

(2017) 12 BOM CK 0001
In the Bombay High Court
Case No : 2433 of 1990

Videocon International Limited and another

APPELLANT

Vs

Union of India & Ors.

RESPONDENT

Date of Decision : 13-12-2017

Acts Referred:

[Constitution of India](#), [Article 226](#) -
Power of High Courts to Issue certain writs

Citation : (2017) 12 BOM CK 0001

Hon'ble Judges : A.S. Oka, Riyaz I. Chagla

Bench : DIVISON BENCH

Advocate : K.R. Bulchandani, Avik Sarkar, Amit Nikam, Pradeep Jetly

Judgement

1. As the factual controversy in these petitions is admittedly more or less identical, these petitions can be disposed of by a common Judgment. For the sake of convenience, we are making a detailed reference to the facts of the case in Writ Petition No. 2433 of 1990. In fact, the main submissions have been canvassed in the said Writ Petition. 2. The petitioners in the Writ Petition No. 2433 of 1990 were at the relevant time manufacturers of colour televisions and other electrical items. At the relevant time, the petitioners were importing Video Tape Deck Mechanism (VTDM) and Colour Picture Tubes (CPTs) as electronic items against the additional licences issued pursuant to Import and Export policy 8891 (for short "the said policy"). Under the said policy, export houses/trading houses were eligible for additional licences for the period for which the export house/trading house certificates are valid. It was provided that items permissible will be those allowed under the policy on the date of issue of licences. At the relevant time, VDTMs and CPTs were listed as Open General Licence (for short "OGL") items. VDTMs were at Serial no.821(79) and CPTs were at Serial no.821(5) of Appendix 6, List 8 Part 1 forming a part of the said policy. There is no dispute about the fact that both the items were listed as OGL items at the relevant time. Between the period from 2nd August 1988 to 10th March 1989, the petitioners purchased additional licences which were of the dates prior to

21st March 1989. The licences were endorsed under clause 215 of the said policy. 3. According to the case of the petitioners, between 2nd February 1990 to 26th February 1990, they opened Letters of Credit in favour of the foreign suppliers for the import of said two categories of goods. All imports were made prior to 31st March 1990. Between 1st November 1989 to 11th October 1990, the petitioners filed Bills of Entry with Sea Customs and Air Customs against the imports made from time to time of the said goods. It is their case that similar goods were cleared earlier. However, the Customs raised an objection to the validity of the additional licences. Therefore, the goods were allowed to be bonded and where goods were meant for export, reexport was allowed against bond with bank guarantee. However, the goods which were meant for home clearance were not allowed to be cleared in view of ITC public notice No. 109 of 1989 issued on 21st March 1989. By the said public notice, CPTs were deleted from Sr. No. 821(5) and shifted to Entry No. 129 of Appendix 2B. By the said public notice, even VTDMs were deleted from 821 (79) and were shifted to Entry No. 138A in Appendix 2B. Both the categories of goods were shifted by the public notice to the list of restricted items for import. As the clearance of the goods was not allowed, the petitioners filed the present petition. Writ Petitions in this group were admitted by granting interim relief in terms of prayer clause (b) by which the respondents were directed to allow the petitioners to clear the goods against additional licences the copies of which have been annexed as Exhibit A and B to the petitions on petitioners executing ITC Bond in favour of the respondents. A liberty was granted by the said interim order dated 10th September 1990 to the respondents to adjudicate after following the principles of natural justice. Accordingly, an Order in Original was passed by the Commissioner of Customs(C) in respect of the Bills of Entry subject matter of some of the petitions. By the said Order in Original, the Commissioner of Customs ordered confiscation of goods by holding that imports under the additional licences were invalid in view of the public notice No. 109/89 dated 21st March 1989 (for short "the said public notice"). Against the Order in Original dated 30th April 1992, the petitioners preferred a statutory appeal before the Customs, Excise and Gold Control Appellate Tribunal at Mumbai (for short "the Appellate Tribunal"). By order dated 10th November 1997, the Appellate Tribunal disposed of the appeal on the ground that this Court was seized of the matter. By carrying out amendment, the Order in Original dated 30th April 1992 was permitted to be challenged and accordingly, additional grounds were added and prayer (aa) was added for incorporating a challenge to the order Dated 30th April 1992. Only other substantive relief claimed in this petition is prayer (a) enjoining the respondents to allow clearance of the goods imported by the petitioners against the additional licences the copies of which have been annexed as Exhibits A and B to the petition. 4. There is a reply dated 6th January 2003 filed by Shri Bachan Singh, Assistant Commissioner of Customs, Group VB, Mumbai. In the reply, reliance was placed on the said public notice by which the category of goods subject matter of the Writ Petition was transferred from the list of OGL items to the list of restricted items. It was contended that the imports in

