded will be satisfied if a post-decisional opportunity is given if demanded. So we hold that in the case of action under Clause 8-B, it is not necessary to give a pre-decisional opportunity but a post decisional opportunity must be given if so requested by the person affected.

The next question for consideration is whether the decision to keep in 'abeyance' should be communicated to the person concerned. There can be no two opinions on this. Ours is a Constitutional Government, an open democracy founded upon the rule of law and not a cloak and dagger regiment. It is inconceivable that under our constitutional scheme a decision of the kind contemplated by Clause 8-B which may have the effect of bringing to a standstill the entire business activity of the person affected and which may even spell ruin to him, should be made and implemented without being communicated to that person. Intertwined is the question of observance of natural justice and how can natural justice be satisfied if the decision is not even communicated? It would be most arbitrary and quite clearly vocative of Arts. 14 and 19(1)(g) of the Constitution if Clause 8-B is to be interpreted as excluding communication of the decision taken. There is nothing in Clause 8-B to suggest that the decision is not to be communicated. On the other hand, the expression "without assigning any reason" implies that the decision has to be communicated, but reasons for the decision have not to be stated. Reasons of course, must exist for the decision since the decision may only be taken if the authority is satisfied that the grant of license or allotment of imported goods will not be in the public interest. We must make it clear that 'without assigning reasons' only means that there is no obligation to formulate reasons and nothing more. Formal reasons may lead to complication when the matter is still under investigation. So the authority may not give formal reasons, but the skeletal allegations must be mentioned in order to provide an opportunity to the person affected to make his representation. Chapter and verse need not be quoted. Details may not be mentioned and an outline of the allegations should be sufficient.

Public interest must *nolens volens* be the paramount consideration. If the threatened public mischief is such as to outweigh the likely injury to the party, the authority may take action under Clause 8-B. If the threatened public injury is very slight compared to the harm which may be done to the party, the authority may not take action under Clause 8-B. There may be cases where the 'abeyance' orders may themselves be productive of serious public injury as where a substantial amount of foreign exchange may be lost or a large number of workers are likely to be thrown out of employment etc. In such situations the authorities may pause and have second thoughts, consider the inevitable consequences and be guided by that element of the public interest which outweighs all others. Which element of the public interest should be given

greater weight and which grounds should weight at all are matters for the authority taking action under Rule 8-B. Courts do not concern themselves with the sufficiency of the grounds on which action is taken or with the balancing of competing considerations, in favor of and against the action.

One of the submissions very strenuously used before us was that a large number of the applications for import licenses and allotments of imported goods which have been kept 'abeyance' relate to goods which are totally unrelated to beef tallow or any other animal tallow and there was no justification whatever for keeping them in 'abeyance'. But an 'abeyance' order under Clause 8-B is directed not against any particular type of goods but against an importer, licensee or other person against whom an investigation into allegations under Cl.8 is pending. The question is not whether any particular type of goods should be allowed to be imported or allotted to any person, - that is a question of policy- but whether it is not in the public interest that a particular person should be prevented from obtaining import licenses or imported goods of any description pending investigation into the allegations under Clause 8-B. That would depend on the nature of the allegations, the extent of involvement of the person concerned and, most important, the element of the public interest. If the allegations against a person involve him deeply in trafficking or racketeering in import licenses and imported goods, the authority may consider it inexpedient in the public interest to keep in abeyance any application of his for the grant of a license or allotment of goods. On the other hand, even if the allegations are grave, if the effect of an order under Clause 8-B is likely to result in loss of considerable foreign exchange or to shut down an industry throwing large number of workers out of employment, the authority should restrain itself in larger public interest, from making an order under Clause 8-B or may make an order confining the abeyance order to applications and goods of certain description only instead of making a general order which extends to all applications for import licenses and allotment of imported goods. Again, the allegations may reveal that the involvement of the person in illegal activity is so remote or minimal that it would be entirely inexpedient to make an order under Cl.8-B. A person who legitimately purchases imported goods, or imports goods under a license lawfully acquired by him and who has used the goods in the manufacture or a different kind of goods in which industry the person is engaged may not be visited with an order under Cl.8-B merely because the original licensee's actions may be suspicious. Again where a person's bona fides are not suspect at all but he may be technically at fault or he may have acted on a bona fide interpretation of the rules and regulations, it may not be a case for making an order under Clause 8-B. But there are all matters for the consideration of the authority making the order under Clause 8-B and not for the court."

24. Thus, it would be seen that under Clause 8 a person can be debarred from importing goods for from receiving licenses or allotment of imported goods for a specified period if such a person is guilty of any acts of commission or omission

enumerated in that clause. The court held that an order of this immensity cannot be made without due investigation and without giving a reasonable opportunity to the affected party. Thus the court clearly laid down that such debarment order should be a result of investigation finding a person guilty of acts of commission and omission stipulated in that clause. Not only this, before passing an order, giving of reasonable opportunity to the affected party was a must.

