

(1992) 06 RAJ CK 0004

In the Rajasthan High Court

Case No : SBCW No"s. 5125, 5352, 6323 and 943 of 1991 and 944-945 of 1992

Swastika Woollen Industries (P) Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 05-06-1992

Acts Referred:

Customs Act, 1962 — Section 11, 11(B), 24, 4, 45(1)

Defence of India Rules, 1962 — Rule 84

Imports and Exports (Control) Act, 1947 — Section 3, 3(1), 3(3), 4A

Citation : (1992) 62 ELT 17

Hon'ble Judges : M.R. Calla, J

Bench : Single Bench

Advocate : B.L. Sharma, M. Rafiq, Ashok Mishra, Chandra Shekhar and A.N. Khan, for the Appellant; Sudhir Gupta and Praveen Balwada, for the Respondent

Judgement

M.R. Calla, J.—The petitioners in these six writ petitions are carrying on the trade of manufacturing and sale of yarn and non-worsted yarn having factories at Alwar in the State of Rajasthan, at Amritsar, Panipat (Haryana) and village Dhoom Manikpur in the district of Ghaziabad in the State of U.P. etc. Through these writ petitions, order or directions as under have been sought :-

(1) Quashing of the Item 221(2), Item 29(iv) Appendix 6 of the Import and Export Policy 1990-93 and Item 17(iv) and 25 of the Order No. 1/90-93 OGL No. 1/90, dated 30-3-1990.

(2) To allow the petitioners to import the goods namely Woollen Rags, synthetic rags and shoddy wool through the Inland Container Depot, Sanganer.

(3) Quashing of the Public Notice No. 11/88, dated 18th April, 1988, or any other public notice that may be issued in this behalf impost similar restrictions as to the required standard of mutilation, by the Customs Collector, Delhi and declaring the application of the same imports made through ICD. Same to be illegal, unconstitutional and void in law.

(4) Quashing of the order dated 2-8-1991 and declaring the same to be illegal, unconstitutional and void in law

(5) Not to operate the Public Notice No. 11/88, dated 18-4-1988 or any other identical public notice issued by any Customs Collectorate to the imports of synthetic woollen rags/shoddy wool made through ICD, Sanganer and further directing the respondents to act in accordance with the guidelines laid down by the committee and further that the rags cut into two pieces which are beyond cleaning and repair would qualify the definition of old rags as given in clause (b) of para 29(ii)(b) of the Import & Export Policy as also by Clause (ii)(b) of the Open General Licence.

2. According to the petitioners the raw material required for the manufacturing process of finished goods by the factory of the petitioner companies consist of woollen rags, shoddy wool and synthetic rags. This material is generally imported under the Open General Licence from different European countries and the United States of America. The import of woollen rags, shoddy wool and synthetic rags is allowed under the Import and Export Policy 1990-93 only when they are imported in completely pre-mutilated condition. The import of woollen rags, synthetic rags and shoddy wool is allowed through two ports only viz. Bombay and Delhi ICD, although ICD at Sanganer has been settled with effect from 19th September, 1989. The Collector of Customs and Central Excise, Jaipur has in exercise of powers conferred upon him u/s 45(1) of the Customs Act, 1962 appointed the Rajasthan Small Industries Corporation Ltd. (A Government of Rajasthan Undertaking) to be the custodian of imported goods received at Inland Container Depot, Sanganer Industrial Area, Jaipur as would be evident from the Public Notice No. 20/90 issued by the office of the Collector, Customs and Central Excise, Jaipur. The Inland Container Depot, Sanganer has been established with a view to give benefit of containerisation by "moving so as to be available at the points in proximity to the important industrial places. The responsibility for movement of the containers from Bombay to Jaipur has been entrusted to the Shipping Corporation of India and Rajasthan Small Industries Ltd., Jaipur. An agreement for the said purpose has been entered into between Shipping Corporation of India and Rajasthan Small Industries Corporation Ltd., Jaipur to give boost to the export from the State of Rajasthan to outside countries while imports to the State of Rajasthan from outside the countries are yet to be encouraged and the result is that the ICD, Sanganer have to move empty containers from Gateway Port, Bombay to Sanganer, which in turn increases the cost of transportation. According to the petitioners, there are about 25 plants engaged in the manufacturing and sale of shoddy yarn and non-worsted yarn in the State of Rajasthan. The importation of the goods to the ICD Sanganer has been completely banned. It is further the case of the petitioner that importation of goods through ICD, Sanganer is convenient and cheaper to the petitioners. Since the Shipping Corporation of India has entered into an agreement with the Rajasthan Small Scale Corporation Ltd., Jaipur and they are jointly responsible for unloading of the goods from Gateway port, Bombay and loading it into trucks

engaged by them for the purpose of transporting the goods from Bombay to Sanganer in just 40 hours. As against this, the port at Bombay being the busiest port of this country is highly congested and clearance of goods in Bombay after off-loading from ship consumes a substantial time anywhere between one to two weeks, and thereafter it is required to be transported to Delhi by trains, while the trains are not promptly available for the transportation of goods and normally consumes not less than one month to reach the goods to Delhi where again about a fortnight is consumed in making the goods reach the factory premises possible. It has been further submitted that restricting importation of the said goods through Bombay port and Delhi ICD would also visit the petitioners with otherwise avoidable extra costs which were never in the contemplation of the petitioners. The goods imported through Delhi ICD in containers would continue to remain under the bond of the Customs Officers and it would necessitate an extra cost. The petitioners intend to import the said goods regularly through ICD Sanganer where, according to the petitioners, all facilities exist for clearance of the said goods, including the facilities for checking and pre-mutilation and warehousing etc.