question were made by the petitioners after the date of the said public notice and therefore, they were not entitled to import the goods under the additional licences. It was contended that the validity of the additional licences was limited to the items which are placed under the OGL. A submission was made that the import policy prevailing at the time of public notice will be applicable. 5. The submission of the learned counsel for the petitioners is that if subclauses 2 and 8 of clause 215 of the said policy are read together, it is clear that the additional licences were issued permitting import of OGL items appearing in Appendix6 List8 Part1. Inviting our attention to the said public notice, he pointed out that VTDM and CPTs were deleted from Appendix6 List8 Part1 from the date of the said public notice and that the same were included in the list of restricted items. He submitted that the public notice refers only to imports made under the OGL by eligible actual users and not to the imports of OGL items under the additional licences issued to export houses/trading houses. He submitted that the said public notice does not contain any provision invalidating additional licences issued prior to the date of the said public notice. He submitted that vested right accrued under one policy cannot be taken away by another policy. In any event, he submitted that sub-clause 2 of clauses 223 and 224 of the Import and Export policy AM 199093 (for short "the subsequent policy") permitted the holders of the additional licences issued prior to 1st April 1990 to import the items listed in Appendix6 List8 Part 1 of the OGL provided the Letter of Credit were opened prior to 1st April 1990. 6. The learned counsel for the petitioners relied upon various decisions of the Apex Court and this Court, viz; *M/s. Bharat Barrel and Drum Mfg. Co. Ltd. v. The Collector of Customs, Mumbai*, AIR 1971 SC 704 *M/s. Jain Exports (P) Ltd. v. Union of India*, (1988) 3 SCC 579 *Union of India v. Loksons Pvt. Ltd*, 1989(43) ELT 226 (Bom) *Jayant Vegoils & Chemicals (P) Ltd. v. Union of India*, 1987 (30) ELT 134 (Bom) *Ashok Kumar Jain v. Union of India*, WP No. 1481 of 1992 decided on 8th March 2010 *Mahindra & Mahindra Ltd. v. Union of India*, AIR 1979 SC 798 *D. Navinchandra v. Union of India*, AIR 1987 SC 1794 and *Prem Chand Somchand Shah v. Union of India*, 1991 (53) ELT 498 (SC). 7. His submission is that the Apex Court has held that the public notices are always prospective and the same cannot be applied to the licences issued prior to date of public notices. He submitted that the import licences are governed by the policy prevailing when the licences are issued and the same are not governed by the subsequent changes in the policy. He submitted that the policy on the date of licences will apply to the imports and not the policy on the date of import. He would, therefore, submit that the action of not clearing the goods is illegal and the Orders in Original are illegal. 8. The learned counsel for the respondents opposed the petition. He invited our attention to the decision of the Apex Court in the case of the *Collector of Custom (Bombay) v. Elephanta Oil and Industries*, 2003 (152) ELT 257 (S.C.). He also relied upon a decision of the Apex Court in the case of *Union of India v. Godrej Soaps Pvt Ltd*, 1986(26) ELT 465 (SC) He also pointed out the law laid down in the case of *Darshan Oils Pvt Ltd v. Union of India*, 1995(75) ELT 32 (SC). 9. We have given careful consideration to the submissions. Firstly, we must make a reference to the said policy. Clause 61 of

the said policy deals with Open General Licence (OGL). Clause 61 reads thus: "Open General Licence 61. (1) Appendix 6 of this Policy contains a number of lists of items allowed for import under Open General Licence by various categories of importers and the conditions for their import. Open General Licence facility can be availed of by the specified categories and subject to the conditions laid down therein. In addition to the items listed in Appendix 6. Actual Users (Industrial) can import under Open General Licence raw materials, components and consumables which do not appear in Appendices 2, 3, 5 and 8 of this Policy, subject to the conditions laid down. Before effecting import of such unlisted items under Open General Licence Actual Users (Industrial) are advised to obtain confirmation from the CCI&E, New Delhi that the concerned Actual User can import the item under Open General Licence facility only to import such items as are in conformity with the provisions of their industrial licence or registration certificates as well as the extent of indigenisation already achieved or to be achieved by them. Units subject indigenisation in the Phased Manufacturing Programme will be required to follow the List Attestation Procedure for import of components under Open General Licence as mentioned in this Policy. Import of scientific and measuring instruments is not permitted under the Open General Licence. (2) Import of chemical and allied items under brand names, will not normally be allowed unless full description thereof along with specifications and chemical structure are furnished. Eligible importers desirous of importing any such item under Open General Licence are advised to clear it with the DGTD (...Policy Cell), New Delhi, before placing orders overseas. Import of consumables under brand names shall not be allowed under OGL. (3) In the case of any professional grade electronic component, importers should set down internationally accepted specification in the invoices so as to enable the Customs authorities to satisfy themselves whether its clearance is permissible or not under OGL or otherwise." (emphasis supplied) 10. As far as additional licences are concerned, the same are dealt with in clause 215 of the said policy. Subclauses 1,2 and 8 of clause 215 read thus: "Additional Licences 215 (1) The Export Houses Trading Houses will be eligible to Additional Licences on the basis of the admissible exports made in the proceeding licensing year. The value of these licences will be calculated at 10% of the NFE earnings on the total eligible exports made in the proceeding licensing year. This percentage shall be 12% in cases where an Export Trading House is able to achieve a minimum growth of 10% in terms of NFE realisation in the previous year, over and above the year preceding the same. The NFE earnings for this purpose, would have the same meaning as defined in the Note below Para 212 (2)(a) above. (2) The Additional Licences will be valid for the import of the following items upto the full value of the licence : (i) Items appearing in Part 1 of List 8, Appendix 6 of this Policy; and (ii) Import of capital goods listed in Appendix 1 Part B of this Policy. (3)... (4)... (5)... (6)... (7)... (8) Export Houses/Trading Houses will be eligible for Additional Licences for the period(s) for which the Export House/Training House Certificates are valid. However, the items permissible will be those as allowed under the Policy on the date of issue of the licence (s). It may not, therefore, be necessary