25. However, Clauses 8-A and 8-B empowered the Central Government to pass interim orders pending investigation into the allegations under Clause 8. licenses may have already been issued and allotment of imported goods may have already been made. In such a case the authority could consider it desirable to prevent the person from importing goods pursuant to the licenses or prevent him from obtaining the imported goods allotted to him through the specified agencies by making an order under Clause 8-A suspending the importation of goods, the grant of license or the allotment of imported goods. Even in such a case, Clause 10 provided that no action under Clause 8-A could be taken without giving a reasonable opportunity to the person concerned and the court clearly held that Clause 8-A contemplates a post-decisional hearing. Clause 8-A is analogous to Section 9(4) of the Foreign Trade (Development & Regulations) Act, 1992.

26. However, there may be a case where licenses have not yet been issued and allotment may yet have to be made. Once action under Clause 8 is initiated, the appropriate authority may be satisfied that it would not be in the public interest to issue licenses or making allotments to the person concerned, without ascertaining further details with regard to the allegations made against him. In such cases Clause 8-B empowered the authority to make an order of abeyance. The court held that for making such an order of abeyance pending further investigation, there was no provision while Clause 10 provides for a reasonable opportunity for taking action under Clause 8-A. In these circumstances, the court posed the following question:

"Does it mean that principle of natural justice of procedural fairness is to be altogether excluded when action is taken under Clause 8-B?

27. It answered this question in the negative by observing that it was not permissible to interpret any statutory instrument so as to exclude natural justice, unless the language of instrument leaves no option to the court.

28. However, the court after holding that principles of natural justice were implied whenever action under Clause 8-B were to be taken, observed that there may be certain circumstances where pre-decisional opportunity may not be necessary keeping in view the urgency of the matter and post-decisional hearing may serve the purpose. It however gave example of such emergent cases where pre-decisional hearing may not be necessary and post-decisional hearing would serve the purpose by making these remarks:

"... It may be that the opportunity to be heard may not be pre-decisional; it may necessarily have to be post-decisional where the danger to be averted or the act

to be prevented is imminent or where the action to be taken can brook no delay. If an area is devastated by flood, one cannot wait to issue show cause notices for requisitioning vehicles to evacuate population. If there is an out-break of epidemic, we presume one does not have to issue show cause notices to requisition beds in hospitals, public or private. In such situations, it may be enough to issue post-decisional notices providing for an opportunity. It may not even be necessary in some situations to issue such notices, but it would be sufficient but obligatory to consider any representation that may be made by the aggrieved person and that would satisfy the requirements of procedural fairness and natural justice....."

29. The court further added that pre-decisional natural justice is not usually contemplated when the decisions taken are of ad interim nature pending investigation or enquiry. Such an order may be made ex parte which may provide an opportunity to the aggrieved party to be heard at a later stage.

30. It is thus clear that the Advice Memo in the present case is in the nature of interim order whereby authorities have decided to keep the matter of issuance of IEC/licenses in `abeyance". It is not a case where licenses have already been given and are sought to be suspended (kind of situation which Clause 8-A in Liberty Oil Mills (supra) postulates). In a matter of this nature, Liberty Oil Mills (supra) held that pre-decisional natural justice is not usually contemplated and ad interim orders may be made ex parte. When such an order is made the aggrieved party shall have right to make an appropriate representation seeking review of the order and asking the authorities to rescind or modify the order and principles of natural justice would be satisfied if the aggrieved party is given an opportunity at his request.

31. No doubt, in the instant case, after the impugned Advice Memo was issued, the petitioners sent legal notice dated 30th July, 2001 for cancellation of the order and reply dated 11th September, 2001 was sent. However, it may not be treated at par with post-decisional hearing inasmuch as the petitioners had demanded cancellation of the Advice Memo and in reply it was stated that because the matter was under investigation the petitioners had been kept on Advice Memo. Post-decisional hearing, in conformity with the principles of natural justice, would demand that the petitioners are communicated about the allegations against it so that it is afforded an opportunity to meet those allegations. Thus keeping in view the principles laid down in Liberty Oil Mills (supra), it cannot be said that it was necessary to give pre-decisional hearing before issuing Advice Memo dated 23rd March, 2001 and interest of justice would be sub-served if the petitioners are given due and proper post-decisional hearing.

32. These writ petitions are accordingly disposed of with the following direction:

I. The petitioners shall make appropriate representation against the Advice Memo dated 23rd March, 2001. In the counter affidavit, the respondents have now disclosed the allegations against the petitioners which relate to exporting 14

consignments from ICD-TKD declaring the goods as Calcium Stearate although exporting Calcium Carbonate and claiming the benefit under Sl.No.362 of Produce Group Chemicals of the DEBP. The respondents shall however provide the petitioners, within one week, investigation report in respect thereof so that the petitioners know the details of such investigation. Within two weeks thereafter, the petitioners would submit their representation and may also ask for personal hearing. The competent authority shall consider the representation and give the petitioners personal hearing, if desired, and decide the representation of the petitioners within four weeks thereafter.

33. There shall be no order as to costs.