3. It has been submitted on behalf of the petitioners that in the identical circumstances the petitioner Firm M/s. Swastik Woollen Mills (Pvt.) Ltd., Alwar was allowed to import raw-material through ICD Sanganer under the interim orders passed by this Court. The said goods arrived at ICD Sanganer some time in the month of March, 1991. The respondents constituted a committee consisting of two Asstt. Collectors of Customs, the Appraising Officer, one Inspector Customs and one Textile Representative. This Committee was entrusted with the job of inspecting the said goods. The Committee, accordingly, examined the goods in the presence of the representatives of the importer. These goods mostly consisted of synthetic rags of trousers cut into four pieces as well as into two pieces. Opinion was sought from a tailor who was an expert in the subject. After some matching pieces were shown to him and he opined that these cannot be re-stitched into a garment because of the zig-zag cut, the committee in its report dated 18th March, 1991 opined that further mutilation of the two pieces of trousers (synthetic rags) will be futile exercise and the goods were accordingly released after obtaining approval from the Deputy Collector of Customs. The other petitioners, believing that they would also receive the same treatment, instructed their foreign suppliers to further export the material under the remaining part of the contract by sending the said goods to the extent they were agreed upon to be exported under the contract. So far as the Collector of Customs, Jaipur was concerned, there were no guidelines for the required standard of mutilation and the observations of the Committee so constituted under the orders of the Collector (Customs), Jaipur were taken to be the guidelines to be followed in checking the standard of mutilation. The respondents consistently acting on such guidelines allowed eight containers imported by the said Firm through ICD, Sanganer. These very guidelines were applied to the imports made by some other importers of identical goods. The petitioners seek to

enforce the operation of the same guidelines for the import of synthetic rags etc. through ICD, Sanganer until any notification in this regard is issued by the competent authority. It has been further submitted that the guidelines so laid down by the Committee are very much in conformity with the provisions of the policy as well as Open General Licence and puts sufficient checks on any import of the synthetic rags made contrary thereto.

4. The petitioners have come with the case that prior to the Import and Export Policy, 1988-91 different Collectors of Customs at different ports had issued various public notices laying down the standard of mutilation. This gave them unbridled powers to act in a most arbitrary fashion and adopt the policy of pick and choose. The representatives of the trade impressed upon the Government of India to issue a uniform policy with regard to the standard of required mutilation so that the business community was not harassed and there should be no scope for arbitrariness and corruption. With this end in view for the first time, in the policy 1988-91, specific clause was inserted stating that mutilation must conform to the requirement specified by the Customs Authorities in their notification. Despite the assurance given by the Government of India that such notification would be issued shortly, no such notification laying down the guidelines for the required standard of mutilation has so far been issued. The Import Policy uses the expression "completely pre-mutilated condition". The policy required that the rags should be so worn out and soiled or it must appear to be beyond cleaning or beyond repair. Open General Licence which is statutorily issued document in contradiction to the public notice also contains the same conditions with regard to the required mutilation. The sole idea is that the imported items should not be capable of being re-used as garments. But the policy was never intended to impose any condition that the mutilation should be in a particular manner or that the goods should be in a particular shape, size or form. The importability is to be determined with respect to the conditions under the policy and that the Open General Licence and the condition to be applied would be whether the goods can be said to be pre-mutilated and as such cannot be re-used as they are imported. According to the petitioners, the customs authorities have no power to impose any special condition or set any other standard for determining as to what is rags. But the Customs Authorities are seeking to impose further condition with regard to the condition of the rags, which tantamounts to amending the import policy, whereas the modification of such policy is a matter for the Import Trade Policy Control Authority alone and the Customs Authorities have only to give effect to the policy and cannot seek to alter or amend the same.

5. A grievance has been raised that the local Customs Officers have invoked the public Notice No. 11/88, dated 18th April, 1988 issued by the Customs Collector, Delhi. Para 4(b) of the said public notice contains guidelines for mutilation as under :-

"(b) In the case of trousers and similar garments, there should be one cut across each leg standing left to right/or to left and at least one cut horizontally across

so that these should result in a minimum seven separate pieces. The cuts should extend through the entire length or width of the garment. The cutting should not be at the seam or stitch and should be haphazard and in different directions making the cut pieces totally unserviceable as garment or cloth."

6. It has been submitted that the OGL is an order issued by the Central Government under the powers conferred on it by virtue of Section 3 of the Imports and Exports (Control) Act, 1947 and it too does not contained any such condition. It has been submitted with regard to the material imported by the petitioners that the report itself describes the goods to be used and having cuts at random virtually made for two pieces 1 to 5 inches away from groin line and vertically and horizontally in four pieces. It has been further submitted that the disputes of the present nature have arisen in the past also, and the withheld goods have been ordered to be released by various High Courts viz. Bombay, Gujarat, Madras and Andhra Pradesh. Experts opinions have been obtained about the true meaning of "mutilation" and reference has been made to the biggest suppliers of such rags of the world viz. -M/s. Minnoapolis Rag Stock Company in their letter dated 22nd April, 1987 addressed to M/s. Swastika Company, G.T. Road, Panipat (Haryana) that by rendering one out horizontally or vertically across completely mutilates the garments and that this method of mutilation had been accepted world over and all the exporters in U.S.A. were adopting this method. It has been further submitted that the labour cost in U.S.A. is very high and the cost involved in mutilating the garments as required by the authorities in India would be enormous and impracticable. It has been submitted that the petitioner companies have entered into contracts with their suppliers to pay to them .50 cents per kilogram of the said goods. It has been submitted that if the imported rags are required to be cut into 7 to 8 pieces it would increase the cost of raw-material by more than double. It has been further submitted that the public Notice No. 11/88 dated 18th April, 1988 issued by the Collector (Customs), Delhi cannot be applied to imports through ICD, Sanganer falling under the Collector of Customs, Jaipur who has never issued such identical public notice nor he has adopted the same by any express order and that such decisions are ultra vires of the Import Policy 1990-93, meant for the actual users at has also been submitted that there is no public notice under sub-section (c) of Para 29 of the Import Policy.