for an applicant Export House/Trading House to hold a valid Export House/Trading House Certificate at the time of submission of the application for the Additional licences, if otherwise due." (emphasis added) 11. Thus, sub-clause 1 of clause 215 lays down that the export houses/trading houses will be eligible for additional licence on the basis of the admissible exports made in the preceding licencing year. The value of the licence is to be calculated as provided in sub-clause 1. As stated earlier, sub-clause 2 provided that additional licences will valid for the import of the items appearing in Part1 of List 8 of Appendix 6 of the said policy. Sub-clause 8 provides that additional licence will be valid for the period for which the export house/trading house certificates are valid. Sub-clause 8 reiterates that additional licences will be in respect of the items permissible under the said policy on the date of issue of licences. Clause 216 of the said policy makes the licences transferable in part without requirement of endorsement or permission from the licencing authority. 12. The said public notice dated 21st March 1989 is already referred earlier. As stated earlier, by the said public notice, two items subject matter of the petitions were removed from the Appendix6 List8 Part1. Clauses 3 and 4 of the public notice are relevant for our consideration. Clauses 3 and 4 of the said notice read thus: "3 In respect of capital goods taken out of Open General Licence in terms of this Public Notice, Import under Open General Licence by eligible importers shall not be permitted except to the extent covered by firm contracts entered into and registered with a foreign exchange dealer (Bank) before the date of this public Notice. 4 In respect of raw materials, components and consumables taken out of Open General Licence in terms of this Public Notice Import under Open General Licence by eligible importers shall not be permitted except to the extent of irrevocable letters of credit already opened and established before the date of this Public Notice for which shipments are made within a period of ninety (90) days from the date of this Public Notice." 13. One of the arguments of the learned counsel for the petitioners was that public notice applies only to the Open General Licences and not to the additional licences. According to us, there is a fallacy in this argument. We have referred to clause 61 of the said policy which provides that Appendix 6 of the policy contains number of items allowed for import under OGL by various categories of importers. The export houses/trading houses are entitled to additional licenses for the import of items appearing in Part 1 of the List 8 of the Appendix 6 of the said policy. Additional licence can be granted only to export houses/trading houses and by virtue of grant of additional licence, the holder thereof is entitled to import OGL items specified in Part 1 of the List 8 of the Appendix 6 of the said policy. The Appendix 6 contains the items which can be imported by holders of OGL. Thus, if some item goes out of Appendix 6, the holder of additional licence cannot import the said item. The other question will be whether the said public notice will affect the existing additional licences which were valid on the date of notice. We have dealt with this question in the subsequent part of this Judgment. 14. We may also make a reference at this stage to the subsequent policy (for the years 1990-93). Clauses 223 and 224 are relevant for our consideration. Clause 1 of paragraph 223 lays down that

additional licences issued to export houses/trading houses prior to 1st April 1990 on the basis of the exports made during 1986-87 or earlier period shall cease to be valid on or after 1st April 1990 for the import of the items of raw material, components and spares which appear in Appendix 6 List 8 Part I of the said policy but which are not covered by Appendix 6 List 8 Part I of the subsequent policy. There is a similar provision made in sub clause 1 of clause 224 in respect of additional licences issued to export/trading houses prior to 1st April 1990 on the basis of the exports made during 1987-88 and 1988-89. However, subclauses 2 of both clauses 223 and 224 are relevant. Both the clauses provided that restriction imposed by subclauses 1 of clauses 223 and 224 will not apply to those licence holders who have already made firm commitments by irrevocable Letters of Credit opened and established through authorised dealers in foreign exchange on or before 31st March 1990. It means that on the basis of the Additional licences issued prior to 1st April 1990 on exports made in the years 1986-87, 1987-88 and 1988-89, the imports made after 1st April 1990 will be valid notwithstanding subclauses 1 of clauses 223 and 224 provided the irrevocable Letters of Credit have been opened and established through authorised dealers in foreign Exchange prior to 1st April 1990. Therefore, wherever the Letters of Credit as aforesaid have been opened before the cut off date, the import on the basis of the extended licences issued prior to 1st April 1990 was permissible. The learned counsel for the petitioner stated that in all cases, the Letters of Credit were opened prior to 1st April 1990. In some cases where imports were made on the basis of documents against payment, the imports have been made prior to 31st March 1990. Only in one case, (in Writ Petition No. 1805/90), the import was made after 31st March 1990. 15. The issue is whether any vested right is accrued on the basis of the extended licences obtained by the petitioners. The question is whether the subsequent policy will affect the additional licences which were valid on 1st April 1990 when the subsequent policy came into force. On this aspect, reliance is placed on the decision of the Apex Court in the case of M/s. Jain Exports Pvt. Ltd and another v. Union of India and others. In paragraph 2, it is observed thus: "2. The following common contentions have been advanced by learned Counsel for the appellants: (1) The import policy of which year would be applicable to the facts of the present case " the period during which the licences were issued or the time when import actually took place. (2) Whether "coconut oil" appearing in para 5 of Appendix 9 of the Import Policy of 1980-81 was confined to the edible variety or covered the individual (sic-industrial) variety. (3) Whether in the face of the decision of the Board and Central Government as the statutory appellate and revisional authorities, it was open to the Collector functioning in lower tier to take a contrary view of the matter in exercise of quasi-judicial jurisdiction; and (4) Whether the order of the Collector was vitiated for breach of rules of natural justice, and collateral considerations in the making of the orders. It is not in dispute that the relevant import policy to be referred to is of the year 1980-81 as all the licences were issued during that period. The Collector found and the High Court has not recorded a different finding that when the licence was first