7. Reply to the writ petition has been filed on behalf of respondent No. 5 seeking to traverse the claim of the petitioner by stating that the provisions challenged by the petitioners were introduced for the first time in the midst of the earlier Import & Export Policy, 1988-91 by the two public notices dated 28th April, 1989 both in OGL 1/88 and Import & Export Policy 1988-91. The impugned provisions have been introduced in Import Policy OGL with effect from 28th April, 1989 and ICD at Sanganer, Jaipur having been started at Jaipur with effect from 24th May, 1989 vide notification dated 24th May, 1989, the petitioners are estopped from challenging the impugned provisions as they have enjoyed the benefits of the same for the last two years. It has been submitted that the power u/s 3(1) of the

Imports & Exports (Control) Act, 1947 enables the respondents to not only prohibit and restrict the importation of goods as such, but also the points of entry by or through any part in the country. It has been submitted that the impugned policy and the impugned provisions have been formed in order to prevent unscrupulous traders from importing serviceable garments and cut garments by the wrongly describing them as woollen/synthetic rags and the measures have been taken to prevent the same in the manner as provided in the law. It has been submitted that the Government has taken decision to allow these types of goods only through two ports viz. Bombay and Delhi instead of all other ports, because no mutilation facilities are available for allowing these goods and materials at the other ports and if the same is allowed, there are great chances of misuse of policy because the Government felt that some unscrupulous importers are not importing completely mutilated synthetic/woollen rags and after clearance they are repairing these goods and reselling at considerably amount of profit. Further a committee consisting of officials of Ministry of Finance, Commerce and Textiles had examined this aspect and recommended that as adequate facility for mutilation are available at Delhi ICD, Bombay, these should allowed at these two ports only and not at other ports because of non-availability of mutilation facilities. These restrictions are within the powers of the Central Government u/s 3(3) of the Imports & Exports (Control) Act, 1947. The ICD, Sanganer has been started very recently before issue of I.T.C. Policy and, therefore, the Government could not have considered ICD, Sanganer and even otherwise there is no discrimination in allowing the import of synthetic rags through the two Ports, i.e. Delhi and Bombay only. It has been submitted that the facilities for accumulations and mutilation are readily available at Bombay and Delhi, whereas the same are not so readily available at ICD, Sanganer. It has been further submitted that even the importers can directly transport the goods from Bombay or Delhi after clearance, whereas for importation at ICD, Sanganer goods are required to be transported through Bombay Port to ICD, Sanganer which involved extra cost and the containers remain unlifted at Bombay and, therefore, the petitioners are better placed to import these items at Delhi and Bombay. By referring to condition No. 29 of the ICD Policy, it has been submitted that the Customs Authorities have not amended the Import Policy, but in view of para 29(c) of the Condition laid down in OGL Appendix 6 of ITC Policy, 1990-93, the Customs Officers have defined mutilation to be applied for determining the mutilation of goods when imported. According to the respondents, the mutilation of goods is to be done by the foreign suppliers and if they have to cut the goods to the extent desired by the import buyers, they will not loose anything and prospect of loosing the business would naturally motivate the foreign suppliers to comply with the request of the importers to give any number of cuts and yet the importers seek to limit the cuts in order to import such rags which are repairable and which can be re-sold in the market on normal profit and causing hardship thereby to the domestic industry. The respondents are right in determining the degree of mutilation laid down in the Public Notice No. 11/88. The number of cuts wanted by the Public Notice No. 11/88, if implemented by the importers, the

imported goods will not be re-stitched and retrievable and; therefore, according to the respondents the Public Notice No. 11/88 is a long arm to negotiate and it is standing in the way of carrying on the illegal activities. Reference has also been made to Section 24 of the Customs Act. Item No. 211(2) and 29(iv) of Appendix 6 of the Import and Export Policy, 1990-93 and item No. 17(iv) and 25 of the Order No. 1/90-93 OGL 1/90, dated 30th March, 1991 Public Notice No. 11/88, dated 18th April, 1988 and Order dated 2nd April, 1991 have been, thus, pleaded to be justified and sought to be defended.

8. Section 3(3) of Imports & Exports (Control) Act, 1947 is reproduced as under :-

"3(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, or any goods or class of goods imported into India.

9. Para 221(2), Item No. 29(i) to (iv) of the Appendix 6 of the Import & Export Policy for 1990-93 and Item No. 17(iv) and 25 of Order No. 1/90/93 OGL 1/90 dated 30-3-1990 are reproduced as under:-

Para 221(2):

(2) Import of items covered by Appendices 1-B and 6, List 8, Part I, will be subject to all other conditions, except the A.U. condition, as contained in the relevant OGL orders.

Item No. 29(i) to (iv):

(29) (i) Import of Woollen Rags/shoddy wool/synthetic Rags will be allowed only when these are imported in completely pre-mutilated condition.

(ii) Definition of Woollen Rags is as follows :-

(a) "New" - Waste woollen cloth whether woven or knitted which is left after a garment had been cut out including genuine tailor cutting piece ends, discarded pattern bunched and sample bits.

(b) "Old" - Range of woollen textile fabrics (including knitted and crocheted fabrics), which are required for manufacture of shoddy yarn and may consist of articles of furnishing or clothing or other clothing so worn out, soiled or torn as to be beyond cleaning or repair.

(c) The mutilation must conform to the requirements specified by Customs authorities in their Notification.

(iii) This definition shall apply mutatis mutandis to synthetic rags.

(iv) Import of Woollen rags/synthetics rags/shoddy wool will be allowed through two ports only viz. Bombay and Delhi ICD.

Item 17(iv) and 25 of Order No. 1/90/93 OGL 1/90, dated 30-3-1990:

"17(iv) Imports of Woollen rags/synthetic rags/shoddy wool will be allowed through two ports only viz. Bombay and Delhi ICD.

Item 25:

(25): Items covered under Appendix 6, List 8, Part-I of the Import and Export Policy, 1990-93 (Volume-I) can also be imported against Additional Licences by Export Houses/Trading Houses as per Policy. All the conditions applicable to import of items under Open General Licence, except the Actual user condition, will equally be applicable in respect of import of Open General Licence Items against Additional Licences.

10. The relevant portions from Public Notice dated 18-4-1988 (No. 11/88) and the order dated 2-8-1991 are reproduced as under :-

"Office of the Collector of Customs, New Delhi, Customs House Public Notice 11/88.

Sub: - Norms of mutilation for import of Woollen/synthetic rags under OGL:

Attention of the importers, Customs House Agents and all other concerned is invited to para 25(i) of Appx. 6 of the Import and Export Policy, April 1988-March, 1991, in terms of which import woollen rags/shoddy wool/synthetic rags will be allowed under OGL only when these are imported in completely pre-mutilated condition. Further, in terms of clause (c) to para 25(i) of the said Appx. 6, the mutilation must conform to the requirements specified by Customs authorities in their notification.

In the context of the above, the following norms of mutilation are laid down for the purpose of determining as to what would constitute "completely pre-mutilated rags".

(a) In the case of coats, frocks and similar garments, the cutting should result in a minimum of 6 pieces. One cut should extend from each of the shoulders to the respective under-arm (not at the seam or stitch) so as to separate the arms from the garments (the cutting could also run horizontally through the middle of the arms making two pieces each). Another cut (not at the seam or stitch) should extend from collar to the bottom of the garment (at the back and also front where warranted) separating the garment into two pieces. Still another cut should extend diagonally from one shoulder to a bottom of the other side. It should be ensured that the cuts run through the entire length of the garment and should be haphazard and in different directions. The cuts could also be vertical or horizontal at various places but resulting in a minimum of 6 pieces. In the case of children garments, a fewer cuts (not at the seam or stitch) may be accepted. All such cuts mentioned above should render the garments totally unserviceable as cloth or garment.

(b) In the case of trousers and similar garments, there should be one cut across

each leg standing left to right or right to left and at least one cut horizontally across so that these should result in a minimum of 7 separate pieces. The cuts should extend through the entire length or width of the garment. The cutting should not be at the seam or stitch and should be haphazard and in different directions making the cut pieces totally unserviceable as garment or cloth.

(c) Any other woollen/synthetic article should cut into a minimum of 6 pieces making it totally unserviceable as garment or cloth. The cuts should not be of seam or stitch in case of garments.

(d) In cases where mutilation is done by chopping machines or punching machines, the garments or articles should bear sufficient number of cuts, slits or holes that the garments/fabrics are completely damaged and are not usable as garments or cloth.

Importers are advised to ensure that woollen/synthetic rags imported by them conform to the above norms. It is emphasised that if in case of imported consignment, the extent of mutilation does not conform to the above guidelines, the goods will be liable to penal action. No request for further mutilation will be entertained after importation of goods. This comes into force with immediate effect.

Sd/- H.K. Zutshi

Collector of Customs

Dated 18-4-1988.

Order Dt: 2-8-1991:

"For Customs House Use

Notes in the Group Examination Report Opened examined 2,14,23,37 and 43 after selection Opened the selected bales as mentioned above after destuffing the container No. TELEX 402795/Q/(40) and examined in the presence of appraiser, AC (DCP) DC (Cus.) Tex Proch. Rep. CHA & Importer, checked declaration and found these are old used and pre-mutilated synthetic rags. These rags consists of trousers and mutilated as follows:

No. No. of pcs per trouser found 2 2 Nos. 14 2 pcs. 23 2 pcs. 37 2 pcs. 43 4 pcs.

Cuts were at random, vertically made for 2 pcs 1 to 5 inches away from groin line and vertically and horizontally for 4 pcs near the knees. This mutilation does not conform to the requirement of Delhi CH PN No. 11/88 issued by the Collector of Cus. Delhi representation samples sent herewith for perusal on orders placed.

Sd/- Sd/- Sd/- Sd/- Sd/- Tax Procl Rep. AC (KD) AC (KD) Inspector for CHD"

11. The challenge to Item No. 221(2) and 29(iv) of Appendix 6 of the Import and Export Policy and Item 17(iv) and 25 of the Order No. 1/90/93 OGL 1/90 dated 30/3/1990, in the instant case, has assumed importance because according to

Item No. 221(2) import of items covered by Appendix 6, List 8, Part-I is subject to other conditions except the A-4 conditions as contained in the relevant OGL orders. The relevant OGL order has been issued on 30-3-1990. It has been placed on record in Swastika Woollen Industries Writ case No. 5125/1990 as Annexure/1 of the paper book. Entry No. 590 of Appendix 6 List 8 Part-I of the Import and Export Policy (April 1990 to March, 1993) is as under :-

Entry 590:- "Woollen rags/synthetics rags/shoddy wool in completely pre-mutilated form only.

12. Shri Sudhir Gupta sought to raise the controversy that the items imported in the cases at hand are not even rags what to walk of the same being in completely pre-mutilated condition. He has referred to the Words and Phrases of Central Excise and Customs by S.B. Garkar and submitted that as per the meaning of hosiery given therein, the imported items are as good as hosiery rather than being rags. He has placed reliance on 1990 (30) ECR 407 In this case, which was decided by the Tribunal, the Collector had given a positive finding that the garments in two pieces could be re-stitched and altered to make them serviceable and, therefore, the items were held to be the one which were not beyond cleaning or repair and were not unserviceable rags. This case was decided On its own facts and the observations have been made with reference to the positive finding which had been arrived at with regard to the imported items by the Collector of Customs. In Rajeev Woollen Mills Vs. Union of India and Others, it has been held by the Delhi High Court that the old woollen rags to be imported must be in completely pre-mutilated condition and should be so worn-out, soiled or torn as to be beyond cleaning or repair. So far as this proposition is concerned, in my opinion, there cannot be any quarrel. Certain items imported in the cases at hand had also been produced before me by Shri Sudhir Gupta to demonstrate that in want of the requisite number of cuts in terms of public notice such items cannot be regarded as rags. Reliance was also placed on 1991 (56) ELT 613 In this case, it was held that the rags ought to be understood only as defined in the policy and the Collector's finding on the basis of dictionary meaning was illegal. The Collector's finding that the garments were usable after repair by poor and needy people was irrelevant and beyond the scope of definition given in ITC Policy 1988-91 and further that the importation is to conform to the requirements specified by the Customs authorities in their notification; even the standard of mutilation not publicised immediately before the import or shipment. This judgment, in my opinion, does not advance the case of the respondents and lend no strength to the arguments of Shri Sudhir Gupta.