revalidated on 18-1-1982, such revalidation was subject to paragraph 215 of the Import Policy of 1981-82. Again while revalidating some of the licences on 25-9-1982, it was stipulated that during the extended period, items which do not appear in Appendices 5 and 7 of Import Policy of 1982-83 could not be allowed to be imported and items which appear in Appendix 26 of the Import Policy of 1982-83 will also not be allowed to be imported. The Collector turned down the plea that the licences allowed the import of items appearing in Appendices 5 and 7 of 1979-80 policy and 1982-83 policy in addition to the items appearing in the OGL and industrial coconut oil. In the instant case, the licences were either of 1980 or 1981 and were revalidated from time to time. For convenience we may refer to a sample order of revalidation dated 28-6-1982. Revalidation was subject to the following conditions: "This licence is revalidated for a further period of six months from the date of revalidation with the condition that during the extended period of validity the items which do not appear in Appendices 5 and 7 of the Import Policy of 1982-83 will not be imported. This licence will also not be valid for the import of items appearing in Appendix 26 of the Import Policy of 1982-83 during the extended period of validity. 3. The High Court has come to the correct conclusion that the terms of Import Policy of 1980-81 would apply to the facts of these cases. " (emphasis added) 16. Another decision of the Apex Court on the point is in the case of *M/s. Bharat Barrel and Drum Mfg. Co. Ltd v. Collector Of Customs, Bombay*, 1971 (3) SCC 170 In this case, the appellant before the Apex Court had obtained import licences in June 1962 in respect of a particular steel item. The appellant placed orders for import on the basis of the two licences. Clearance of the goods was not allowed on the ground that the goods were not as specified in the import licence. It was objected on the ground that under the import licence, the appellant was entitled to import only prime quality steel sheets and what was imported was industrial scrap sheets. The argument of the appellant before the Authority was that the licence did not contain a condition of importing prime quality sheets. The condition that the sheets must be of prime quality was imposed for the first time by the public notice dated 6th December 1962. The Revisional Authority took the view that the public notice dated 6th December 1962 was issued after the licence was issued and the said notice had no retrospective operation. In paragraph 5 and 6, the Apex Court observed thus: "5. Interrupting the narrative, it is necessary to point out at this stage two important matters: (1) that the difference in the conditions of the two licences was apparently not noticed by the Collector of Customs and by the Board and (2) that the condition that the goods should be of "prime quality" was not a condition of either licence. Under the first licence the sheets were to be of 18 gauge quality; under the second licence there was no such condition relating to thickness of the sheets. There was again no evidence that any part of the consignment was not fit for use in the manufacture of drums and barrels. By importing sheets of 11, 12 and 13 gauge or of gauges varying between 18 and 24 no breach of the conditions of the second licence was committed. The condition that the sheets imported must be of "prime quality" was imposed for the first time by the Iron and Steel Controller's Public Notice No. I/I-S/62, dated

December 6, 1962 and could not obviously apply to the sheets imported under the two licences which were issued earlier. But the Collector as well as the Central Board of Excise and Customs decided the cases principally on the ground that the goods were not of "prime quality". The Collector of Customs and the Central Board of Excise and Customs also did not keep the facts in respect of the twelve consignments distinct and decided them together as if there was no difference between the conditions of the two licences. 6. The revision applications filed before the Government of India were consolidated for the purpose of hearing and a single order was passed. The Officer who heard the revision applications on behalf of the Central Government was of the view, and rightly, that the Public Notice No. I/I-S/62, dated December 6, 1962 of the Iron and Steel Controller had no retrospective operation and the condition of "prime quality" could not be applied to the sheets imported under the licences issued before that date. But in his view, one of the two licences e.g. licence, dated June 13, 1962, covering the consignments was issued specifically for 18 gauge sheets, while sheets of different sizes (including 18 gauge) were imported against that licence and on that account consignments covered by that licence "had to be treated as unauthorised". He then proceeded to observe that the fine in lieu of confiscation of the goods covered by the Collector of Customs, Bombay Orders S/10-530/63-LC, S/10-531/63-LC, S/10-532/63-LC, S/10-533/63-LC, S/10-534/63-LC, and S/10-535/63-LC all, dated November 30, 1963, be remitted in full; that in respect of four consignments covered by the Collector's Orders S/10-443/63-LC, S/10-444/63-LC, S/10-445/63-LC and S/10-446/63-LC all, dated October 5, 1963, the fine be reduced by half; and that the fines reduced by the Board in the cases covered by the Collector's Orders S/10-22/64-LC and S/10-71/64-LC both, dated March 2, 1964, be further reduced as decided by them. " (emphasis and underline added) Therefore, in the cases in hand, the said public notice will have no effect on the additional licences issued before the date of public notice. 17. Another decision pressed into service by the petitioner is of a Division Bench of this Court in the case of Union of India v. Loksons Pvt. Ltd. However, in this case the Court was not dealing with the issue of the effect of the changes in the policy after issue of a licence. However, the Division Bench held that public notices cannot govern the applications which were made and rejected prior to coming into operation of the new policy. 18. Reliance was also placed on the decision of the learned Single Judge of this Court in the case of Jayant Vegoils And Chemical (P) Limited v. Union of India, 1987 (30) E.L.T. 134 (Bom.) In this case, import licences were issued on the basis of the policy for the period of April 1980 to March 1981. Show cause notices were issued to the petitioner in respect of the eight licences granted during the subsistence of the said policy of 1980-81. Licences were in respect of beef tallow. In the show cause notice, it was alleged that the licences were not valid for the import of beef tallow. A public notice was issued on 5th June 1981 as a result of which beef tallow could not be imported thereafter under OGL, but only through a canalising agency. The contention of the Revenue was that after 5th June 1981, on the basis of the licence granted earlier, import of beef tallow was not permissible.