13. On the question of rags Shri B.L. Sharma submitted that reference may be made to the following observations of Justice R.P. Bhatt from Nagesh Hosiery Mills case of Bombay High Court (Misc. Petition No. 92 of 1974 decided on 13/15 Jan., 1975), quoted in the decision of Central Board of Excise and Customs v. In re : Hind Hosiery Mills and Ors. 1982 (10) ELT 424 (CBE & C) at page 428, para

16 is reproduced as under :-

"16. In this context the Board considers that it is relevant and necessary to quote the observations of Bhatt J. in the Nagesh Hosiery Mills case :-

"It must be remembered that rags have to be imported and therefore when a tender is invited for importation of "rags", the item "rags" must be given its ordinary trade meaning known to exporters and importers of such item. It is not a contract made between two parties in India but relates to offers for goods which is made with parties outside this country. Admittedly it was for the STC to import rags and by reason of a letter of authority that right was given to the petitioners for and on behalf of the STC. If that be the position, the person exporting the "rags" would naturally give the meaning which is well-known in the trade in his own country and that is the most natural thing to do. If the Union Government desired any restriction on importation then express definition of the item should have been made. If for example, the import of a particular item otherwise well known to the trade was to be prohibited the item itself must contain some statutory prohibition or a special definition given, which of course would then be known to the party importing and also to the party exporting. In any other case, the ordinary meaning as known to the trade must be applied. This is not to accept the conclusion of the 1st respondent (i.e. Collector of Customs, Bombay) that hosiery or garments discarded in richer countries and implying thereby that they are "rags" only in richer countries and are "second hand clothing in India". The expression "rags" must be given its ordinary meaning viz. "hosiery or garment which is ordinarily discarded by the wearer thereof when it cannot be put to any other use economically." This does not mean that the expression "rags" has to be construed in the light of the wearer of the hosiery or the garment by an individual. The expression "rags is not to be construed in the light as to what use such a hosiery or a garment would be made by beggar on the street or by a poor individual. It has to be given a common sense meaning viz. as would be known to the trader who usually deals with such item not necessarily for the well-to-do nor for the man on the street, either but as is usual in his business to cater for all alike. Therefore in my opinion, in construing this expression "rags" as dissected by the 1st Respondent, his approach is neither in accordance with the guidelines laid down in several decisions of the Court nor in accordance with general principles of construction of such items."

14. Shri B.L. Sharma has also placed reliance on 1988 (17) ECR 267 of this case is reproduced as under :-

"13. In the absence of any identifiable test of complete mutilation laid down in the Policy for the guidance of the importers and the enforcement agencies, the benefit has to be given to the importers, Supreme Court has held so in the case of U.O.I. v. TISCO ECR C 450 SC on the controversy whether the goods produced by the respondent therein are skelp or strip. The Court has ruled in that case : "Since the duties on strip and skelp, are not the same it is absolutely necessary

to define the word "skelp" so that there can be no doubt or confusion in the mind either of taxing authority or of the tax payer with regard to the tax liability qua skelp as opposed to strip." This principle squarely applies in the instant case.

15. It has been further submitted by Shri Sharma, learned counsel for the petitioner that similar proposition of law has been laid down in :

(a) 1990 (46) ELT 351

(b) 1990 (28) ECR 417

(c) 1989 (42) ELT 444

16. In Mahamed Sayeed Vs. Union of India and others, it has been laid down that the public notice must be published in the gazette and widely circulated.- The amendment made by the Bombay Collectorate on 14-2-1986 permitting 2 and 4 pieces, the Bombay public notice dated 2-5-1990 adopting the old public notice under new/current ITC and a further amendment permitting two pieces clearly shows that different views have been taken at different places and in Jain Shudh Vanaspati Ltd. Vs. Collector of Customs, it has been held that public notices are only administrative in nature and cannot affect the OGL order. In East India Commercial Co. Ltd., Calcutta and Another Vs. The Collector of Customs, Calcutta, the distinction between notification and notice has been pointed out in para 33 at page 1358, as under :-

"33. Firstly, the said notice does not purport to have been issued u/s 3(1) of the Act, whereas the orders referred to earlier, that is, notification Nos. 23-ITC/43 and 2-ITC/48 and similar others, were issued by the Central Government in exercise of the power conferred on it by sub-rule (3) of Rule 84 of the Defence of India Rules or Section 3(3) of the Act, as the case may be. The Central Government itself makes a clear distinction in the form adopted in issuing the notice, Secondly, while the notifications issued u/s 3 of the Act are described as orders, the notices are described as "public notices", while the notifications u/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 u/s 3 of the Act, having statutory force have to be repealed, if the new order in any manner modifies or supersedes the provisions of an earlier order; public notices are issued periodically without repealing or modifying the earlier notices or notification. For instance, on December 7, 1955, the Central Government in exercise of the power conferred by Sections 3 and 4A of the Act made an order under Cl. 12 thereof the orders contained in Schedule IV were repealed; Schedule IV only mentioned five notifications issued u/s 3 of the Act, but no public notice was included in that list. To put it differently, orders made u/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 Hand-book 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 thus:

"In the past the half yearly publication on Import Control, popularly known as the "Red Book" has included not only a statement of policy for the ensuing six months but also a reproduction of various notifications relating to Import Control and detailed information on points of procedure."

It is true the Chief Controller made an affidavit in the High Court that the policy-statements are issued u/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 u/s 3 of the Act.

17. Shri Sharma has also argued that certificate of Excise Department certifying end use has also been submitted in the Swastika Woollen Mills case and on that basis it stands ensured that the imported items in the case at hand shall be used only for the purpose for which they have been imported and, thus, there should not be any difficulty in releasing the goods.

18. In view of the details of the conditions of OGL as quoted above, the following questions have to be examined :-

1. What is meant by completely pre-mutilated condition?

2. Whether the requirements to which the mutilation must conform should be as specified by Customs authorities in the notification or as per the public notices issued by the Customs Department at Delhi, and who are to be regarded as Customs Authorities for the purpose and what is meant by notification.