The learned Single Judge observed in paragraph 6 as under: "The grave-men of the charge is that after June 5, 1981 the petitioners were not entitled to import beef tallow as the import was canalised through the State Trading Corporation. The petitioners on the other hand contend that each R.E.P. import licences were issued prior to June 5, 1981 and each of the licence contains a condition that the licence would be subject to the conditions in force relating to the goods at the time of issuance of the licence. The petitioners claim that as the public notice dated June 5, 1981 did not specifically prohibit import of beef tallow under licence granted prior to June 5, 1981, the import though was of a period subsequent to June 5, 1981, was not in contravention of any law. The petitioners claim that the Government of India and the Central Board of Excise and Customs have always accepted the position that in respect of the licences granted prior to June 5, 1981 it is open to import beef tallow subsequent to June 5, 1981, in the absence of specific prohibition in the public notice." In paragraphs 9 and 10, it was held thus: "With these rival arguments, the first contention which requires answer is whether the petitioners violated any provisions of the Import (Control) Order, 1955 by import of beef tallow subsequent to June 5, 1981. It is not in dispute that 8 R.E.P. licences held by petitioner No. 1 and granted during the subsistence of Import Policy of AM 1981 enabled the petitioners to import beef tallow under O.G.L. It is not in dispute that for the entire Policy period AM 1981 the item "beef tallow" was not a canalised item and was available for import under O.G.L. It is also not in dispute that at the time of declaration of Import Policy for AM 1982 beef tallow was not made a canalised item but could be imported under O.G.L. Condition 1 set out in the import licence reads as under: "This licence will be subject to the conditions in force relating to the goods covered by the licence, as described in the Import Trade Control Policy Book for the period during which the licence has been issued, or any amendments thereof made upto, and including the date of issue of the licence, unless otherwise specified. Relying on this clause, Shri Desai urged that the importability under the licence was governed by the Import Policy prevailing on the date of issue of licence and as beef tallow could be imported under O.G.L. at the time of issuance of the licence, it is not open for the respondents to claim that the import could not be effected subsequent to June 5, 1981. As mentioned herein above, it is not in dispute that the public notice dated June 5, 1981 did not specify that the inclusion of beef tallow as a canalised item would affect the licence granted prior to that date. Shri Desai then submits that not only this position is very clear by the plain reading of the licence and the Import Policy, but the Central Board of Excise and Customs and the Government of India have consistently taken that view. The submissions of the learned counsel is correct. " (emphasis added) Thereafter, the learned Judge proceeded to hold thus: "It is futile for the respondents to suggest that as soon as the policy was amended on June 5, 1981 the import of beef tallow would be prohibited under the licences issued during 1980-81 unless firm commitments made by opening irrevocable letters of credit are established prior to April 1, 1981. ".....Shri Dhanuka is right in his submission that once the item is included in Appendices 8 and 9, then it is not

permissible for the licence holder, who has secured licence subsequent to that date, to import beef tallow, but that would not prevent the licence holder who has secured the licence prior to that date. As there is no specific prohibition in the public notice affecting the earlier licence holders, it is not possible to disturb their rights. " (emphasis added) 19. Thus, the learned Single Judge held that such a licence will be governed by the prevailing policy when the same was issued and the subsequent notice will not affect the licence issued earlier. 20. In the case of Ashok Kumar Jain, Proprietor of M/s. Jain Brothers v. The Union of India decided by a Division Bench of this Court, the issue was about REP licence granted on 13th February 1990 when import and export policy of April 1988 to March 1991 was in force. The argument before the Division Bench was that the licence was valid for 18 months from 13th February 1990 and as the import had taken place in June 1992 after expiry of the policy of 1988-91, the import will be governed by the policy for the years 1991-94. The Division Bench considered the decision in the case of Jain Export Pvt. Ltd. v. Union of India. Ultimately, the Division Bench, relying upon the aforesaid decision of the Apex Court, this Court held thus: "In paragraph No. 3 of the decision, the Supreme Court held that the High Court had come to the correct conclusion to the terms of import policy of 1980-81 (i.e. period during which the licence was issued) would apply. In view of the decision of the Supreme Court, we have no doubt that the import in question which was effected in pursuance of a REP Licence dated 13th December 1990, would be governed by the import export policy of AM 1988-91." (emphasis added) 21. In the case of M/s. D. Navinchandra and Company v. Union of India, a similar issue arose for consideration of Bench of the Apex Court consisting of three Hon'ble Judges. In paragraphs 21 and 22 of its decision the Apex Court held thus: " 21. It must be emphasised that in the case of Raj Prakash, this position has been explained by saying that only such items could be imported by diamond exporters under the Additional Licences granted to them as could have been imported under the Import Policy of 1978-79, the period during which the diamond exporters had applied for Export House Certificates and had been wrongly refused and were also importable under the import policy prevailing at the time of import which in the present case would be during the Import Policy of 1985-88. These were the items which had not been "specifically banned" under the prevalent import policy. The items had to pass two tests, firstly, they should have been importable under the Import Policy 1978-79 and secondly they should also have been importable under the Import Policy 1985-88 in terms of the order dated April 18, 1985 and if one may add, in such terms "in accordance with the import rules" whether canalised or not canalised. It must be emphasised that in this case also, the court had no occasion to consider the significance of the words "whether canalised or otherwise" mentioned in the order dated April 18, 1985 because that point did not arise in the case before it. What did the court then intend by these words used by the court? We have seen that diamond exporters could import the items which they were entitled to import under the Import Policy 1978-79 provided they were importable also under the import policy ruling at the time of import. These are items which were open to import by Export

Houses holding Additional Licences for sale to the Actual Users (Industrial). These are items which were directly imported, for example, items in Part 2 List 8 of Appendix 6 of Import Policy 1985-88. These are items which are not canalised. Canalised items are those items which are ordinarily open to import only through a public sector agency. Although generally these are importable through public sector agencies, it is permissible for any import policy to provide an exception to the rule and to declare that an importer might import a canalised item directly. It is in that sense and that sense only that the court could have intended to define the entitlement of diamond exporters. They would be entitled to import items which were canalised or not if the import policy prevailing at the time of import permitted them to import items falling under such category. This was also viewed in that light in the case of Indo Afghan Chambers of Commerce [(1986) 3 SCC 352] 22. It must be emphasised that in the order dated April 18, 1985, this Court did not do away with canalisation. That was not the issue before this Court. The expression "whether canalised or not canalised" was to include both. This Court did not say that canalised items could be imported directly by the importers ignoring the canalisation process. We are of the opinion that this Court did not say that canalisation could be ignored. That was not the issue. High public policy, it must be emphasised, is involved in the scheme of canalisation. This purpose of canalisation was examined by this Court in *Daruka & Co. v. Union of India* [AIR 1973 SC 2711 : (1974) 1 SCR 570 : (1973) 2 SCC 617] where the Constitution Bench of this Court observed that the policies of imports or exports were fashioned not only with reference to internal or international trade, but also on monetary policy, the development of agriculture and industries and even on the political policies of the country and rival theories and views may be held on such policies. If the Government decided an economic policy that import or export should be by a selected channel or through selected agencies the court would proceed on the assumption that the decision was in the interest of the general public unless the contrary was shown. Therefore it could not be collaterally altered in the manner suggested. The policy of canalisation which is a matter of policy of the Government was not given a go-by by the observations referred to in the order of April 18, 1985. Indeed it is possible to read the order in a manner consistent with canalisation scheme in the way we have indicated. If that is so, then it should be so read. When this Court observed that the fact whether items were sought to be imported by diamond merchants were canalised would not be an impediment to the import directly by them, the court meant to say that this could be imported directly by them through the canalisation organisation. The need for canalisation stands on public policy and that need cannot be lightly or inferentially given a go-by. It should not be presumed that collaterally the court had done away with the system of canalisation based on sound public policy. We have found nothing in the different authorities on this subject, which militate against the above views. Therefore, the action taken by the Custom authorities in issuing adjudication notice and proceeding in the manner they did, we are of the opinion that they have not acted illegally or without jurisdiction. This must proceed in accordance with law

as laid down by this Court which, in our opinion, is clear enough. The fact that in subsequent decisions, the petitioner is not a party is not relevant. Generally legal positions laid down by the court would be binding on all concerned even though some of them have not been made parties nor were served nor any notice of such proceedings given." (emphasis added) 22. In the decision relied upon by the learned counsel for the petitioner in the case of Prem Chand Somchand Shah v. Union of India, the Apex Court reiterated the law laid down in the case of M/s. Navinchandra and Company (supra). Ultimately, in paragraphs 13 and 14 the Apex Court held thus: "13 Shri H.N. Salve, has, however, urged that the view of the decision of this Court in D. Navinchandra & Company case the Export Houses who were granted Additional Licences under the Import and Export Policy 1978-79 have to be treated at par with Export Houses who have been granted Additional Licences under the Import and Export Policy for the subsequent years and since there has been relaxation in the matter of policy of canalisation of imports under sub-para (4) of para 215 in respect of Additional Licences granted to Export Houses under the Import and Export Policy 1988-91, the petitioners are also entitled to a similar relaxation. We are unable to agree with this contention. In D. Navinchandra & Company case this Court has not laid down that Export Houses, like the petitioners, who are granted Additional Licences on the basis of the order dated April 18, 1985, are to be treated under Import and Export Policy prevalent at the time of import. In that case this Court, while explaining the background in which the order dated April 18, 1985, was passed has observed: (SCC P.76 para 20) "It has to be borne in mind that the basic background under which the Rajnikant decision was rendered, (sic) the Export Houses had been refused Export House Certificates because it was insisted that they should have diversified their export and that was a condition for the grant or entitlement of an Export House Certificate. It was found and it is common ground now that that was wrong. Therefore, the wrong was undone. Those who had been denied Export House Certificates on that wrong ground were put back to the position as far as it could be if that wrong had not been done. To do so, the custom authorities and government authorities were directed to issue necessary Export House Certificates for the year 1978-79 though the order was passed in April 1985. This was a measure of restitution, but the court while doing so, ensured that nothing illegal was done." After referring to the decision in Raj Prakash Chemicals Limited this Court has stressed: (SCC p.77 para 21) "The items had to pass to two tests, firstly, they should have been importable under the Import Policy 1978-79 and secondly they should also have been importable under the Import Policy 1985, and if one may add, in such terms in accordance with the import rules, whether canalised or not canalised." This Court has gone on to emphasise: (SCC p.77, para 20) "It must be emphasised that in the order dated April 18, 1985, this Court did not do away with canalisation. That was not the issue before this Court. The expression `whether canalised or not canalised' was to include both. This Court did not say that canalised items could be imported directly by the importers ignoring the canalisation process. We are of the opinion that this Court did not say that canalisation could be ignored. That