3. Whether the import of Woollen rags/synthetic rags/shoddy wool is to be allowed through the two ports viz. Bombay and Delhi ICD only and not through ICD Sanganer and, as to whether the condition that the same can be imported through the two ports namely Delhi and Bombay ICD only is arbitrary, unreasonable and discriminatory.

19. In order to examine as what is meant by completely pre-mutilated condition, reference may be made to the Public Notice No. 11/88 referred to hereinabove.

20. As per condition 29 Appendix 6 of the Import & Export Policy 1990-93 when the completely pre-mutilated condition of woollen rags/shoddy wool/synthetic rags is the condition precedent and a pre-requisite for the import and further the mutilation must conform to the requirements specified by Customs authorities in their notification in this regard, three terms namely, "mutilation", "Customs authorities" and "notification" assume importance. What should be the standard and extent of mutilation is to be specified by the Customs authorities through notification. The argument of Shri B.L. Sharma is that no such requirement have been specified by any Customs authorities by way of notification. His argument is that neither the Public Notice No. 11/88, on which reliance has been placed by the respondents, can be said to be notification nor the author of such public

notice namely Collector of Customs can be said to be a Custom authority - unless it is so defined either under the Act, the Rules, Import and Export Policy or the words "Customs authorities" has not been defined under the Customs Act, 1962. This term was also not defined in the Imports & Exports (Control) Act, 1947, rules or the policy, nor the OGL defines it. Section 3 of the Customs Act, 1962, thus, provides for classes of officers of Customs. Section 4 provides for appointment of officers for Customs. But, there is nothing to show that who are to be regarded as Customs authorities for the purpose of issuing such notification. Sections 3 and 4 are reproduced as under :-

"Section 3. Classes of officers of Customs. - There shall be the following classes of officers, namely;

(a) Principal Collector of Customs; (aa) Collectors of Customs; (b) Collectors of Customs (Appeals); (c) Deputy Collectors of Customs; (d) Assistant Collectors of Customs; and (e) such other class of officers of customs as may be appointed for the purpose of this Act.

"Section 4. Appointment of officers of customs. - (1) the Central Government may appoint such officers as it thinks fit to be officers of customs.

(2) with prejudice to the provisions of subsection (1), the Central Government may authorise the Board a Collector of Customs or a Deputy or Assistant Collector of Customs to appoint officers of customs below the rank of Assistant Collector of Customs.

In this view of the matter, it is not possible to identify as to who is to be regarded as the exact customs authority for the purpose of issuing the specification of mutilation. Reference was made by Shri Sudhir Gupta to Section 222 of the Customs Act at page 386 and 387 of the Commentary on Customs Act by Mukherjee and, it has also been submitted that in the commentary of the aforesaid book there is reference to Customs authorities at Note No. 9. Reference was also made to Note 2 of the aforesaid book at page 54, u/s 11. Neither dictionaries can be treated as the dictator of statute nor commentators can confer the status of Customs authority on any officer. Now, the question arises that in a situation like this when no customs authorities as such can be identified as the Customs authorities and admittedly, when no such notification has been issued by any customs authority, whether the public notice issued by the Collector of Customs should be regarded as the notification issued by the Customs authorities for the purpose. Strictly speaking, the Collector of Customs cannot be brought to the status of Customs authorities in the absence of a clear provision in this regard, lest it would amount to substituting the words "Collector of Customs" instead of "Customs authorities" in condition No. 29(ii)(c). It cannot be presumed that the framers of the Import and Export Policy were not aware of the terms such as Collector of Customs or Customs authorities. The powers of the officers of the Customs have been defined in Section 5 of the Customs Act, 1962. Even from this Section 5 it is not discernible that the Collector of Customs

may be regarded as Customs authority for the purpose of issuing such notification. These powers are circumscribed by the provisions of the Act and the source of power for issuing such notification rests with the Central Government, in accordance with Section 11B of the Customs Act, 1962 and unless the source of power is shown for the Collector of Customs, the Collector of Customs has no competence to issue and specify the standard of mutilation through a Public Notice which is otherwise required to be done by the Customs Authorities through a notification. Neither in the strict sense of the term the Collector of Customs can be regarded as Customs authority for the purpose at hand nor the so-called public notice can be placed at the pedestal of notification. On these terms, if we examine the standard specified for completely pre-mutilated condition as contained in the Public Notice No. 11/88, technically the rigorous of such standard as contained therein cannot be applied. The further dichotomy in this regard is that in the matter of Import Policy the concept of a uniform policy and uniform standard of mutilation cannot be given a go-bye and, if the Collector of Customs is taken to be the Customs authority, the Collector of Customs at different places and indifferent States may issue varying standard of mutilation which would not only result in disparity and uneven standard, but would also lead to confusion and would give rise to the grievance of differential treatment to the importers operating at different places in the country. Thus, when neither a particular authority is identifiable as the Customs authority nor the standards have been specified nor the notification has been issued, it is difficult for this Court to accept the plead of Shri Gupta that the standard of mutilation as provided in the Public Notice should be applied. Apart from this, the grievance about the feasibility of such standards has also been voiced and the submission made with regard to increase of the cost factor involving more consumption of foreign exchange to meet the requirement of 6 to 8 cuts, is also a submission not without force. Looking to the totality of the matter and the span of controversy in this regard, I am of the opinion that for the purpose of determining as to whether the imported items are in completely pre-mutilated condition or not, the general sense of completely pre-mutilated condition" should be applied without insisting upon the plurality of the number of cuts, and the touch-stone on which the completely pre-mutilated condition is to be tested is that the woollen rags/shoddy wool and synthetic rags should be as under :-

"RAGS SHOULD BE SO WORN OUT OR SOILED THAT IT MUST APPEAR TO BE BEYOND CLEANING OR REPAIR; IT SHOULD NOT BE CAPABLE OF BEING RE-USED AS A GARMENT WITHOUT INSISTING UPON PLURALITY OF NUMBER OF CUTS IT IS TO BE SEEN THAT THE ITEM SUFFERS FROM CUTS IN SUCH A WAY SO THAT IT NO MORE REMAINS CAPABLE OF BEING SERVICEABLE AS A GARMENT OR CLOTH."