was not the issue. High public policy, it must be emphasised, is involved in the scheme of canalisation." 14 Shri Salve has placed reliance on the following observations of this Court in this case: (SCC p.77, para 21) "Canalised items are those items which are ordinarily open to import only through a public sector agency. Although generally these are importable through public sector agencies, it is permissible for any import policy to provide an exception to the rule and to declare that an importer might import a canalised item directly. It is in that sense and that sense only that the court could have intended to define the entitlement of diamond exporters. They would be entitled to import items which were canalised or not if the import policy prevailing under such category. This was also viewed in that light in the case of Indo Afghan Chambers of Commerce." (emphasis added) 23. On the other hand, the learned counsel for the Revenue relied upon the decision of the Apex Court in the case of Collector of Customs, Bombay v. Elephanta Oil and Industries Limited. In the said decision, the Apex Court has considered the view taken in the case of D. Navinchandra and Company (supra) and Jain Export Pvt. Ltd.(supra). The question involved in the appeal is quoted in the first paragraph of the said decision which reads thus : "Shah, J." The question involved in this appeal is " whether import of beef tallow under open general licence (hereinafter referred to as "OGL") was permissible after issue of Import Trade Control Public Notice No. 29-ITC (PN/81) on 5-6-1981 clarifying that the existing description "mutton tallow" in Entry 44 shall be read as "tallow of any animal origin including mutton tallow". Paragraphs 2 and 3 note the factual aspects which read thus: "2. Appendix to Import Policy 1981-82 provides for a list of items, import of which is canalised through public sector agencies. Item 44 provides that import of tallow of any animal origin including mutton tallow was canalised through State Trading Corporation of India. 3. It is contended by the respondent that OGL item was imported against licence dated 29-6-1981 which was an impress licence issued to M/s B. Arun Kumar and Co., Bombay under the Import-Export Policy for the period 1981-82 and that the respondent entered into a contract for import which was notarised on 6-6-1981. Subsequently, the written contract signed by the supplier was submitted to New Bank of India for issuing letter of credit. However, as the Bank refused the same and as on 3-2-1983 notice was issued by the supplier for cancellation of the contract, Writ Petition No. 313 of 1983 was filed in the High Court of Delhi for various reliefs including the directions to the Bank to open letter of credit. On 30-3-1983, letter of credit was actually opened. On 16-6-1983 and 1-7-1983, bills of entries for import of beef tallow were filed." In this case, the licence in question was issued on 29th June 1981 when import policy of 8182 was in force. On the basis of the public notice dated 5th June 1981, a notice was issued by the Department to the assessee. Notice was issued on the basis of the contention that after 5th June 1981 import of beef tallow was not permissible. An order of confiscation was passed by the Collector of Customs on the ground that import of beef tallow was not permissible. Accordingly, the assessee preferred an Appeal. The Tribunal held that right to import the goods under OGL is a statutory right and cannot be overruled by a public notice and that the import of beef tallow

which ceased to be OGL item when it was canalized by the public notice is governed by the import policy when the licence was issued and not by the public notice. Therefore, an appeal was preferred before the Apex Court. The Apex Court allowed the Appeal after considering its decision in the case of D. Navinchandra. In paragraphs 14 and 16, the Apex Court held thus: "14. The aforesaid aspect was further considered in Darshan Oils (P) Ltd. v. Union of India [(1995) 1 SCC 345 : 1994 Supp (5) SCR 278] wherein this Court held thus: (SCC p. 348, para 8) "8. In D. Navinchandra & Co. v. Union of India [(1987) 3 SCC 66 : (1987) 2 SCR 989] it was clearly held that the entitlement to import items which were canalised or not, is governed by the Import Policy prevalent at the time of import. In the present case, the import of a canalised item being made after amendment of the Policy by the public notice dated 11-11-1983 in a manner not permitted by the amended Policy, the appellants cannot claim to avoid the logical consequences of the import being made contrary to the Import Policy prevailing at the time of import of the goods." 16. For levying of the fine also, it is to be stated that before issuance of licence to the respondent on 29-6-1981 by Import Trade Control Public Notice, it was clarified that the existing description "mutton tallow" in Entry 44 shall be read as any tallow of any animal origin including mutton tallow. The bills of entry were tendered only on 16-6-1983 and 1-7-1983 respectively and at that time Import-Export Policy of 1983-84 was in force which prohibited import of beef tallow. Therefore, the respondent has imported a prohibited item. It is also to be stated that the respondent was an experienced export house well versed in the policies and procedure in regard to the import and export of goods as noted by this Court in the other matter of the respondent. [Re: Jain Exports (P) Ltd. v. Union of India [(1993) 4 SCC 51 : 1993 Supp (1) SCR 185] (emphasis added) 24. In the case of Collector of Customs & Central Excise v. Lekhraj Jessumal & Sons, the Apex Court was dealing with the interpretation of import policy in the context of tariff schedule. In the case of P.T.R. Exports v. Union of India relied upon by the learned counsel for the respondent, it was held that the applicant has no vested right to have export or import licences in terms of the policies in force at the time of making application. The Apex Court held that grant of a licence depends upon policy prevailing as on the date of grant of licence. The Apex Court held that the Government is entitled to issue or withdraw or modify the export or import policy. 25. Thus, the consistent view taken by the Apex Court in the case of D. Navinchandra and Elephanta Oil and Industries is that the import will be governed by the policy in force on the date of import and not on the date on which licence was issued. The case of D. Navinchandra was decided by a Bench of three Hon"ble Judges. The decision in the case of M/s. Jain Exports is by a Bench of two Hon"ble Judges. 26. We have already referred to the subsequent policy which came into force on 1st April 1990. Subclauses 1 of both clauses 223 and 224 thereof provide that additional licences issued to export/trading houses prior to 1st April 1990 shall cease to be valid on or after 1st April 1990. In these petitions under Article 226 of the Constitution of India, there is no challenge to subclauses 1 of clause 223 and 224 of the subsequent policy. However,

subclauses 2 of clauses 223 and 224 protect imports made after 1st April 1990 subject to the conditions mentioned therein. Both the clauses, provided that the restriction imposed by subclauses 1 of clauses 223 and 224 will not apply to those licence holders who have already made firm commitments by irrevocable Letters of Credit opened and established through authorised dealers in foreign exchange on or before 31st March 1990. It means that on the basis of the Additional licences issued prior to 1st April 1990 on exports made in 1986-87, 1987-88 and 1988-89, the imports made after 1st April 1990 will be valid notwithstanding subclauses 1 of clauses 223 and 224 provided the irrevocable Letters of Credit have been opened and established through authorised dealers in foreign Exchange prior to 1st April 1990. Therefore, wherever the Letters of Credit as aforesaid have been opened before the cut off date, the import on the basis of the extended licences issued prior to 1st April 1990 was permissible. 27. Therefore, the petitioners are entitled to relief in respect of the cases which are governed by the subclauses 2 of clauses 223 and 224 of the subsequent policy (1990-93). 28. We have perused the Order in Original passed by the Collector of Customs. The order is completely erroneous as it relies upon the said public notice. We have already held that the said public notice will not affect the validity of additional licences issued earlier. However, after the said policy came to an end on 31st March 1990, the additional licences which were unexpired and valid would be governed by the subclauses 1 and 2 of the clauses 223 and 224 of the said subsequent policy. In view of sub-clause 2, the import under the additional licences could have been permitted after 1st April 1990 only if the petitioners had made confirmed commitment by irrevocable Letters of Credit opened and established through authorised dealers in foreign exchange prior to 1st April 1990. However, if an extension thereafter is made after 31st March 1990, the same shall be treated as a fresh commitment to which protection under sub-clause 2 will not apply. 29. In these writ petitions, we cannot go into the question of fact whether the petitioners had already made confirmed commitments by irrevocable Letters of Credit opened and established through authorised dealers in foreign exchange prior to 1st April 1990. 30. In Writ Petition No. 2433 of 1990 the impugned order of the Collector of Customs will have to be set aside by passing an order of remand to the Collector to decide the show cause notices afresh in the light of what is held above. 31. In Writ Petition Nos. 2109, 2110 and 2111 of 2002 which were transferred from Aurangabad Bench, there is a challenge to the show cause notices. The said challenge cannot be upheld and the show cause notices will have to be decided in accordance with law in light of what is held in this Judgment. 32. In Writ Petition No. 3550 of 1991, there is a challenge to a similar Order in Original passed by the Collector of Customs and therefore, by setting aside the said order, the matter will have to be remanded to the Collector of Customs for fresh adjudication on the show cause notices. The same is the case with the Writ Petition Nos. 3225 of 1989, 1970 of 1990, 3314 of 1990, 3315 of 1990 and 86 of 1991. 33. In Writ Petition Nos. 2117, 2834, 1805 of 1990 and Writ Petition No. 485 of 1992, there is no challenge to any show cause notice or any order. Only writ of mandamus is prayed. 34 Accordingly, we

pass the following order: (I) Writ Petition Nos.2117, 2834 and 1805 of 1990 as well as Writ Petition No. 485 of 1992 stand disposed of in terms of what is held in this Judgment. The authorities are free to issue show cause notices and pass appropriate orders thereon within a period of four months from today; (II) Writ Petition Nos.2109, 2110 and 2111 of 2002 stand disposed of by directing the concerned Authority to adjudicate upon the show cause notices in the light of what we have held in this Judgment and order; (III) In rest of the writ petitions, impugned orders of the Collector of Customs are quashed and set aside and the matters are remanded to the Collector of Customs or to the Authority which is empowered to adjudicate upon the show cause notices for deciding the show cause notices afresh in the light of what is held in this Judgment and Order in accordance with law; (IV) Fresh order shall be passed in the aforesaid cases as expeditiously as possible and in any event within a period of four months from today; (V) We make it clear that in those cases which are not covered by subclauses 2 of clauses 223 and 224 of the import and export policy 1990/1993, the Authorities are free to take appropriate action in accordance with law. However, no adverse action can be taken in the cases which are covered by the aforesaid clauses; (VI) The Bonds furnished by the Petitioners shall be kept alive for a period of five months from today; (VII) Rule is made partly absolute on above terms with no order as to costs.