21. This is the test which is to be applied by the respondents on the items which have been imported and are in question in the cases at hand. So far as the items which were shown to me by Shri Sudhir Gupta so as to demonstrate that they were not completely mutilated rags, Shri B.L. Sharma has submitted that firstly,

what had been shown by Shri Sudhir Gupta were not the representative samples and, secondly, it was pointed out that these items were not being taken as completely pre-mutilated rags only on the ground that these items were not having the requisite number of cuts according to the Public Notice. Once it is held that plurality of cuts as mentioned in the Public Notice cannot be decisive so as to take an item to be completely pre-mutilated rag or not - it follows that no item can be with held merely because of want of requisite number of cuts and, accordingly, it is held that no item is to taken as serviceable or capable of being re-stitched and used merely because it lacks certain number of cuts and, thus, the plurality of the number of cuts cannot be insisted upon. The respondents would examine the items as rags in completely mutilated form on the basis of the test which has been quoted hereinabove.

22. Regarding the proposition that the import should be allowed not only from two air ports namely Bombay and Delhi, it should be allowed at other places also including the ICD Sanganer and that the condition that it could be imported through the two ports namely Delhi and Bombay ICD only is arbitrary, unreasonable and discriminatory, it was submitted by Shri B.L. Sharma that the impediment to import consignments of synthetic rags/woollen rags and shoddy wool through the ports at Bombay and Delhi only is arbitrary, unreasonable and discriminatory as the same is neither permissible nor authorised u/s 3 of the Imports and Exports (Control) Act. There is no rational basis for the import through Delhi ICD and Bombay ICD only. While Section 3(1) of the said Act authorises the Central Government to prohibit or restrict the import and export of goods of any specified description, this power is of general nature only. In the garb of this power the particular port cannot be picked. A comparison of clauses (a) and (b) of Section 3(i) of the Act would show that while clause (b) empowers the Central Government to make provisions for prohibiting, restricting or otherwise controlling, the bringing into any port or 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, in clause (a) the expression "any port or place in India" is conspicuously missing and it shows that for the purpose of import there is no question of selection of port. Sub-section (3) of Section 3 of the said Act does not cover the choice of ports for the goods which have been imported into India. This provision, therefore, covers a situation of post-importation. The submissions were also made with reference to the practical difficulties which the importers have to face in case the import is restricted through the selected ports only. It was also submitted that the importation of goods by ICD Sanganer was more convenient and cheaper as the Shipping Corporation of India has entered into an agreement with the Rajasthan Small Industries Corporation Ltd., Jaipur and they are generally responsible for unloading of the goods and loading it into trucks for the purpose of transporting the goods from Bombay to Sanganer in just 40 hours. I am not mentioning here the details of these submissions as the same have already been given in the earlier part of this judgment while narrating the case of the petitioner. Shri

Sudhir Gupta has submitted that the ICD Sanganer at Jaipur was started vide notification dated 24th May, 1988. He has submitted that u/s 3(1) of the Imports and Exports (Control) Act, 1947 the respondents are competent not only to prohibit and restrict the importation of goods as such but also binds entry by and through and port in the country. He has also submitted that the Government had decided to allow import of these types of goods only through Bombay and Delhi ports instead of other ports in order to prevent unscrupulous traders from importing serviceable garments and cut garments by wrongly describing them as woollen/synthetic rag and, therefore, preventive measures had to be taken. It is further submitted that the importation facilities are available only at Bombay and Delhi and if the import is allowed through ports other than Delhi and Bombay, there are greater chances of misuse of the policy on account of want of importation facilities. The imposition of such restrictions was within the powers of the Central Government u/s 3(3) of the Exports and Imports (Control) Act, 1947.

23. Shri B.L. Sharma has placed reliance on a decision of the Madras High Court in the case of B.L. Tandon v. Union of India in Writ Petition No. 2167/1990, rendered on 25th April, 1990. In this decision, the argument that unscrupulous importers were adopting to import serviceable garments under the guise of imported rags was considered and it was held that it would not enable the respondents to impose a restriction which is not warranted as the respondents have enough machinery, resources and manpower to devise ways and means for checking the import of any unauthorised item, and nothing prevents the respondents from providing identical importation facilities at other places and there is no rational or any reasonable explanation as to why the ports at Bombay and Delhi alone should be given such status. Reliance has also been placed on the several orders passed by Delhi High Court in this regard permitting clearance through Calcutta port which is a port other than Delhi and Bombay.

24. Shri Sudhir Gupta, on the other hand, has placed strong reliance on a decision of Calcutta High Court reported as Kalindi Woollen Mills (P) Ltd. and Another Vs. Union of India (UOI) and Others, In this judgment, the Calcutta High Court has held that at the time of bringing the imported goods in the country there is restriction as to the points of entry - it is for the purpose of administrative feasibility for effective machination, for effective control and in order to plug loopholes perpetrated by unscrupulous traders. In Calcutta case (supra) support has been taken from Abdul Aziz Aminudin Vs. State of Maharashtra, so as to uphold the restrictions to two particular ports only. True it is that the powers conferred u/s 3(1) is not restricted merely to prohibiting or restricting imports at the time of point of entry of goods, but extends also the subsequent disposal of the goods imported and it is not for the courts to decide the policy matters and, therefore, on the authority of the Calcutta High Court and applying the principle laid down in Abdul Aziz's case (supra) decided by the Supreme Court the power of restriction is there u/s 3 of the Act - but the mere clothing with the power is not the complete answer to the questions raised before me. Since power has to be exercised in accordance with the provisions of

law and cannot be exercised in an arbitrary manner. The power has to be exercised and the orders are accordingly required to be issued for cogent and sound reasons which are germane to the object sought to be achieved.

25. The Madras High Court in Tandon's case (supra) i.e. WP No. 2161/1990 decided on 25th April, 1990 has observed that merely because the respondents are not willing to provide facilities at Madras, the citizens cannot be put to any unreasonable restrictions. Delhi High Court in the several orders passed on 17th January, 1992 while disposing of the writ petitions No. 126/1992 to 131/1992, has recorded as under :-

"Before us the parties have cited Division Bench judgments of this Court, one is in favour of the petitioner and the other is in favour of the respondents where in the petitioner has also brought to our notice a judgment of the Supreme Court in SLP (Civil) No. 9939-40 Union of India and Ors. v. Shine Woollen Mills (P) Ltd. and Ors., dated 23rd May, 1991, copy of which is Annexure-PI to the writ petition. We are bound by the Supreme Court's decisions and accordingly, the writ petition is allowed and disposed of strictly in terms of the Supreme Court decision referred to above. The only difference would be that the petitioner would be entitled to clear the goods at Calcutta Port instead of Madras Port. With this order and direction the writ petition stands disposed of."

26. In this regard apart from what has been observed by the Madras High Court in Tandon 's case (supra) and in several cases by the Delhi High Court, I am of the opinion with reference to Kalindi Woollen Mills (P) Ltd. and Another Vs. Union of India (UOI) and Others, that merely because the Government is clothed with the powers u/s 3 of the Imports and Exports (Control) Act, 1947 it does not mean that the restrictions to the imports through the ports of Bombay and Delhi only in the cases at hand is justified. The fact that the responsibility for movement of the containers from Bombay to Jaipur has been entrusted to the Shipping Corporation of India and the Rajasthan Small Industries Ltd., Jaipur and an agreement has been entered into between the Shipping Corporation of India and the Rajasthan Small Industries to give boost to the export from the State of Rajasthan to outside countries and import to the State of Rajasthan needs encouragement, the empty containers have to be moved which increases the cost of transportation. There are about 25 plants in the manufacturing and sell of shoddy yarn and non-worsted yarn in the State of Rajasthan. Importation of the goods through the ICD Sanganer has been completely banned. The importation of goods through ICD, Sanganer is more convenient and cheaper to the importers. Shipping Corporation of India and Rajasthan Small Industries Corporation are jointly responsible for unloading of the goods and loading it into trucks engaged by them for the purpose of transporting the goods from Bombay are such glaring facts which cannot be lost sight of. The factual position pointed out by the petitioners that Bombay being the busiest port in the country is highly congested and clearance of goods in Bombay and after off-loading from the ship consumes a substantial time between one or two weeks and thereafter it is

required to be transported from Delhi by trains while the trains are not promptly available for transportation and sufficiently long time of about one month is taken in such transportation and it takes further time to reach the factory premises, is also relevant. The facilities of clearance, pre-mutilation, warehousing etc. cannot be considered as impossible tasks. I have also considered the Schedule-A included in SBCW No. 5352/1991RA. Spinning Mills case, which is a chart showing comparative expenses incurred with respect to gateway port Bombay, dry port Delhi and ICD Sanganer. Thus, in the aforesaid fact situation, it cannot be said that the imposition of restriction to two ports namely Bombay and Delhi only is justified and, I am of the opinion that the restrictions so imposed are oblivious of the present fact situation and the consideration which are germane in such matter and which should have weighed while exercising powers u/s 3 of the Imports & Exports (Control) Act, 1947. Accordingly, this restriction as has been imposed restricting the clearance to Bombay and Delhi is held to be arbitrary and unreasonable.

27. Accordingly, all these writ petitions are partly allowed, the conditions mentioned in the Public Notice No. 11/88, dated 18th April, 1988 with regard to the norms of mutilation for importing of woollen/synthetic rags under OGL are declared to be illegal and the same will not be acted upon and given effect to and, instead the respondents are directed to follow the test as mentioned in the body of this judgment at page 26. Condition No. 29(iv) of Appendix 6 of Import and Export Policy 90-93 is also declared to be arbitrary and unreasonable. It is directed that the petitioner shall be allowed to import the goods namely woollen rags, synthetic rags and shoddy wool through ICD, San-ganer and subject to the test laid down in this judgment, the items imported by the petitioners" shall be released in accordance with law.

28. Before parting with the judgment, I may refer to *Rajeev Woollen Mills v. Union of India and Ors.* (supra), which was cited by Shri Sudhir Gupta on another point, in which the Delhi High Court has also considered that if the imported goods are left at the railway godown and the importers are incurring heavy demurrage, it shall be for them to make an application u/s 49 of the Customs Act, 1962 and thereafter it will be for the Asstt. Collector to order steraja of the goods in question in a public or private warehouse pending determination as to whether the goods have been legal imported or whether they are excisable to customs duty, it certainly becomes a concern of the Court if the matters remains pending in the court and a grievance is raised about the heavy amount which is to be paid by the importers as demurrage. In this case, it was pointed out that the petitioners will have to pay heavy amount of demurrage while the writ petitions are pending here since 1990-91 and 1992. In the case of *Swastika Woollen Industries*, counsel for the petitioner pointed out that the total demurrage upto 1-5-1992 comes to Rs. 40.59 lacs. These figures were pointed out by him in an application dated 1-5-1992 filed before this Court and the orders thereon were passed on 13th May, 1992. In these circumstances, it was also argued that in the event of goods not being cleared for the reasons not

attributable to the importers, the practice is to issue detention certificate by the Customs Collector and upon such certificate being issued the custodians have to consider the question of waiving the demurrage charges. It was also pointed out that such certificates have also been issued by the Customs Collector, Calcutta. In this view of the matter, when the writ petitions have been partly allowed and it is found that the imported items were detained by applying the standards of pre-mutilation, as contained in the Public Notice which has been declared to be illegal, the concerned Customs Collector may issue the detention certificates and thereupon the custodians may consider the question of waiving the amount of demurrage either wholly or partly depending upon the facts and circumstances in each case and taking into consideration the fact that the matters were pending before this Court.

29. The writ petitions are partly allowed as indicated above with no order as to costs.